IN THE SUPREME COURT OF BELIZE A.D. 2014
(DIVORCE)

ACTION NO. 282 of 2014

BETWEEN

August Henry Tabony **Respondent/Applicant**

AND

Diane Lori Tabony **Petitioner/Respondent**

Before: **The Honourable Madame Justice Griffith**

Date of hearing: **2nd & 6th October; 29th October, 2015 on oral and written submissions**

Appearances: **Mr. Eamon Courtenay S.C. of Courtenay Coye LLP along with Ms. Magali Marin Young S.C. for the Applicant/Respondent; Mr. Michael Young S.C. with Mr. Yohhanseh Cave for the Respondent/Petitioner.**

DECISION

Divorce – Preliminary Issue - Jurisdiction of the Court – Domicile – Acquisition of Domicile of Choice – Residence of Wife – Meaning of Ordinarily Resident for three years - Section 148 Supreme Court Act, Cap. 91 of the Laws of Belize.

Introduction

1. The parties Diane Lori Tabony and Henry August Tabony are citizens of the United States of America who wed in October, 1986. They subsequently moved to El Salvador where they resided and raised a family for several years. Mr. Tabony became a citizen of Belize in or around 1982 and Mrs. Tabony became a citizen of Belize in April, 2014. Mrs. Tabony instituted proceedings for divorce here in Belize, citing in her Petition that both she and Mr. Tabony were resident in and domiciled in Belize since, 2008. Mr. Tabony mounted a challenge to the Court's jurisdiction to entertain the petition for divorce on the grounds that (a) he was not domiciled in Belize and (b) Mrs. Tabony did not satisfy the requirement of having been ordinarily resident in Belize for three (3) years prior to the presentation of the petition. This is the Court's ruling with respect to the trial of the preliminary issue.

Issues

2. The issues raised for determination derive from the singular question of whether the Court has jurisdiction to entertain Mrs. Tabony's petition for divorce. These issues are stated as follows:-

   (i) What are the bases of the Court's jurisdiction in proceedings for divorce?

   (ii) Was August Tabony domiciled in Belize on institution of the divorce proceedings?

   (iii) If not, was Diane Tabony resident at the time of and ordinarily resident in Belize for three (3) years prior to the institution of the divorce proceedings?

Background

3. The parties were married in 1986 in Louisiana in the United States of America. They had two children (now adults), respectively in 1989 and 1991. The parties then moved to El Salvador in 1996 where Mr. Tabony operated a sewing machine business. Whilst in El Salvador the couple changed residences three times in eleven years and in 2007 moved to their final place of abode in El Salvador, referred to as the Residencia Escalon home. The premises at which the couple and their family resided in El Salvador were always rental premises as they did not purchase property there but their children were educated up to secondary level in El Salvador.

4. Mr. Tabony during the years, established retail outlets for his sewing machine business in several other countries in Central America including Belize. There were two companies established in Belize in connection with the business and those companies purchased properties in San Pedro, Belize. The first, a condominium unit in Banyan Bay, was purchased in 1999. A second condominium unit in Grand Colony, was purchased in 2008. (Insofar as the ownership and purpose bear some relevance to the Court's determination of the issue of jurisdiction, the parties are at variance as to the respective uses and purposes of the said units). After completing high school the parties' children left to further their education in the United States and remained overseas.

5. After their children graduated from high school, the parties according to Mr. Tabony remained in El Salvador at the Residencia Escalon, from where Mrs. Tabony continued her role in the management and operation of the business. In, 2013 there was a definitive indication of the breakdown of the marriage when Mrs. Tabony moved out of the Residencia Escalon home and into her own apartment, Las Magnolias. In her petition, Mrs. Tabony alleged that from 2008 to 2013 the parties resided at their condominium in Grand Colony, where in 2013 she asked Mr. Tabony to move out from the premises but he refused. Whilst resident in Belize, Mrs. Tabony stated (in a subsequent affidavit) that she travelled from Belize to El Salvador during this period, to administer the chain of gift stores owned by the Mr. Tabony.
6. In the first instance Mrs. Tabony asserts that Mr. Tabony is domiciled in Belize, thus providing the basis of the Court's jurisdiction to entertain her petition for divorce. Alternatively Mrs. Tabony asserts that she has been ordinarily resident in Belize for the three years prior to the presentation of her petition, that is, from the 17th November, 2011. For the most part, the factual circumstances and occurrences surrounding the parties' lives are not in dispute. The dispute centers around the conclusions to be drawn from the facts and circumstances as they relate to the question of whether domicile or residence in Belize have been established.

Issue (i) – Jurisdiction for Divorce Proceedings in Belize

7. The legal principles upon which jurisdiction is founded for purposes of dissolution of marriage are not in dispute by respective counsel for the parties. The first basis of jurisdiction was accepted by both sides as being the common law rule that the domicile of the husband at the date of the petition grounded the Court's jurisdiction in the cause. This meant that the domicile of the wife was dependent upon that of the husband. Learned Senior Counsel for the Petitioner/Respondent provided in written submissions, a very helpful account of the history and chronology of provisions applicable to matrimonial proceedings as they derive from the law of England.

8. The Court acknowledges as accurate, the history of the law relating to divorce, as being reflective of its ecclesiastical origins which held the position that marriage was for life and the rare occurrences of divorce '*a mensa et thoro*', enabled parties to live apart but not to remarry. Divorce as is known today, '*a vinculo matrimonii*', could be obtained by a select few through a private Act of Parliament. Throughout the years, in response to continually emerging social conditions, relief was afforded by way of statute beginning with the Matrimonial Causes Act 1857, which inter alia, established grounds upon which marriage could be dissolved and centralized the administration of the law for matrimonial causes into in a single court[1]. As further helpfully laid out in the submissions of learned senior counsel for the Petitioner, jurisdiction in matrimonial proceedings was expanded by Acts in 1937 and 1949[2].
9. As distinct from the grounds for and procedure to be followed in divorce proceedings, the basis of the Court's jurisdiction remained the common law rule of the husband's domicile, as opposed to any provision of statute. The 1937 and 1949 Acts respectively altered this rule whereby a petition could be presented by a wife deserted by a husband who was immediately prior to the desertion, domiciled in England. Subsequently, the Court's jurisdiction was further expanded by the entitlement afforded a wife with a dependent domicile not of England, to present a petition on the ground of ordinary residence in England for 3 years prior to the presentation of the petition.
10. This law was received in Belize by virtue of section 18 of the Supreme Court of Judicature Act, Cap. 91 of the Laws of Belize, which vested in the Supreme Court of Belize, the jurisdiction of the High Court of Justice in England as provided thereto by the Supreme Court (Consolidated) Act, 1925 of the United Kingdom. By various amendments to the SCJA however, updated aspects of matrimonial law were introduced into Belize law the last of which with relevance to this case is the relief afforded in the UK 1949 Law Reform (Miscellaneous Provisions) Act, which provided for ordinary residence as a basis of jurisdiction.

[1] Rayden on Divorce, Vol I, 15th Ed. pg 7et seq.
[2] Matrimonial Causes Act, 1937; Law Reform (Miscellaneous Provisions) Act, 1949

This was introduced in Belize by SCJA amendment no. 22 of 1966.

11. In England, the law relating to divorce for the greater part practiced today was introduced by the Divorce Reform Act 1969 (thereafter contained in the consolidated Matrimonial Causes Act, 1973). The former substantively introduced the concept of 'no fault' divorce by establishing the single ground of 'irretrievable breakdown' of the marriage evidenced by statutorily defined grounds. More importantly with respect to the issue at hand however, was the Domicile and Matrimonial Proceedings Act, 1973, which inter alia, abolished the common law domicile of dependency of the wife and fundamentally altered the basis of the court's jurisdiction in matrimonial proceedings.[3] This Act has not been introduced in Belize by any means.

12. This brief history and continuum has been stated not because it provides the answer to the legal conclusions as to domicile or residence which need to be determined in this matter. The history has been provided rather, to illustrate the context in which the principles are to be considered. Both in relation to the grounds for divorce and basis of jurisdiction, the gains of the legislative reforms to matrimonial law in England represented painstaking processes over a number of years, arising from acknowledgement of changing social conditions, particularly with respect to the place of women in society. Additionally, the reforms were preceded by widespread consultations and studies, usually in the form of Royal Commissions (for example, the Morton Commission which lead to the reformative 1969 divorce legislation). With respect to jurisdiction, from 1952 there were reports of several committees with unheeded recommendations and several failed attempts at reform sought to be introduced by private bills before the reforming Act of 1973 came to fruition. Throughout the entire period of failed reform it was recognized that for a woman to have an independent domicile would be more in conformity with modern tendencies.

[3] Rayden supra, pg 16.

Submissions on Applicable Law

13. The applicability of the common law rule of the husband's domicile and the dependency of the wife's domicile on that of her husband is accepted as the primary basis for the Court's jurisdiction to entertain a divorce petition. The statutory expansions to the Court's jurisdiction are also clear and accepted in the form of sections 147 and 148 of the SCJA Cap. 91. Learned senior counsel on behalf of the Petitioner however made two arguments with respect to the issues of jurisdiction and domicile. The first concerned section 18 of the SCJA which provides as follows:-

> *18. (1) There shall be vested in the Court, and it shall have and exercise within Belize, all the jurisdictions, powers and authorities whatever possessed and vested in the High Court of Justice in England, including the jurisdictions, powers and authorities in relation to matrimonial causes and matters and in respect of suits to establish legitimacy and validity of marriages and the right to be deemed natural-born Belizean citizens as are, by the Supreme Court of Judicature (Consolidation) Act 1925, vested in the High Court of Justice in England:*
>
> *Provided that a decree declaring a person to be a natural-born Belizean citizen shall have effect only within Belize.*
>
> *(2) Subject to rules of court, the jurisdictions, powers and authorities hereby vested in the Court shall be exercised as nearly as possible in accordance with the law, practice and procedure for the time being in force in the High Court of Justice in England.*
>
> *(3) Where any jurisdiction, power or authority is by this Act vested in the Court, the grounds upon which the same may be exercised and other provisions relevant to the subject-matter in respect of which the jurisdiction, power or authority is so vested may be prescribed*.

14. Section 18 was submitted as creating an open ended basis for reception of law so that the position regarding the UK's abolition of the wife's domicile of dependency forms part of the matrimonial law of Belize. This proposition was immediately countered by learned senior counsel for the Respondent by reference to the case of **Tilvan King v Linda Aguilar King**[4] wherein it was definitively held by the Court

[4] Belize Civil App. No. 31 of 2008.

of Appeal of Belize that section 18(1) vested the Supreme Court of Belize with only the jurisdiction of the High Court of Justice of England under the 1925 Act and nothing subsequent thereto.[5] This argument having been clearly negated by the Court of Appeal it is found without much consideration that the Domicile and Matrimonial Proceedings Act, 1973 of England does not form part of the law of Belize.

15. In the alternative, learned senior counsel for the Petitioner submitted that the principle of the dependency of the wife's domicile offends against the Constitutional provisions of equality before the law (section 6) and non-discrimination (section 16), in this case on the basis of sex. It is not found necessary to examine this argument with respect to the question of whether or not the Constitution is or is not offended by the common law principle of the domicile of the husband. The Court agrees with learned senior counsel for the Petitioner's response to this argument that it would not be open to the Court in the absence of a substantive claim for constitutional relief, to consider or grant such relief. The issue also did not form part of parameters argued before the Court and was being raised for the first time in closing submissions at the conclusion of the proceedings. Additionally, the Court is guided by the established rule that the common law stands unless or until altered by the clear terms of statute[6] and adherence to this rule is strengthened especially given the historical convention that underpins matrimonial law. The common law rule of the wife's dependent domicile remains the law in Belize.

Issue (ii) – Domicile of the Parties.

16. Having regard to the Court's finding that the dependency of the wife's domicile remains the law in Belize, the question for determination with respect to domicile concerns only that of Mr. Tabony. The starting point of consideration of this issue is an exploration of the meaning of domicile.

[5] Ibid per Mottley J.A. @ para 10.
[6] Cross on Statutory Interpretation 3rd Ed, 2006, pgs 166-167; Leach v R [1912] A.C. 305 per Lord Reid.

As learned senior counsel for the Respondent pointed out, domicile is one of the connecting factors between a person and the legal system that is applied to him or her in certain specified contexts. Learned authors Dicey & Morris[7] state that '*the object of determining a person's domicile is to connect that person with some system of law*' – that is, a system of rules and regulations that govern behaviour. Some of these specified contexts within a legal system include - as is currently before the court - matrimonial causes, but also taxation or succession laws.

17. Learned senior counsel for the Petitioner had mentioned in preliminary observations to his submissions to the Court, that the instant case does not raise any issue of conflict of laws as there is no competing forum for jurisdiction. It is indeed the case that there is no competing forum for jurisdiction, but by virtue of the fact that the nationality and residence of the parties introduce a foreign element into the domestic law of the Court, the matter does become one of private international law, in the sense that the Court has to apply the principles of private international law in order to determine the question of whether or not it has jurisdiction.

18. As stated before, all are agreed as to the general law pertaining to domicile so that the Court need only concur the submissions of both sides – firstly, that there are three classifications of domicile known in law – viz, a domicile of origin, a domicile of choice and one of dependency. A domicile of origin is acquired at birth – the country where a person is born. A domicile of choice may be acquired by a person residing in another country with the intention of continuing to reside there permanently or indefinitely. A person who acquires a domicile of choice may abandon that domicile but until another is acquired his domicile of origin revives. Lastly, a domicile of dependency arises in respect of minors, married women or persons not otherwise legally competent[8]. With relevance to the case at bar, the main generally accepted principles relating to domicile are that:-

    (i) no person can be without a domicile – a domicile of origin either remains or is later revived upon the abandonment or other lapse of a differently acquired domicile; and

[7] Dicey's Conflict of Laws, 7th Ed. pg 86 et seq.
[8] Generally Dicey on Conflict of Laws, supra.

(ii) no person can have more than one domicile at a time.

19. Apart from acknowledging his domicile to be that of the United States of America, it is unnecessary to dwell on Mr. Tabony's domicile of origin. The question is whether Mr. Tabony acquired a domicile of choice in Belize. It is considered that this question can be examined via two different approaches. The first, is to consider whether Mr. Tabony acquired a domicile of choice in El Salvador, in which case, by virtue of the fact that a person can have only one domicile at a time, this finding would lead to the conclusion that Mr. Tabony did not acquire a domicile of choice in Belize. Alternatively, the Court can examine the question of whether Mr. Tabony acquired a domicile of choice in Belize by frontally addressing the issue with reference to the quality of his connection to Belize. It is considered that the latter of these alternatives is the obvious and more effective approach.

20. With respect to the law, the statements of principle on the acquisition of a domicile of choice did not vary as between the opposing sides. With reference to the case at bar, the most relevant principles are considered by the Court as follows[9]:-

(i) A domicile of origin is more tenacious than a domicile of choice, in that it is more difficult to prove the abandonment of a domicile of origin (and thereby the acquisition of a domicile of choice), than it is to prove the abandonment of a domicile of choice (given that the domicile of origin revives);

(ii) The acquisition of a domicile of choice is effected by a combination of residence and intention to permanently or indefinitely reside (referred to as *animus manendi*);

(iii) The ascertainment of a domicile of choice is very much both partly a question of law and of fact;

(iv) A person is presumed to be domiciled where he resides but that presumption is easily rebutted;

[9] Dicey on Conflict of Laws, 7th Edition, Ch. 6; Dicey & Morrison the Conflict of Laws, 13th Ed. Vol. I, paras 6-026 et seq; Written submissions of both counsel.

(v) The question of *what* residence means, is a question of law; the question of *where* a person resides within that meaning, is a question of fact;

(vi) Residence, as a matter of law, means little more than physical presence but more than being present in a country casually or as a traveler;

(vii) Residence does not require a mental element to reside, but inasmuch as the establishment of domicile (by choice), requires an intention to permanent or indefinitely reside, the quality of residence is primarily relevant and thereby brings into bearing an intention to reside;

(viii) The *animus manendi* must be manifested in residence of a general and indefinite period as opposed to for a fixed or limited period, or for a particular purpose[10]

(ix) The intention to permanently reside need not only exist in a positive form of intending to remain permanently, it suffices for a person to be resident without any real intention of leaving;

(x) The acquisition or not of naturalization may be an indicator of the acquisition of a domicile of choice but is not conclusive;

(xi) In determining *animus manendi*, the quality as opposed to length of residence is the greater indicator;

(xii) Residence must be freely chosen and not due to or dependent on any external factor such as illness or the duties of an office;

(xiii) In determining domicile, the complexity usually arises in relation to ascertaining intention (as distinct from a physical fact of residence) and all circumstances even the most trivial, must be taken into account;

(xiv) There is no circumstance or group of circumstances which amount to definitive criteria and the same circumstances or groups of circumstances may give rise to different results in different cases;

(xv) A domicile of choice is lost by giving up both components of physical residence and intention to reside – it cannot be lost by giving up one and not the other;

[10] Udny vUdny (1869) L.R. 1 Sc. & Div. 441 @ 458 per Lord Westbury.

21. With respect to the circumstances referred to in sub-paragraph (xiv), the following factors can be considered as indicators of *animus manendi*[11]:-

> Long residence; purchase or lease of land; construction of a house; residence or not in furnished accommodation; marriage to a citizen or inhabitant; presence of spouse and children; business interests; personal affairs such as making of a will, place where personal papers are kept, exercise of voting rights, decisions made on nationality and education of children, membership of clubs and many other circumstances.

Submissions as to evidence of Mr. Tabony's Domicile

22. With respect to the evidence presented to the court, learned senior counsel for the Petitioner submitted that his naturalization since 1982, registration as a voter, possession of a driver's licence, acquisition of naturalization for his daughters, purchase of property, acknowledgement of Belize as a second home and ownership of several business interests and assets are all indicia of Mr. Tabony's acquisition of a Belizean domicile. Additionally, it was submitted that Mr. Tabony expressed a desire to leave El Salvador in an email to his wife. Learned Counsel for the Petitioner also highlighted the fact that under cross examination Mr. Tabony expressed his love for Belize and that his business interests appeared greater in Belize than in El Salvador.
23. Additionally, attention was drawn to the fact that although residing in El Salvador for many years, Mr. Tabony made no attempt to renounce his Belizean citizenship and also made no attempt to apply for permanent residence or citizenship in El Salvador. It was also considered of great significance by learned senior counsel for the Petitioner, that the Respondent never purchased property in El Salvador despite the fact that the family resided there for so many years nor did he acquire a Salvadoran driver's licence (this was alleged by the Petitioner). With respect to property, it was said that the Grand Colony home which was purchased by the Respondent at the request of the Petitioner represented the home Mrs. Tabony

[11] Dicey & Morris on the Conflict of Laws, supra, para 6-049

always wanted but never had whilst in El Salvador. It was submitted that the evidence that Mr. Tabony made Belize his domicile of choice was compelling.

24. On the other hand, learned counsel for Mr. Tabony urged that much in the same way that the factors present could be evidence of Mr. Tabony's intention to permanently reside, they were not conclusive in any way of his intention given the existence of his life in El Salvador. In the first instance it was pointed out that the Respondent owned businesses throughout Central America, thus the existence of his businesses in Belize was not indicative of any intention to remain permanently in Belize. Further, that the Belize business interests were managed from El Salvador. Learned senior counsel for Mr. Tabony pointed out that in spite of the fact that he held Belizean citizenship at the time, it was El Salvador that he chose to migrate to from the United States, set up his business and raise his family and to date, his personal effects and important aspects of his personal life such as friends, physicians and church, remain in El Salvador.

25. The failure to obtain permanent status in El Salvador was explained by the Respondent who testified as to the difficulty in satisfying immigration requirements for status in El Salvador. The Respondent also maintained that the cheap cost of rental property relative to the higher cost of purchasing property was the reason that he did not own property in El Salvador and not the fact that he didn't consider El Salvador his home. With respect to the assertion that he was a registered voter in Belize, the Respondent's explanation was that he initially registered as a voter as part of his naturalization process in Belize, but never renewed his registration and never voted in an election. The properties purchased in Belize were purchased by the companies he owns as investments and not at the behest of the Petitioner.

26. It was submitted on behalf of the Respondent that the Petitioner had no part in the purchase of the properties and was not even consulted before hand. Those properties it was further said, were used only to provide some place for the couple to stay when they visited Belize to attend to the business and this was to be confirmed by the absence of any personal effects in the photographs provided by the Petitioner.

The evidence, learned senior counsel for the Respondent said, pointed to the Respondent having resided and to date still residing permanently in El Salvador.

Court's Analysis of Evidence of August Tabony's Domicile

27. The following facts which are relevant to the determination of Mr. Tabony's domicile were either not contested between the parties or were admitted under cross examination:-

(i) The parties both of American domicile of origin, moved to El Salvador in 1996 as a married couple with young children. The family resided in rental accommodation and never purchased property;

(ii) The Respondent established a sewing machine wholesale business in El Salvador and there was a home office associated with the business operated in latter years from Residencia Escalon;

(iii) The children were educated entirely in El Salvador up to high school level and left to pursue further education and remained overseas;

(iv) The family moved three times whilst in El Salvador, the final time, to Residencia Escalon but the Petitioner moved out of that home in July, 2013 to the Las Magnolia's Residence;

(v) The family employed nationals of El Salvador as housekeeper and office manager;

(vi) The Respondent became a citizen of Belize as early as 1982, had established business in Belize in 1978 and presently the business interests (Tabony Industries Ltd) include number of gift shops - Toucan Gift Shops;

(vii) The Petitioner plays a role managing the gift shops in Belize;

(viii) The Respondent was at one point registered to vote and holds a drivers licence in Belize;

(ix) Through companies owned by the Respondent, property is owned in Belize, namely the Grand Colony Condominium in San Pedro and before that the Banyan Bay property in San Pedro;

(x) The Respondent never attempted to purchase residential property in El Salvador but was content to reside in rental accommodation;

28. In addition to the facts not contested, the Court makes the following findings of fact from the evidence presented:-

    (i) Despite ownership of business, ownership of property (through his companies), there was little evidence suggesting that the Respondent actually resided in Belize;

    (ii) Whilst the Respondent was at one point a registered voter he never renewed his voter registration and never voted in an election. The initial registration was done as a part of his naturalization process;

    (iii) There is no evidence of the Respondent having personal effects in Belize. The photographs submitted by the Petitioner of the Grand Colony condominium did not provide any evidence of such personal effects within the unit;

    (iv) There is no evidence provided of any personal associations in Belize such as church, social or charitable organisations, personal physician or personal bank account;

    (v) The Respondent maintained a bank account as a non-resident at Belize Bank International Ltd;

    (vi) The Respondent obtained resident status in El Salvador in 2005 and has an application for permanent residence pending;

<u>Conclusions as to the Respondent's Domicile</u>

29. It is firstly stated that there is very little evidence of August Tabony residing in Belize. Where is his physical home?

    The Grand Colony Unit does not show signs of day to day occupation. The photographs depict a beautifully furnished unit but with no obvious signs of any one or more person residing there permanently. As learned senior counsel for the Respondent pointed out – no clothes in closets; no personal effects, no signs of occupation in the kitchen – the photographs of the Grand Colony Unit do not depict evidence of occupation of any caliber which would be indicative of the quality of residence required to prove domicile.

Additionally, one would expect to find bank accounts, social security registration or taxation payments, evidence of utility bills that go to one's residential address; even mundane things such as regular grocery bills. A social security card is required to conduct most aspects of local business in Belize. The possession of a driver's licence is considered weak evidence of residency given Mr. Tabony's long standing connection in Belize. It is found that the acquisition and retention of citizenship was more connected to business interests but not indicative of domicile.

30. The fact that the family was raised in El Salvador is taken as of significant weight and the fact that property was bought in Belize is found to facilitate short visits as opposed to establishing a permanent home. The failure to purchase property in El Salvador does not negate the couple's quality of residence there, as it is found that the failure to purchase was due to financial convenience. Despite the fact that the Respondent in the email to the Petitioner uttered that he wanted out of El Salvador - it is not found that he actually removed himself and started living full time somewhere else. It is accepted as submitted on behalf of the Respondent that the email expressed frustration at the particular circumstances he was engaged in at the time. As a whole, taking into account the principles expressed earlier (paragraph 20 above) against the circumstances accepted or found by the Court, it is not considered that August Tabony acquired a domicile of choice in Belize. There is little evidence of actual physical residence and even if physical residence were to be found, the circumstances do not support a finding of an intention to permanently reside.

Issue (iii) – Diane Tabony's Residence prior to presentation of Petition

General Principles

31. In light of the Court's finding that there is insufficient evidence supporting Mr. Tabony having acquired a domicile of choice in Belize, the Court's jurisdiction can now only be founded pursuant to section 148 of the Supreme Court of Judicature Act, Cap. 91. This provision was already introduced in the Court's brief discussion in paragraph 13 above, but is now fully extracted as follows:-

In proceedings for divorce or nullity of marriage, if the wife is resident in Belize and has been ordinarily resident therein for a period of three years immediately preceding the commencement of the proceedings, the Court shall have jurisdiction for the purpose of such proceedings notwithstanding that the husband is not domiciled in Belize.

As has been the case with respect to all other aspects of the relevant law, counsel on both sides were not at variance with respect to the legal principles to be considered in determining the question of the Petitioner's ordinary residence. The dispute between the parties arose with reference either to the finding of relevant facts upon which the Court is asked to determine residence or the inferences to be drawn from facts accepted or so found.

32. Various principles and illustrations defining residence have been proffered by both sides, similarly taken from English authorities and sources. The Court from these authorities has once again extracted certain principles to be applied or considered in determination of the issue at hand. It is useful at the outset, to set out all of these definitions or principles which are found to be most relevant (emphasis mine):-

(i) Halsbury's[12] defines ordinary residence in the following terms:-

" *'Ordinary residence' is residence adopted voluntarily and for settled purposes as part of <u>the regular order of life for the time being</u>, as opposed to such residence as is casual, temporary or unusual.*"

This definition was highlighted by learned senior counsel for the Petitioner as a starting point for the Court's consideration of the issue.

In addition to this definition however, the Court also finds it useful to refer to the continuation of the paragraph which goes on to state as follows:-

"It is possible, in some contexts, for a person to be ordinarily resident in two or more places, <u>but this would seem to be impossible in cases where ordinary residence is a basis for the court's jurisdiction</u>."

(ii) There is no difference between 'resident' and 'ordinarily resident'[13] – per Karminski J who referred to and agreed with Pilcher J in **Hopkins v**

[12] Halsbury's Laws of England, 4th Ed. Vol 8(1): Conflict of Laws, para. 704
[13] Stransky v Stransky [1954] P 428 per Karminski J@435-437

Hopkins[14]. The latter stated, that on the facts of that case – *"…the adverb 'ordinarily' added nothing to the adjective 'resident'*.

(iii) However, further Per Karminski J in ***Stransky v Stransky***[15] with respect to the use of 'resident' as a requirement at the time of institution of the suit and 'ordinarily resident' during the preceding three years -

"I do not think that the use of the two terms is either meaningless or accidental. Clearly, mere temporary absences from England, such as a holiday abroad, would not make a gap in the period of ordinary residence. Nor, in my view, would a longer gap of some months, such as one caused by a journey overseas by a wife accompanying her husband on a business trip, necessarily break the period of ordinary residence."

The use of 'ordinarily resident' for three years preceding the presentation of the Petition would seem to be for the purpose of acknowledging that temporary absences over the required period of time, need not preclude a finding of residence.

(iv) Useful assistance is to be gleaned from the treatment of the term 'ordinary residence' in income tax cases insofar as residence is regarded from the standpoint of being adopted voluntarily and for a settled purpose[16].

(v) The UK law has replaced 'ordinarily resident' with 'habitually resident' but authorities have held that these terms are synonymous[17] and should remain so within the field of family law[18]

(vi) Physical presence does not confirm residence and physical absence is not inconsistent with residence[19]

(vii) Residence is not gleaned only from an exercise of counting days spent. There has to be an element of quality of residence.[20]

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[14] [1928] A.C. 234 @ 243
[15] Supra, pg 437
[16] Such as Levene v Commissioners of Inland Revenue [1929] A.C. 217 per Viscount Cave LC @ 225 – "*ordinary residence connotes 'residence' in a place with some degree of continuity and apart from accidental or temporary absences*"; Commissioners of Inland Revenue v Lysaght [1928] A.C. 234 per Viscount Sumner @ 244 that "'*resident' indicates a quality of the person charged and is not descriptive of his property, real or personal*"
[17] Ikimi v Ikimi [2001] EWCA Civ 873 paras 22 and 31 per Thorpe LJ
[18] Ibid @ para 31
[19] Sinclair v Sinclair [1968] 189 @ 222 per Russell LJ
[20] Armstrong v Armstrong [2003] EWHC 777

Some Authorities.

33. The authorities cited, which for the most part spanned both sides of the divide will be briefly considered and discussed. The consideration will be brief, for in the final analysis it is difficult if not impossible, not to find distinguishing factors which illustrate that the existence of the same factors in different cases will give rise to different results.

    (i) The examination commences with ***Stransky*** and the '*real home test'*. The issue of jurisdiction on a divorce petition before the UK Court was in this case based on the English equivalent of section 148 of Cap. 91 – ordinary residence. The petitioner was married to a Czechoslovakian national who had not acquired a domicile of choice in England. Within the period of the three years prior to the presentation of the petition, the wife had spent a total of over 15 months in Germany where the husband had been employed. Throughout the three years prior to the presentation of the petition, the wife had maintained a flat in London where the parties lived from time to time for about four years. The wife stayed there at times without the husband, never rented the flat and kept it ready for occupation upon any return from abroad. Karminski J, after explaining the meaning of 'ordinarily resident' (paragraph 31(ii-iii) above), found that the wife's prolonged absences in Munich were as a result of the exigencies of her husband's work; that she never intended to make Munich her home for an indefinite period and that far from disposing of her flat in London she went to great lengths to retain it as a permanent home. This was found to be her real home during the relevant period of the three years prior to the presentation of the divorce petition.

    (ii) Next we consider **Hopkins v Hopkins**[21]where although clearly resident in England at the time of presentation of petition for divorce, it was found that for five months out of the three years prior, the wife had been resident in Canada with her husband.

[21] [1928] A.C. 234 @ 243

For those five months the Court held that the wife ceased to be resident in England as she had moved there to be reconciled with her husband who had deserted her and during that time had no home in England. It was also made clear that there was no contention that the wife had two physical residences from which to choose to live. The difference in this case from ***Stransky*** above, is easily seen insofar as the wife in ***Hopkins*** packed up her life and moved away from England. But for the continued cruelty of her husband, she would have remained with him in Canada. In those circumstances, the period of three years ordinary residence was found to have been broken.

(iii) ***Hopkins*** can be contrasted with **Lewis v Lewis**[22]where the wife had during the three years prior to the presentation of her petition for divorce accompanied her husband from England to Australia for purposes of his employment. The wife returned to England within several months and asserted ordinary residence as the basis of jurisdiction of her petition. It was found, similarly as in ***Stransky***, that the circumstances were that the wife left for Australia with the intention that her stay there was to be temporary only, although she had no idea for how long. The wife left her parents in charge of her flat in London, which she returned to having left Australia. Within these circumstances it was once again found that the wife's stay in Australia, being intended only to be temporary for purposes of her husband's employment, resulted in her ordinary residence in England being unbroken by the temporary absence.

34. These are older cases, but still directly relevant to Belize by virtue of the law under consideration. The English position has moved on to habitual residence for one year prior to the presentation of the divorce petition[23]. As stated in paragraph 31(v) above, it has been held that habitual and ordinary residence are nonetheless one and the same[24].

[22] [1956] 1 All ER 375
[23] Section 5(2) of the Domicile and Matrimonial Proceedings Act, 1973
[24] Ikimi v Ikimi supra.

With this in mind we now examine ***Ikimi*** which was extensively relied upon in support of the Petitioner's arguments against the objection to jurisdiction. The facts need not be stated except to the extent that the husband and wife were both Nigerian nationals with sufficient wealth to afford a second home in Hampstead, London which they purchased in 1978 – less than one year after they were wed. The house in London was fully furnished and staffed. The couple's four children were all born in London and educated there from secondary school into university. Between 1995-1998, the couple were unable to enter the United Kingdom as a result of sanctions imposed by the EU in response to the political situation in Nigeria. In 1998 the sanctions were relaxed and the wife returned to England where she spent several weeks at a time and otherwise in Nigeria. The wife filed a petition for divorce in England in September, 1999 on the basis that she was habitually resident in England for the one year prior to the presentation of the petition. The husband challenged the Court's jurisdiction to hear the divorce which was upheld at first instance and the husband appealed.

35. Aside from the statements of law (per Lord Scarman in *Reg v Barnet LBC Ex Parte Shah*[25]), to the effect that albeit the decision in ***Stransky*** was approved, the 'real home test' was rejected and that habitually and ordinarily resident were to be given one and the same meaning, the importance of ***Ikimi's*** decision to the instant case lies in the dicta between paragraphs 27 – 36. These very paragraphs were cited by learned senior counsel for the Petitioner but the Court places different emphasis on the words of Thorpe LJ and extracts as follows:-

    (i) Paragraph 34 – regarding the submission of counsel that the statutory requirement for habitual residence throughout the relevant year demands a degree of continuity not demonstrated in that case -

    "There can be no doubt that the definition adopted by the House in Ex Parte Shah requires normal residence here apart from temporary or occasional absences. On the other hand those absences may be of long or short duration. It is in that area that the difficulty of the case lies."

[25] [1983] 2 AC 309

Thorpe LJ thereafter found that the wife had the requisite intention of having voluntarily adopted residence in Hampstead as soon as she was able to do so and that she was there for a settled purpose, namely the support of her children as they continued their education, the breakdown of her marriage and her need for health and dental care. The remaining question then pertained to her bodily presence as measured by the number of days spent, given that the couple had two long established matrimonial homes.

(ii) Paragraph 35 - Thorpe LJ then considered the test of Coleridge J at first instance which was set out in paragraph 10 of the appeal judgment (with my emphasis) –

> *[I have already dealt with the matter of law relating to dual residences: as I have indicated in my judgment, habitual residence is a state of affairs which exists regardless of the precise time spent in the particular country. In my judgment, reviewing all the facts of this case and the history of this family, the quality of the wife's presence here amounts unquestionably to residence. Furthermore, the family's life and in particular the wife's life, in relation to her visits to this country and her occupation of 25 Vivien Way, is such that it can be properly described as 'habitual'*.]

(iii) Thorpe LJ said thus in relation to Coleridge's test above –

"Now in my opinion the test proposed by Coleridge J in those passages of his judgment is too relaxed. It would result in a finding for the wife in the present case, presumably had she spent no more than five of the 365 relevant days within the jurisdiction. That approach seems to me to move the concept of habitual residence altogether too far towards the concept of domicile, which requires no bodily presence but may be satisfied by the sort of considerations set out by the judge in paragraph 16 of his judgment. In the field of family law jurisdiction sometimes may be assumed on the basis of domicile, sometimes on the basis of habitual residence or sometimes on the basis of bodily presence. Where the statutory requirement is that the state of habitual residence must be proved over a stated duration the important ingredient of bodily presence, in my opinion, must be elevated well above the token level that Coleridge J was seemingly prepared to accept. The difficulty lies in the reformulation of his proposition. If the requirement is set too high the consequence may be that the spouse having divided the relevant period equally between the two

jurisdictions will not be able to invoke a habitual residence in jurisdiction in either. Setting the standard too low enables the spouse to invoke the jurisdiction in both. As a matter of policy, I like Coleridge J, would favour a liberal rather than a restrictive outcome. Of course the consequence of liberality may be forum-shopping...<u>However I would be loathe to formulate any general test for the application of this statutory provision in cases such as the present where spouses have created two matrimonial homes of equivalent status</u>. The danger of stated tests is that they are soon exposed by the arrival of a challenge in the form of a set of facts unforeseen by the architect of the test. No field is more vulnerable to such challenges than the field of family law…"

36. Thorpe LJ concluded that the wife had in fact satisfied the statutory requirement for habitual residence for one year. In considering Thorpe LJ's words at paragraph 35 extracted above with care, several observances are made which are to be considered with reference to the instant case. Firstly, inasmuch as it has been decided that ordinary and habitual residence are no different, there is nonetheless the difference that the stated duration remains in Belize as three years instead of one year. Settled purpose and voluntary presence aside, it is considered that the ***quality*** of residence over the space of three years has to be differently regarded than over the space of one year. In ***Ikimi***, (as shown in paragraph 34), the court having found the wife's seeing to the education of her children to be a settled purpose, the determination of habitual residence turned on bodily presence. It was also found in ***Ikimi*** that there were in fact two matrimonial homes of equivalent status.
37. The Court's reading of ***Ikimi***, is that given that all other relevant factors remained more or less equal, the question of bodily presence tipped the balance in favour of Mrs. Ikimi. In the instant case it must still be ascertained whether there was a voluntary and settled purpose. It must also be ascertained whether the quality of residence of Mrs. Tabony is as such that a similar finding of a home of greater or equivalent status as that in El Salvador can be made. Given the requirement for three years as opposed to one, it is found that bodily presence is not as important as the finding of a settled purpose and overall quality of the residence.

With these considerations in mind, the Court now turns to the evidence of Mrs. Tabony's residence.

Mrs. Tabony's Residence – the Evidence

38. Given that Mrs. Tabony needed to have been resident in Belize three years prior to the presentation of her Petition, that period would commence from the 17th November, 2011. The quality of Mrs. Tabony's residence is critically examined according to the evidence provided by her, as supported or otherwise contradicted by evidence from the three additional witnesses – Ms. Montes Guardado, Ms. Zepeda Rivera and Mrs. Iraida Gonzalez:-

    (i) It is inferred that El Salvador was the couple's primary residence as that is where the family was raised. This inference remains at least until 2007-2008 when the daughters graduated from high school and left El Salvador to pursue tertiary education;

    (ii) Mrs. Tabony then asserts that thereafter (after the children left) she started to reside on a more long term basis in San Pedro and insisted that the Respondent purchase the Grand Colony home. The Petition and Mrs. Tabony's affidavits implied that the Grand Colony home was occupied as a primary place of abode from where she conducted her daily life. This does not accord with the evidence. The photographs submitted by the Petitioner show a well-appointed unit. They do no show an occupied unit and the evidence of the employees in Salvador was that the Petitioner travelled from El Salvador with clothes and personal effects to a place she supposedly primarily resided. The actual amount of times that Mrs. Tabony travelled is not accepted from these witnesses, but the more innocuous information of her packing a suitcase of personal belongings to go to Belize and returning with the same items, (at least from 2011 when the Assistant started working), is not consistent with someone who alleges that from 2008 they started to primarily reside at the unit in San Pedro.

(iii) It is accepted that the parties remained in cohabition until 2013 when according to Mrs. Tabony in her Petition, she asked Mr. Tabony to move out of the Grand Colony Unit and he refused – whilst according to Mr. Tabony, Mrs. Tabony moved out of their home in El Salvador at Residencia Escalon into separate premises at Las Magnolias. Mrs. Tabony at no time denied that she moved to Las Magnolias. The Court would question why a person who was residing mainly in Belize would need to rent separate accommodation in El Salvador.

(iv) Additionally, Mrs. Tabony did not dispute that after packing up her belongings from Residencia Escalon in July, 2014, she shipped them to the United States. Mrs. Tabony did point out that the Grand Colony unit was already furnished - but personal effects does not mean only furniture. As learned senior counsel for the Respondent submitted, personal effects include photographs, pots and pans, mementos, paintings – in general - signs of physical occupation. Such signs were noticeably absent from the Grand Colony Unit (the photographs were provided by Mrs. Tabony and as such accepted as an accurate depiction of the usual state of the unit);

(v) In addition to the physical occupation of the home, a person residing in Belize should have evidence of general business transactions such as a local bank or utility statements or a social security card as this is necessary to conduct most kinds of business as a resident of Belize.

(vi) Mrs. Tabony's evidence was that she has no shares in the Respondent's companies but she has been Chief Operating Officer and lead buyer of Toucan Gift Stores under a management agreement. She was therefore employed by Belizean companies and as an employee would have been liable to income tax and social security deductions. Mrs. Tabony stated compliance with those requirements was not a matter for her as she was not in charge of the company, so no evidence of her local employment was forthcoming.

(vii) In further consideration of the employment issue, as a resident but non national, Mrs. Tabony would have required permission to hold that employment. No evidence of Mrs. Tabony's status being anything other than a visitor was presented. It is either that her assertion with respect to being employed was inaccurate or if true she failed to validate her status as a lawfully resident employee (at least until April, 2014 when she became a citizen), which she should have been able to do.

(viii) With respect to the three additional witnesses, it is accepted that Mrs. Gonzalez certainly does know Mrs. Tabony, but her lack of knowledge of more intimate details of Mrs. Tabony's life, as exposed under cross examination, relegated her to an acquaintance. It was not denied that Ms. Maria Paz was Mrs. Tabony's personal assistant. She was hired since 2011 in El Salvador. If according to Mrs. Tabony's evidence she was residing primarily in Belize since 2008 the need to hire a personal assistant from El Salvador to assist her with business she managed mainly from Belize is viewed with some reserve. Similarly the family's longtime housekeeper continued to work for Mrs. Tabony when she moved to Las Magnolias but there is no evidence presented of a housekeeper from Belize where again, Mrs. Tabony alleged she was residing since 2008. It is also presumed that Mrs. Tabony having been employed, some employee from the nine gift shops she manages in Belize might have been available to attest to her continued presence and employment at the business.

(ix) A minor point, but one which can nonetheless be noted in all the circumstances, is that no evidence was provided with respect to the basis upon which Mrs. Tabony acquired her citizenship. The qualification in her case, would be either by marriage to a citizen or residence for five years. Presumably Mrs. Tabony's application for citizenship may have spoken to the fact of her having been resident for any particular period of time. But this point is not considered of much significance given that it is highly probably that the most convenient basis to have put forward her application was by marriage to a citizen.

Conclusion

39. With respect to all of the evidence considered above, it may well be concluded that Mrs. Tabony can be said to have had a settled purpose in coming to Belize, namely – regular visits to oversee the businesses she managed. However, the quality of her presence, when one considers its context as a connecting factor for purposes of matrimonial law, can be viewed as falling short. One common thread amongst the cases briefly examined above, is that save for ***Ikimi***, the jurisdiction sought in the UK was for UK citizens, who had lived there for most of their lives and thereafter were seeking to re-establish residence as the connecting factor after the interruptions arising as a result of their marriage. In the instant case, Mrs. Tabony seeks as a foreign national, (at least up to April, 2014 when she became a citizen), to establish the connecting factor where no or little ties would have existed before.

40. Given the difference in the requirement of three years versus one year of ordinary or habitual residence, the importance placed on bodily presence in the instant case, is not the same as was found to be in ***Ikimi***. Given the explanation of how 'ordinary' qualifies residence (***Stransky***; ***Lysaght***) in disregarding temporary absences, the approach suggested of isolating November, 2011 to November, 2012 as most important qualifying year is not accepted. Rather, taking the approach from the consideration of ***Ikimi*** at paragraph 34 above and taking into consideration all of the observances on the evidence from paragraph 37 above, Mrs. Tabony's presence in Belize over the course of the three years is not found to be of such quality to satisfy the requirement for ordinary residence. Instead, it is found that Mrs. Tabony was a frequent visitor who came to oversee the businesses for short periods at a time, but not that she was resident to any degree over the required 3 years, so as to ground the Court's jurisdiction for divorce.

Final Disposition

41. On conclusion of the trial of the preliminary issue of the Court's jurisdiction to entertain the divorce petition of Mrs. Tabony, it is found that:-

(i) The Respondent August Tabony is not domiciled in Belize;

(ii) The Petitioner Diane Tabony has not been ordinarily resident in Belize for three (3) years prior to the presentation of her Petition; and

(iii) In the circumstances the Petition is dismissed for want of jurisdiction with costs to the Respondent to be assessed if not agreed.

Dated this 25th day of January, 2016.

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Shona O. Griffith
Supreme Court Judge.