

[1999–00 Gib LR 161]

LOPEZ v. LOPEZ and VICTORY

SUPREME COURT (Pizzarello, A.J.): April 19th, 1999

Family Law—financial provision—pension rights—part of “property and other financial resources” to be considered under Matrimonial Causes Ordinance, s.32, even though inchoate—may order payment of lump sum in respect of pension/gratuity under s.33(2)—may adjourn application sine die if retirement some years away or if immediate order would invalidate pension as impermissible charge

The respondent in divorce proceedings applied for ancillary relief.

The parties had been married for 19 years. In divorce proceedings by the husband based on his wife’s adultery, the wife applied for, *inter alia*, a share in the husband’s pension rights or gratuity from his employment with the Gibraltar Services Police. The terms of the pension scheme stated that the pension and other benefits under the scheme could not be assigned or charged to any other person or body and would be forfeit if any purported or assignment was made.

The wife submitted that (a) she did not seek an assignment of or charge over the pension fund, but rather a settlement of matrimonial property under ss. 33 and/or 41 of the Matrimonial Causes Ordinance by the payment of a lump sum on the husband’s eventual retirement; (b) case-law on the invalidity of charges over English military pensions was irrelevant; (c) the fact that the husband did not yet have the money did not prevent the court from making the order sought, since s.32 of the Ordinance required that it should have regard to the parties’ resources in the foreseeable future; (d) if the court were not prepared to make the necessary order immediately, the proceedings should be adjourned to a future date.

The husband submitted in reply that (a) pension rights could be the subject of a settlement only if the pension scheme permitted, and since the scheme allowed no assignment of benefits, the order sought by the wife would be ineffective; (b) the court had no power to order payment of a lump sum in respect of pension rights under s.32 of the Ordinance; (c) the wife’s claim was to an inchoate property right to which s.41 did not apply, and in any event, a settlement of property under s.41 could be made only at the time of the pronouncement of the divorce and only in favour of the innocent party in the proceedings; (d) if the court made the order sought he would lose his pension and the wife would receive nothing; and (e) the court could not adjourn the proceedings to a future

date under s.33, and should not do so, since the matter would then remain undecided for 20 years or more.

Held, adjourning the application *sine die*:

(1) The court was satisfied that any charge granted by it over the pension and/or gratuity due to the husband in future would be ineffective under the terms of the scheme and would result in the loss of benefits to the husband. It was irrelevant that the scheme was a civilian rather than a military pension scheme (para. 12).

(2) The court could, however, order a lump sum payment to be made in respect of a wife's equitable interest in her husband's pension fund or gratuity under s.33(2) of the Matrimonial Causes Ordinance. The words "the court may ... order that the husband shall ... secure to the wife such gross sum of money ... as ... the court may deem reasonable" were wide enough to encompass such an order. The fact that the husband would not himself become entitled to the pension fund or gratuity until he fulfilled the necessary conditions did not affect the wife's rights, if any. Section 32 expressly required the court to consider all the parties' property and other financial resources, and it would not be so required unless it could act accordingly (para. 13).

(3) However, having regard to the length of time remaining before the husband's retirement—during which the parties' circumstances might change considerably—and because an immediate order would be regarded as a charge over the pension fund, the court would not make an immediate order in this case. Instead, it would adjourn the application *sine die*, with liberty to the parties to apply to restore it. The other applications for ancillary relief would be adjourned to a fixed date (paras. 14–15).

Cases cited:

- (1) *Attias v. Attias*, 1995–96 Gib LR 206.
- (2) *Baker v. Baker*, Supreme Ct., D & M No. 47 of 1990, unreported.
- (3) *Hardy v. Hardy* (1981), 2 FLR 321; 11 Fam. Law 153.
- (4) *Milne v. Milne* (1981), 2 FLR 286; 125 Sol. Jo. 375.
- (5) *Payas v. Payas*, Supreme Ct., D & M No. 15 of 1995, unreported.
- (6) *Ranson v. Ranson*, [1988] 1 W.L.R. 183; [1988] 1 FLR 292.
- (7) *Roberts v. Roberts*, [1986] 1 W.L.R. 437; [1986] 2 All E.R. 483, considered.
- (8) *Wall v. Wall*, Supreme Ct., D & M No. 41 of 1994, unreported.

Legislation construed:

Matrimonial Causes Ordinance (1984 Edition), s.32(1):

"It shall be the duty of the court in deciding whether to exercise its powers under this Part in respect of a decree of divorce ... in relation to a party to the marriage and, if so, in what manner, to have

regard to all the circumstances of the case including the following matters, that is to say—

(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future . . .”

s.33(2): The relevant terms of this sub-section are set out at para. 13.

s.41: “If it appears to the court in any case in which the court pronounces a decree of divorce . . . against a wife by reason of any such fact as is mentioned in any of the paragraphs (a), (b) or (c) of section 16(2), that the wife is entitled to any property either in possession or reversion, the court may, if it thinks fit, order such settlement as it thinks reasonable to be made of the property, or any part thereof, for the benefit of the innocent party and of the children of the marriage or either or any of them.”

C. Finch for the petitioner;

Miss J.A. Evans for the respondent.

1 **PIZZARELLO, A.J.:** Two summonses came before me on June 29th, 1998. The first in time, issued by the respondent on June 4th, 1998, was for an order *inter alia* that (a) the respondent receive such share of the petitioner’s pension fund/gratuity as the court thinks fit; and (b) the petitioner pay maintenance for the respondent and Ilka Lopez, the eldest child of the marriage, in such sums as the court sees fit. The second summons was taken out by the petitioner on June 18th, 1998 for an order, *inter alia*, that the respondent’s name be removed from the tenancy agreement of 8 Rosia House, Naval Hospital Road and that possession of the tenancy be granted to the petitioner for himself and the children of the marriage. The matter was adjourned for hearing on July 27th, 1998, when Mr. Finch drew attention to the case of *Roberts v. Roberts* (7).

2 When the matter came before me on July 27th the point at issue, submitted Mr. Finch, was a legal one, namely: Can the pension of the petitioner be charged? Miss Evans did not agree. Her point was that she was asking for a settlement of the property based on the summons dated June 4th, 1998. *Roberts v. Roberts*, she submitted, was not on point, as it was based on the Army Act 1955, and in that case the parties had shared their capital, it was a military pension, and the parties had been married only 12 years.

3 In the instant case, however, the marriage has subsisted for 19 years. They are a young couple and, proportionally, that is a lengthy period. If the petitioner is in employment until the age of 60 the marriage will nevertheless represent a little less than 50% of his adult earning life, and to date, the petitioner has paid no maintenance and only pays rent. Under the Matrimonial Causes Ordinance, the court may make a settlement of

part or the whole of the property and while M.o.D. pensions cannot be assigned or charged, s.203(2) of the Army Act does not apply to civilian regulations and the pension is not governed by the Army Act which states that a pension cannot be assigned or charged.

4 She submits that that is different from what the respondent seeks, which is that a lump sum be payable on the petitioner's retirement, when he will have been paid and will be in funds. The fact that the money is not in his hands does not preclude the court from making the order: see *Milne v. Milne* (4), and consider the requirement of s.32 of the Matrimonial Causes Ordinance. The gratuity is a financial reserve likely to be made in the foreseeable future which he will have available in the future, and the 19 years of marriage entitled the respondent to claim an equitable contribution in respect of that sum.

5 Miss Evans submits that if the court is not prepared to make the order now the matter might be adjourned for a future date as in *Hardy v. Hardy* (3). The respondent is asking for an order to pay a lump sum in the future and that is not a charge. She seeks a settlement in respect of the expectation and that can be adjourned, for the pension is property which can be settled and, as a civilian pension, should not be equated to a military pension. An order to pay a lump sum simpliciter is not a charge.

6 In reply, Mr. Finch concedes that pension rights can be property rights and therefore property capable of a settlement, but only if the scheme allows. The letter from the Command Secretariat dated July 14th, 1998 to Messrs. Finch & Partners is quite clear:

“Reference our telcom of 13.7.98 and your subsequent letter.

GSP Officers are members of the United Kingdom Departments Gibraltar Pension Scheme which, in itself, is a pension scheme exclusive to Gibraltar, as you quite rightly state. As far as matrimonial proceedings are concerned, this would be covered by para. 816 of the scheme which is termed ‘assignment’ and reads as follows:

‘816 Assignment

A pension and other benefits under this scheme may not be assigned or charged to any other person or body and any pension or benefit will be forfeit if any purported assignment or charge is made.’

I trust the above will serve to clarify the situation.”

7 In this case the fact is that two normal people have lived together for many years with no resources other than their wages, and after the break-up that position is the same but the whole general position is worse, since where there were one family's needs to consider now there are two. The

husband has left the matrimonial home and cares for two of the children and the court has to look at the matter in the round.

8 Regarding a lump sum, Mr. Finch submits that provision for that has not been made in the law and the court is not empowered to make such an order. The English courts may do so under the provisions of s.23 of the Matrimonial Causes Act 1973, but those provisions were not enacted in Gibraltar and the cases cited which are based on that English provision therefore fall. Section 32 deals with the duties of the court and these are limited to the “exercise of its powers under this Part.” Nor, he says, does s.41 empower the court to make a lump sum settlement. It provides power to settle the wife’s property at the time the court pronounces a decree for divorce. In England there is provision to make an application at a later stage but not in the Matrimonial Causes Ordinance, under which the settlement is to be made at the time of the pronouncement of the divorce and then only to the innocent party, which the respondent is not, within the terms of the section.

9 Furthermore, any claim on the pension and/or gratuity is an inchoate right and, he submits, this is not a property right within the meaning of s.41 because (a) it has to be earned and (b) it cannot be charged. If the court does not accept his submission and is minded to make an order settling the property, that would then be a legally enforceable charge, and if the pension is to be charged for the future then the charge will be nullified in its effect and will disappear because the pension which is charged is forfeited and lost to both parties and so any order is self-defeating. It would be wrong, therefore, to make the order requested as both parties will be seriously prejudiced: the petitioner, because he will lose the pension/gratuity, and the respondent, because she will get nothing and will lose any chance to any benefit arising out of the petitioner’s retirement on a pension with or without a gratuity.

10 As for the possibility of an adjournment, that is wrong, says Mr. Finch, and should not be entertained by the court: see *Roberts v. Roberts* (7) and *Ranson v. Ranson* (6). It is possible under s.23 of the Matrimonial Causes Act for an application for a lump sum to be made at any time after the decree but an equivalent of that section has not been incorporated in the Ordinance and, in his submission, s.32 does not give the court the power to do so. If, contrary to his submission, the court should rule that there is such power, then, he submits, the court should, having regard to all the circumstances of the case, take the view that in 20 years’ time (when the gratuity might come to be payable) circumstances will be very different and the matter should not be allowed to hang over the petitioner’s head.

11 Miss Evans, in reply, pointed out that this court has in the past made orders to pay lump sums and she cites *Baker v. Baker* (2); *Attias v. Attias*

(1); *Payas v. Payas* (5); and *Wall v. Wall* (8). As to the nature of the pension, she draws attention to the fact that it is a civilian pension and ought not to be treated as a military pension. A scheme should not oust the court's jurisdiction. Finally, she says, there is nothing in the Matrimonial Causes Ordinance to prevent an adjournment even if it be for a long time.

12 I do not consider that this court ought to charge the pension and/or gratuity in any way, for the reasons put forward by Mr. Finch, namely that first, it is contrary to the scheme, and secondly, the effect of an order will be nullified by the forfeiture of the benefit. The fact that it is a civilian scheme rather than one under the Army Act 1955 does not seem to me to be material.

13 I consider that the court may provide for a lump sum payment arising out of the equitable interest a wife may have in respect of any pension or gratuity awarded in favour of her spouse. This court has done so in the past. Section 33(2) provides:

“ . . . [O]n pronouncing a decree nisi for divorce or nullity or at any time thereafter, whether before or after the decree has been made absolute, the court may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as, having regard to her fortune, if any, to the ability of her husband [to pay] and to the conduct of the parties, the court may deem to be reasonable.”

It seems to me the expression “secure to the wife such gross sum of money” is wide enough to encompass a lump sum order because the words “not exceeding her life” relate to the second limb of the provision “annual sum of money.” The fact that in the present case that is an inchoate right and will not become concrete until the petitioner fulfils the necessary conditions in his employment should not defeat her rights, if any. It is still “property” or “other financial resources.” Section 32 places on the court a duty to consider these matters and that duty must translate into giving those matters effect, and how else except by order?

14 It would be wrong in the circumstances of this case to make an order now, first, having regard to the length of time remaining before the petitioner retires—and there may well be many imponderables in the way until that occasion is reached—and secondly, because it would fall within the parameters which Mr. Finch has persuaded me would create a charge.

15 The question remaining is: Should the matter be adjourned or may it be left for a new application when the time comes in the future? With some hesitation, because I am not following the authorities referred to above, I answer the question in the affirmative and adjourn the

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BPS SHIPPING V. LAEMTHONG

application under para. (a) of the summons dated June 4th, 1998, *sine die* with liberty to apply for the summons to be restored on the application of either party.

16 I do not deal in this ruling with the other matters raised by either of the two summons. These were not adequately dealt with on July 27th, 1998, and as I understand that there have been substantial changes in the circumstances of the case, I shall adjourn outstanding matters to a date to be fixed.

Applications adjourned.
