IN THE SUPREME COURT OF BELIZE, A.D. 2019

ACTION: 260 OF 2019

IN THE MATTER of An Application by DIANE LORI TABONY under Section 16 of the Married Women's Property Act, Cap. 176 of the Laws of Belize, R.E. 2011

AND

IN THE MATTER of Section 148(A) of the Supreme Court of Judicature Act, Cap. 91 of the Laws of Belize, R.E. 2011`

BETWEEN

(DIANE LORI TABONY	**PETITIONER**
(AND	
(AUGUST HENRY TABONY	**RESPONDENT**

BEFORE the Honourable Madam Justice Sonya Young

Decision

25th July 2022

Appearances:

Mr. Fred Lumor SC with Ms. Sheena Pitts, Counsel for the Claimants.

Mr. Andrew Marshalleck SC with Ms. Stacey Castillo, Counsel for the Defendant.

KEYWORDS: Family - Divorce - Division of Matrimonial Assets – Prenuptial Agreement – Legal Status of Prenuptial Agreements in Belize – Prenuptial Agreement Executed in Louisiana – Conflict of Laws – Choice of law – Domicile – Law Governing Validity of Prenuptial Agreement – Whether Prenuptial Agreement Valid Under Louisiana law - Whether Domicile of Parties Relevant – Whether Prenuptial Agreement Stipulated or Implied that Marital Property Regime between Parties to be Governed by Louisiana law

DECISION

1. Mrs. Tabony brought an action for the declaration of rights and the division of matrimonial property under the **Judicature Act (Cap 91)** and the **Married Women's Property Act (Cap 176)**. This decision concerns the trial of a preliminary issue - whether Mrs. Tabony could properly rely on the substantive laws of Belize in making her application for ancillary relief. There is also an application for a consequential strike out Order with costs.

2. Mr. Tabony, the Applicant, says that since the parties were married in Louisiana, the doctrine of *lex domicilii matrimonii* must apply, which is that of the state of Louisiana.

3. He further asserts that the parties had entered into a prenuptial agreement (the Agreement) wherein the legal regime of Louisiana had been chosen or may be implied to govern their ownership of immovable and moveable property obtained both before and after marriage. Since the Agreement is valid and existing, the Respondent's action is misconceived and not properly before the Belizean Court.

4. Even if the Agreement was not valid, the parties have the closest connection to Louisiana so that is their matrimonial domicile and the laws which must be applied. Mrs. Tabony has failed to lay any foundation as to why Belize law should govern the division of matrimonial property.

5. The mere fact that the parties ultimately took up residence in Belize can not establish a legal basis for the application of Belizean law either. It is only the

laws of Louisiana which must determine the validity of the prenuptial agreement and any property rights on divorce.

6. Mrs. Tabony counters that section 148 (A) of the **Supreme Court of Judicature (Amendment) Act, 2001** confers property jurisdiction during divorce proceedings on the Supreme Court. The preamble to the amendment *"overrides or repealed or made inapplicable any law whether municipal or international (including the law of the state of Louisiana in the USA) that is in conflict with it."*

7. Once a petitioner is able to establish three (3) years residence prior to the presentation of the divorce petition (as she has done), the applicable law for the distribution of matrimonial property is that of Belize. Since the statutes of Belize on matrimonial proceedings do not accord any validity to prenuptial contracts, that Agreement can not be enforced in Belize even if it is valid under foreign law.

8. She notes that the Agreement is not a prenuptial contract since the Court has not yet determined that it is. Further, it has neither a choice of jurisdiction nor a governing law clause, and even if it did, it could not establish a legal regime since it can not oust the jurisdiction of the court under section 148 (A) to make incidental or ancillary orders.

Brief Background:

9. The parties entered into the Agreement on the 24th October, 1986. They were married the next day in Louisiana, USA. They lived there for ten (10) years and then took up residence in El Salvador with their two (2) children (both now adults). They lived in El Salvador until 2013(according to Diane Tabony) and

2014/15 (according to August Tabony). It appears that they ceased to cohabit in or around July 2013.

10. The Respondent later moved to Belize where she petitioned for divorce in Belize in 2014. That petition was struck out by the court as she was found not to have been resident in Belize. In 2018, she again petitioned for divorce in Belize. The Respondent entered an appearance, answered that petition, and filed a cross petition of his own. A *decree nisi* was granted to the Petitioner on the 24th April, 2019 and was made absolute in July, 2019.

11. In 2018, the Petitioner brought the substantive action for division of the matrimonial property which is now before the Court. She claims an interest in properties situated in Belize, Honduras, and El Salvador.

12. The matter has gone through a number of judges of which I am the latest and hopefully the last. There has been significant delay and I humbly apologise for adding to the parties' burden with my own unintentional inefficiency.

13. I lay blame not only on the exigencies of the job but my own difficulty comprehending what exactly was required of the Court by the amended summons filed. The application itself sought only leave to try a preliminary issue but all the submissions received seemed to actually address the preliminary issue as if it were in fact being tried. This decision will consider those submissions and make determinations on issue where it can, but it is fully aware that there was no leave granted for the trial of any preliminary issue.

The issues as this Court finds them to be from the application and submissions made:

1. Should this action be struck out?

A. Whether the laws of Belize are applicable to the division of the matrimonial property of the parties?

B. Whether the Agreement expressly or impliedly chose the laws of Louisiana as its legal regime?

C. Whether in determining the choice of law issue the laws of Louisiana as the matrimonial domicile should be applied?

D. Whether the Agreement is enforceable in Belize?

Should this action be struck out?

Whether the laws of Belize are applicable to the division of the matrimonial property of the parties?

14. The Applicant submits that where there is a conflict of laws issue re the division of matrimonial property, the English courts look firstly to the law of matrimonial domicile.

15. He relied on ***De Nichols v Curlier (1900) 1 AC***. Here, the parties were married in France where property was subject to community of goods. There was no antenuptial agreement. They subsequently moved to and were domiciled in England. The husband was naturalized there. He died leaving an English will which disposed of all his property although his wife survived him. According to French law, he could not, by his will, pass more than his share of the community.

16. The House of Lords considered the effect of the community of goods and found that it was *"for all intents and purposes, according to the law of France, equivalent to a written contract."* (Paragraph 36). Therefore, the change of domicile could not and did not affect the wife's real proprietary right already acquired under French law. A law which they, as French subjects, were presumed to have been well aware of and must have entered into marriage believing that it would be applied in regulating their right to property for as long as their marriage subsisted.

17. Paragraph 46 explained that:

> *"As a rule, the rights of spouses conferred by the law of one country can have no intrinsic force, except within the territorial limits and jurisdiction of that country. But the comity of nations, with a view to the comfort and convenience of their respective subjects, has rightly conceded that there should be some exceptions to this strict rule of the territorial law. By one of such exceptions it is universally admitted that where, upon marriage, a marriage contract or settlement is made regulating the property of the spouses, such contracts or settlement shall have effect given to its provisions wherever the spouses may afterwards be domiciled."*

18. This position was also adopted in ***Murakami v Wiryadi & Ors [2010] NSWCA 7*** a New South Wales case. Here, the implied contract reasoning was applied when the court chose the law of Indonesia through the *lex matrimonii domicilii* principle. So too in ***Slutsker v Haron Investments Ltd and another [2012] EWHC 2539*** where the *lex domicile* was applied to the movables and the *lex situs* to the immovables.

19. So, Senior Counsel continued, in the instant case where the parties executed a valid and subsisting prenuptial agreement, were married and then lived in Louisiana for ten (10) years; Louisiana was clearly the *domicilii matrimonii* and should govern both the movable and immovable property of the parties.

20. Senior Counsel insisted that unless the agreement is set aside by the court on ordinary contractual principles, per the laws of Louisiana, the Court must apply the parties' choice of law (Louisiana) which was implicitly invoked in the agreement and the prenuptial agreement must be enforced.

21. Counsel proposed that section 18(1) of the **Married Women Property Act** permits parties to enter into prenuptial and antenuptial agreements. She then drew attention to the finding of the Caribbean Court of Justice in ***Rosemarie Ramdehol v Haimwant Ramdehol CCJ Appeal No GYCV 2017/004***. She opined that a similarly (admittedly not identically) worded section in the **Guyanese Matrimonial Persons (Property) Act** was held to expressly provide for ante and post nuptial agreements which must be enforced, unless there was a breach of general contract principles or public policy requiring the agreement be set aside.

22. In any event, she concluded, much of the properties in which the Petitioner seeks a beneficial interest are owned by third party companies whose shares are owned by the Tabony Family Trust, an international trust created under and governed by the Laws of Belize. The Court can not declare a constructive or resulting trust under the provisions of the **Married Women's Property Act** nor on the basis of equitable doctrines applicable in Belize. It is the laws of Louisiana which must determine these rights.

23. Although she accepted that there is no clear English or Commonwealth authority on what choice of law rules would apply in claims of constructive trust, she nonetheless urged that the law of *"the underlying obligation should apply"*

Johnathan Harris Constructive Trust and Private International Law: determining the applicable law, 2012 Trust and Trustees 18(10):965.

24. She commended, in support, ***Lightning v Lightning Electrical Contractors Ltd (1998) Lexis Citation 4671***. The Claimant, an Englishman, had advanced the purchase price for property bought in Scotland by a company resident in England. The English court held that the trust he claimed would be governed by English law as that was where the parties relationship was based.

25. These views were endorsed in ***Luxe Holding Ltd v Midland Resources Ltd [2010] EWHC 1908 (Ch) and Akers and others v Samba Financial Group [2017] AC 424. Murakami v Wiryadi (ibid)*** confirmed that the courts would generally enforce a relevant foreign element in determining a claim for equitable interest under Australian law.

26. The Respondent, on the other hand, reminded the Court that the parties had submitted to the divorce jurisdiction of this Court. Section 148 (A) (1) of the **SCJA** is part of that divorce jurisdiction and parties can not by their agreement *"confer upon a particular court any jurisdiction which under the Act establishing the court it does not possess."* - Bennion on Statutory Interpretation, 5th Edition, pp. 104-105 Part 1 section 19.

27. The Court is therefore bound by the property jurisdiction as laid out in section 148 (A) (1) and (2) and determined by the Court of Appeal in cases such as ***Vidrine v Vidrine Civil Appeal No. 2 of 2010*** *and* ***Usher v Usher CIvil Appeal No. 40 of 2010*** which affirmed ***Vidrine***.

28. Senior Counsel quoted Barrow JA (as he then was) at paragraph 45 of ***Vidrine*** where he confirmed that like its maintenance jurisdiction, the Court's property jurisdiction was confined to divorce proceedings. He then emphasized the fact that the applicant had mounted no challenge whatsoever in respect of the Respondent's application for alimony.

29. Seeking further support for his position, Senior Counsel pointed to the preamble to the amendment creating section 148 (A) and surmised that it demanded an interpretation which should read that in spite of the **Louisiana Civil Code** or law, the Petitioner was allowed to make her application during divorce proceedings for a declaration of her title or rights to property acquired with the respondent during the subsistence of their marriage. This, he assured, she had certainly done in strict conformity.

30. He robustly impressed that the court is now bound to consider the discretionary matters contained in 148 (A) and may make any of the *"so-called ancillary orders whenever it has jurisdiction in the main suit"* (Dicey Morris and Collins on The Conflict of Laws, 14th Edition, Vol 2 pg 932 paragraph 18-171). Notably, the Belizean Court has no jurisdiction whatsoever to vary ante nuptial or prenuptial agreements as the English court does.

31. In relation to the exercise of the court's equitable jurisdiction Senior Counsel was swift to point out that notwithstanding the Married Women's Property Act and the Court's jurisdiction there under to apply the equitable remedy of trusts (***Cowcher v Cowcher [1972] 1 All ER 943*** *at* ***947*****)**, the **Judicature Act** gives the Court jurisdiction to deal fully with both legal and equitable claims. So, the

Court under section 148 (A) is able to give such remedies as the parties appear to be entitled to (both legal and equitable).

The Court's Consideration:

32. The first limb of this application begins with the premise that the Agreement is valid and existing and is governed by the Civil Code of Louisiana. It continues that since the Agreement addresses matrimonial property acquired by the parties it must be enforced by the Belizean Court and this includes accepting the laws of Louisiana as the choice of laws.

33. The second limb is that there is a conflict of laws so the choice of law according to the rules of private international law must be the matrimonial domicile - Louisiana.

34. Both limbs conclude that the substantive law of Belize governing the ownership of real property or the division and distribution of matrimonial property on divorce is, therefore, inapplicable.

Let's unpack this one section at a time.

Is the Agreement valid under Louisiana Law?

35. The issue of whether the Agreement is valid and subsisting under Louisiana law (if the Court were to find that that is the applicable law) can not be predetermined as the Applicant seems to have done.

36. He relies on a heavily redacted letter from an Attorney from the state of Louisiana which was sent to his own Attorney here in Belize. He also provided

what seemed to be her curriculum vitae and an ordinary office copy of her qualification as an Attorney in Louisiana.

37. There are a few problems with this chosen approach. Foreign Law is a matter of fact - see Section 44 and 45 of the **Evidence Act, Cap 95**, also Dicey, Morris and Collins on the Conflict of Laws 14th Ed, Vol 1 Rule 18 (Proof of Foreign Law) at pg 255. Secondly, any foreign law on which the party wishes to rely must not only be pleaded it must also be proved.

38. This Court could find nothing in Mr. Tabony's first affidavit in response to the originating summons herein, which pleads the foreign law, and certainly Counsel could not hope to prove the foreign law by appending this letter to the Respondent's affidavit.

39. The Court is mandated only to rely on the testimony of experts and their supporting material. Sections 45 (5) of the **Evidence Act (ibid)** ascribes to the judge alone the duty to determine the sufficiency of a proposed expert's skill. The documents provided by the Applicant do not even contain a properly certified copy of the Attorney's qualifying document.

40. Far worse is the absence of an affidavit of foreign law from this 'expert'.

41. I must agree with Senior Counsel and paragraph 9-013 of Dicey (ibid) on which he relies. This is a factual dispute requiring that expert evidence be put before the Court in the usual manner. The Court will then consider that evidence and make a determination on the issue.

42. Since necessary evidence is not now before the Court, that alone militates against a strike out order or a proper determination of this limb of the stated preliminary issue.

Does the laws of Louisiana expressly or impliedly govern the Agreement?

43. The pertinent sections of the prenuptial agreement read:

"MARRIAGE CONTRACT

…….

Appearers wish to vary the marital regime of the Louisiana Civil Code in the following particulars:

Appeared hereby renounce the community of acquets and gains provided for in the Louisiana Civil Code and declare that henceforth they shall be separate in property and will maintain separate regimes to that effect, except where appeasers jointly designate an asset of liability as a community asset or community liability.

The interest of AUGUST HENRY TOBONY to any immovable property now owned by him or the proceeds of any sale thereof shall remain his separate property. The interest of AUGUST HENRY TOBONY in any corporation of business now owners by him shall remain his separate property.

The interest of DIANE LORI SWEAT MARSCHELL in any immovable property now owned by her, included but not limited to that property located at 9775 Croake Dr.Thornton, Colorado or the proceeds of sale thereof shall remain the separate property of DIANE LORI SWEAT MARSCHELL. Any income therefrom or from any source, to the extent it exceeds the required living expenses of appearers as husband and wife, is to be the separate property of DIANE LORI SWEAT MARSCHELL."

44. While this Court is in no position to make a determination on the validity and enforceability of the Agreement at this point, it can state that the governing law or proper law of the Agreement is Louisiana. The Agreement expressly rejects the community of acquets of that state. That particular clause is clearly indicative of one jurisdiction and no other. The parties were both resident there when the Agreement was entered into, were married in that state, and the contract was entered into there.

45. The Agreement certainly does not have an expressed clause on the governing law so that the Respondent is correct in this regard. It seems that even the

Applicants are well aware of this. However, there is sufficient from which this Court can make the determination which it has.

46. Mind you, this is no determination of the matrimonial domicile which is really the choice of law issue which will be addressed now.

The Choice of Law Issue:

Are the laws of Louisiana the governing regime by virtue of the parties' matrimonial domicile?

47. In international contract disputes choice of law rules are applied, this determines the law which will govern the contract. These rules are applied similarly for entitlement to property. For matrimonial property, it is referred to as the law of matrimonial domicile. This is the principle which the Applicant seeks the Court to employ.

48. This Court understands the Applicant's position to be that by virtue of having been married in Louisiana and having lived there for ten (10) years thereafter, but having acquired property elsewhere, the Court in resolving the division of matrimonial property on divorce must look first to the marital domicile which they say is Louisiana. That is the place which is most closely connected to the parties and their relationship.

49. The Applicant relied on ***De Nichols v Curlier (ibid)*** *and* ***Callwood v Callwood [1960] AC 659*** neither of which dealt with the division of matrimonial property on divorce. Rather, they were both concerned with probate disputes.

50. In his third case, ***Slutsker v Haron Investments Ltd and Anor [2012] EWHC 2539*** the *lex domicile* was applied to movables, and the *lex situs* to immovable. This case too did not deal with the division of matrimonial property on divorce. Rather, after divorce, Mr. Slutsker had been excluded from a Cayman law trust of which Mr. and Mrs. Slutsker, her present and future children, Mrs. Slutsker's mother and father, Mr. Slutsker's mother and father and charity were beneficiaries. Mr. Slutsker argued that since the money had been provided in equal shares, for the property bought by the company whose shares were held by the trust, as a matter of Russian law, he held a half interest.

51. So, while these cases may be excellent examples of the application of the matrimonial domicile rule in conflict of laws cases, they seem to have had no effect in relation to the English position on the distribution of matrimonial property on divorce.

52. In cases decided long after ***De Nichols*** and ***Callwood*** the position continued to be that the governing law is the forum law. So, by filing a divorce petition, the parties not only choose the court that would determine the divorce and ancillary matters but also the law which the court will apply.

53. For example, ***C v C (Ancillary Relief: Nuptial Settlement) [2005] Fam 250***, a case relied upon by the Respondent. After marriage and when quite wealthy the parties had placed certain sums into a trust. Their fortunes changed and they both faced bankruptcy. The husband sought to have the trust set aside. In ancillary proceedings before the English Court, the husband submitted that since the trust had itself designated its proper law (Jersey) that law ought to be applied in determining the wife's application for ancillary relief.

54. The Court of Appeal rejected this argument wholesale stating at **paragraph 31**:

"31. Equally unavailing to the husband is clause 3.1 of the settlement. Once the wife has established the jurisdiction of the Family Division, the proposition that the husband has a right to the application of the law of Jersey in the determination of her section 24 application is completely misconceived. It is trite that a petition may only be defeated by a challenge to jurisdiction or stayed on a plea of forum non conveniens. Once a decree has been pronounced on the petition all ancillary issues must be determined in accordance with the relevant provisions of the Matrimonial Causes Act 1973. Unlike many civil jurisdictions which may inquire as to an applicable foreign law, this jurisdiction applies only the lex fori. In the specific instance of the variation of a post-nuptial settlement, the Nunnely and Forsyth cases are conclusive. They have stood unquestioned for a century and Mr. Francis' suggestion that they are unreasoned and therefore unpersuasive mistakes their power. The proposition that they proclaimed required no more elaboration."

55. So too in ***NG and KR [2008] EWHC 1532 (Fam)*** where Baron J said at **paragraph 82**:

"82) At the outset I remind myself that I decided this case in accordance with English Law and tradition. In terms of financial relief upon divorce I am bound by the terms of the Matrimonial Causes Act 1973 ("the Act") as it has been interpreted in the House of Lords and the Court of Appeal."

56. Then at **paragraphs 87 and 88** under the heading:

*"**The effect of the parties' foreign nationality and the application of English Law:***
87) In the field of family law England is a lex fori country. This is a central pillar in our system of private international law and Mr. Mostyn QC pointed me to Dicey and Morris (14th Edition) at Paragraph 18-207 where it is stated:

'It has never doubted that the court, when making an order for financial provision under the Matrimonial Causes Act 1973… always applies its own law, irrespective of the domicile of the parties. Thus where a divorce is granted by an English Court in a case in which the parties are domiciled in Scotland one party cannot be heard to say that the order proposed to be made by the English court is more generous to the other party than any order which the Court of Session would be likely to make.'

88) The United Kingdom Government, pursuant to its opt-out powers preserved in the Treaty of Maastricht, has refused to enter into the Commission proposal for (a) a Regulation on 'jurisdiction, applicable law and enforcement of decisions and cooperation in matters relating to maintenance obligations' (COM (2005) 649 final 15 Dec 2005) and (b) the Proposed Regulation 'Rome III' as regards 'jurisdiction and introducing rules concerning applicable law in matters of divorce and legal separation' (2006/0135 (CNS) 12 January 2007. Each of those Regulations would introduce an obligation to apply foreign law if it is the 'applicable law' to persons seeking a divorce or maintenance in these Courts. The

Government having rejected those positions, whatever the nationality of the parties and whatever their personal agreements as to jurisdictions, at present English courts applies English Law."

57. The prenuptial agreement was held not to be a valid contract under English law.

58. This Court was unable to find, and no English case was provided where the matrimonial domicile had been applied to an ancillary matter relating to the division of property. The Applicant, in his reply, asked the Court to disregard the English cases as ***Vidrine (ibid)*** had already confirmed that the Belizean legislation was not similar to the English but was to the Australian and Barbadian.

59. The Applicants did present the Australian case of ***Murakami v Wiryadi and Ors (ibid)*** for consideration, which was an action brought by the deceased husband's executor for an interest in property not disclosed by the wife in divorce proceedings and to which the plaintiff felt the deceased had an interest. The couple had been married in Indonesia and the equitable remedies were sought in respect of matrimonial property located in Australia.

60. The Court held that the parties had impliedly agreed that their matrimonial domicile (Indonesia) would be the governing law in relation to their property rights (tacit contract). The proceedings where the non-disclosure had taken place was Indonesia. The local forum was therefore inappropriate. In fact, the case seemed to turn on forum issues more so than conflict of laws.

61. It was felt that there was a reasonable expectation of the parties to an Indonesian marriage that their property rights would be determined in accordance with their

matrimonial domicile. At paragraph 123, Spigelman CJ proposed that there should be *"no difficulty in saying that a matrimonial contract ought to be enforceable in accordance with the same principles as a contract between arm's length commercial parties. If a choice of law. If a choice of law provision in a written commercial contract – such as a partnership or joint venture arrangement – will be recognised and enforced by the lex situs of immovable property as it will be, I see no reason in principle why this approach should not be applied with respect to contract entered into a matrimonial context. (See British SouthAfrica Company v De Beers Consolidated Mines Ltd [1910] 2 Ch 502; P E Nygh & M Davies supra (2002) at [19.3]. See also Dicey and Morris: The Contract of Laws, 11th ed (1987), Stevens & Sons at 1254-1258. I refer to the 11th edition because the 12th edition in this respect turns on the Rome Convention, which does not apply to Australian common law.)*

62. This was Australia's sensible (in my estimation) move forward. It was surprising though that no other Australian cases which dealt specifically with foreign prenuptial agreements or other choice of law issues were presented in support. This caused the Court to ponder whether it should in fact be persuaded to follow this route.

63. Particularly, when confronted with ***Beidenhope v Cantanor [2013] FamCA 243***, another Australian case, Forrest J, in proceedings to stay an action for property settlement, considered a prenuptial agreement made under Dutch law in the Netherlands where the parties subsequently married. He stated at **paragraph 33**:

"It has long been held that no agreement between parties to a marriage not made in accordance with the relevant provisions of the Family Law Act can preclude either party from bringing and pursuing an application for alteration of property interests under s. 79 of the Act, or for maintenance under s. 74 of the Act, nor prevent this Court from the obligation of deciding such applications in accordance with the principles set out in the Act. Those principles include the obligation not to make an order pursuant to s. 79 unless satisfied that it is just and equitable to do so.

(Iii) This Court has previously held that it is not a clearly inappropriate forum to determine property division proceedings commenced here where the parties had executed a pre-nuptial

agreement in France before their wedding that according to both parties' experts was a valid, binding agreement, at least in France. (Footnote xviii - Stafford v Stafford [2005] FAMCA 1393)"

64. In later proceedings, Kent J at paragraph 44-45 found that the prenuptial agreement was not binding, and little weight ought to be attached to it.

65. This decision clearly shows that Australia has a statutory regime which regulates prenuptial agreements and which it applies in determining whether or not to enforce foreign prenuptial agreements.

66. The Court is also reluctant to determine the issue as to matrimonial domicile as a preliminary matter as there is not sufficient evidence on which it could properly do so. Much of the evidence is contested as to the parties' residence etc. since marriage. Secondly, this Court is not yet convinced that there is in fact a conflict of laws issue even if the Agreement is valid under Louisiana law.

67. There appears to be a real nexus to Belize since both parties have petitioned the Belizean court for divorce. Divorce and division of property are intricately related since there could be no application for division of property under section 149 (A) unless there are divorce proceedings ongoing. There is property in Belize the subject of the distribution application. There is no property in Louisiana. With the state of the evidence, the Court is in no position to attempt to rule on the choice of law issue.

68. More importantly, the Court must also struggle to determine whether the Agreement is enforceable in Belize even if Louisiana law is applied as its governing law. Although the Applicant was emphatic in his Reply that the

enforceability of the Agreement was not in issue, it was actually raised by him in his submissions as will be explained below.

Are prenuptial Agreements enforceable in Belize?

69. In ***Crossley v Crossley [2008] 1 FCR 323***, the court affirmed that ante or prenuptial agreements are contracts entered between two individuals intending to marry which look to pre-decide their monetary liabilities and obligations (during marriage and on divorce).

70. The issue as stated by the Applicant seems to presuppose that prenuptial agreements are enforceable in Belize, and even if they are valid under some foreign law that they could simply be enforced here like an ordinary commercial contract. With respect, I do not believe this to be the state of the law in Belize.

71. I could be very wrong in my view of the Applicant's position and the law. But as to the latter, the mere fact that there was no learning presented to this Court on prenuptial agreements being enforced during divorce proceedings in Belize fortified my position significantly.

72. In Belize the Court's jurisdiction in matters of division of property during divorce proceedings is to be found in section 148 (A) of the Judicature Act:

> *"148. 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."*

73. ***Vidrine v Vidrine (ibid)*** clearly outlines how that section is to be applied:

> *"[33] The new jurisdiction conferred by S. 148A of the Act needs to be properly understood. The starting point is stated in the opening words of s. 148A at sub-s.(1): 'a husband or wife may during divorce proceedings make an application to the court' (emphasis added). This*

condition is incorporated by reference in sub-s.(2) which states that 'In any proceedings under subsection (1)…' the court may declare the title or rights, if any, that the spouse has in respect of the property (emphasis added). In sub-s.(3) the condition is indirectly expresses:… 'the court may also in such proceedings making such an order… altering the interests and rights of either the husband or the wife in the property… (emphasis added)'."

74. It seems obvious that in Belize once you have successfully invoked the Court's jurisdiction for divorce proceedings, a party may petition the Court for the division or distribution of property while those proceedings are ongoing. Notably, there is nothing within the Judicature Act which provides for antenuptial agreements or their variation.

75. The Petitioner therefore has a right to seek to have her ancillary matters determined before the Belizean court and the Belizean court has the jurisdiction to determine them. However, choice of law is not about jurisdiction, it is about applying a certain set of rules to determine which jurisdiction's laws ought to apply.

76. It is the Applicant's assertion that the **Married Women's Property Act** allows for prenuptial agreements. This assertion could only have been made in an attempt to persuade the Court that prenuptial agreements could be enforced here but to my mind, it is misconstrued.

77. The **Married Women's Property Act** at section 18, on which Counsel sought to rely, reads:

"(1) Nothing in this Act shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, but no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors."

78. A settlement or an agreement for a settlement is not a prenuptial or post nuptial agreement. The settlement is a marriage settlement and can only affect the rights and obligations of the parties during the subsistence of the marriage. They are settlements which may be made by will or codicil, for example. On the other hand, a prenuptial agreement may regulate those rights and obligations during the marriage and even at its end. (**See *N v N (Jurisdiction: Pre-nuptial Agreement) [1999] 2 FLR 745 ("N v N")* at paragraphs 34 - 36** and ***TQ v TR and Another Appeal [2009] SGCA 6 paragraph 46***).

79. So, with respect, the CCJ decision in ***Rosemarie Ramdehol v Haimwant Ramdehol (ibid)*** is wholly inapplicable to the Belizean position as the Applicant has commended it to this Court. However, it does give invaluable guidance and insight to the Court's determination of the status of a prenuptial agreement in Belize.

80. Firstly, it is to be noted that even the Guyanese legislation discussed in ***Rosemarie Ramdehol v Haimwant Ramdehol (ibid)*** speaks to both ante-nuptial agreements or antenuptial settlements making a distinction between the two:

> *"Nothing in this Act contained shall interfere with or affect any ante-nuptial agreement or settlement, or agreement for an ante-nuptial agreement or settlement, made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or hereafter to be attached, to the enjoyment of any property or income by any person under any ante-nuptial contract or settlement, or will or other instrument; but no restriction against anticipation contained in any ante-nuptial contract or agreement, of a person's own property to be made or entered into by that person, shall have any validity against debts contracted by that person before marriage."*

81. The dissimilarity of the Guyanese and Belizean sections are glaring and significant. Not only does the section refer expressly to an ante-nuptial

agreement, but by using that term it assured that provision was being made for the distribution of property even between divorced persons, not only married persons.

82. This Court is of the view that if the **Married Women's Property Act** intended to allow for agreements relating to property rights on divorce, it would clearly have said so, as did the Guyanese section.

83. The Guyanese legislation also allowed parties to a marriage the right to opt out of the legislative scheme for ancillary relief. The contract then *"trumps the property rules relating to marriage and distribution on divorce"* paragraph 49 of ***Rosemarie Ramdehol v Haimwant Ramdehol (ibid)***. Our **MWPA** allows nothing of the kind.

84. The Applicant has not referred to any other Belizean law which recognizes prenuptial agreements or accord them any validity for the sole reason that there is none. But there is also no legislation which expressly forbids making any such agreement. It has always been a matter of public policy.

85. In ***MacLeod v MacLeod [2008] UKPC 66*** the Privy Council discussed the equivalent under the **Manx Matrimonial Proceedings Act** to section 25 of the **UK Matrimonial Causes Act 1973**. The board ruled as follows and I find it useful to a continuation of the discussion of the Belizean position:

"[31] The Board takes the view that it is not open to them to review the long standing rule that ante-nuptial agreements are contrary to public policy and thus not valid or binding in the contractual sense. The Board has been referred to the position in other parts of the common law world. It is clear that they all adopted the rule established in the 19th century cases. It is also clear that most of them have changed that rule, and provided for ante-nuptial agreements to be valid in certain circumstances. But with the exception of certain of the

United States of America, including Florida, this has been done by legislation rather than judicial decision. There is an enormous difference in principle and in practice between an agreement providing for a present state of affairs which has developed between a married couple and an agreement made before the parties have committed themselves to the rights and responsibilities of the married state purporting to govern what may happen in an uncertain and unhoped for future. Hence where legislation does provide for such agreements to be valid, it gives careful thought to the necessary safeguards."

86. In ***Attorney-General and Others v Joseph (Jeffrey) and Boyce (Lennox) (2006) 69 WIR 104*** at **paragraph 18**, the CCJ affirmed that the decisions of the Privy Council while it was the final Court of Appeal for Belize continue to be binding until and unless overruled by the CCJ. So, it would appear to me that this ruling continues to bind the Belizean court.

87. This stance has been softened by the English Supreme Court in ***Radmacher v Granatino [2010] UKSC 42*** which affirmed the position that it is the court which determines the financial arrangements between the parties on divorce. The court is not bound to give effect to a prior agreement and the parties can not by agreement oust the court's jurisdiction. However, if the agreement had been freely entered into by both parties, who fully appreciated its implications and it would be fair in the circumstances to hold parties to their agreement, then that agreement could be one of the factors considered by the court pursuant to s 25 of the **1973 UK Act** and one to which appropriate weight must be given.

88. In ***Crossley v Crossley (ibid)***, the weight ascribed was referred to as a factor of magnetic importance because of the specific circumstances of that case.

89. The English courts have subsumed the contract as one of the factors to be considered within the statutory regime for dealing with financial relief on divorce. The Australian courts require that the prenuptial Agreement no matter

where made must conform to the Australian statutory regime. The Belizean court is not empowered to do any of this unless and until changes are made to its laws.

90. It must be reminded that this Court is of the certain view that by submitting to the jurisdiction of the Belizean court for the divorce proceedings, the Belizean court has jurisdiction to deal with the originating summons as filed by the Respondent. That summons must be determined in accordance with the laws of Belize (section 149). The prenuptial agreement, even if valid, can not oust the jurisdiction of the Belizean court which both parties submitted to during the divorce proceedings.

DISPOSITION:

1. The application to strike out the Originating Summons is dismissed.
2. Costs would await the outcome of the substantive hearing.

SONYA YOUNG
SUPREME COURT JUDGE