

STEPHEN EVANS-FREKE,)
)
 Petitioner,) **FAMILY NO. ST-2016-DI-166**
)
 vs.) **Cite as: 2019 VI Super 58**
)
 VALERIE EVANS-FREKE,) **ACTION FOR DIVORCE**
)
 Respondent.)

The parties both seek a divorce but disagree on whether New York or the Virgin Islands is the proper forum. Husband filed a divorce complaint on November 14, 2016 in the Virgin Islands. Wife filed a divorce complaint on February 17, 2017 in New York. In an order issued June 8, 2017, the New York court found that it may properly exercise personal jurisdiction over Husband in the divorce action, but ultimately dismissed the action on the grounds that New York is an inconvenient forum because Husband's business assets, which are most significant, are currently situated in the Virgin Islands. The court noted, however, that the record from which it made its determination was "not developed" and it dismissed Wife's action without prejudice should

she be successful in her motion to dismiss in the Virgin Islands or should the Virgin Islands action be dismissed for any other reason.¹

As both parties acknowledge, this Court has subject matter jurisdiction over the marriage and can dissolve the marital relationship.² However, to adjudicate property and support disputes, the Court must have personal jurisdiction over both parties. The questions before the Court are whether the Virgin Islands may exercise personal jurisdiction over Wife; and even if personal jurisdiction is proper, whether the Virgin Islands is an inconvenient forum.

II. The Court lacks Personal Jurisdiction over Defendant/Wife.

A. General Jurisdiction

A court may constitutionally find that it has general jurisdiction, or the right to hear all cases against a defendant regardless of where or how they arise. To establish general jurisdiction, the nonresident's contacts must be continuous and substantial.³ In arguing general jurisdiction, Husband states that Wife has had continuing contacts in the forum because she receives ongoing financial support, insurance, and other services from individuals in the Virgin Islands. However, "only a limited set of affiliations with a forum will render a defendant amenable" to a court's general jurisdiction.⁴ Specifically, the Virgin Islands Code empowers the Court to "exercise personal jurisdiction over a person domiciled in, organized under the laws of, or maintaining his or its principal place of business in, this territory as to any claim for relief."⁵ Husband has not shown that Wife was domiciled in the territory, so general jurisdiction is not proper.

B. Specific Jurisdiction

Alternatively, a court may exercise specific personal jurisdiction over an out-of-state-defendant pursuant to Title 5 V.I.C. § 4903, the Virgin Islands' Long Arm Statute, which establishes jurisdiction based on a party's conduct in certain circumstances. Jurisdiction under § 4903 requires a two-part analysis. First, the plaintiff must show that the nondomiciled party has engaged in any conduct enumerated in § 4903. Second, plaintiff must make a prima facie showing that the defendant also has certain minimum contacts to satisfy constitutional due process.⁶ When jurisdiction over a person is based solely upon § 4903, only a claim for relief arising from acts enumerated in this section may be asserted against him.⁷

¹ See Supreme Court-State of New York, Index No. EF-001289/17, Order dated June 8, 2017, page 14.

² V.I. CODE ANN. tit. 16, §106(a).

³ Molloy v. Indep. Blue Cross, 56 V.I. 155, 183 (V.I. 2012).

⁴ Atrium, V.I., LLC v. Atrium Staffing, LLC, No. ST-17-CV-194, 2018 V.I. LEXIS 76, at *27 (Super. Ct. Aug. 9, 2018).

⁵ Id.; V.I. CODE ANN. tit. 5, § 4902.

⁶ Molloy at, 173; Power v. Blue Serenity, LLC, No. ST-13-CV-523, 2014 V.I. LEXIS 113, at *2 (Super. Ct. Dec. 8, 2014).

⁷ V.I. CODE ANN. tit. 5, § 4903(b).

The plaintiff bears the ultimate responsibility to prove by a preponderance of the evidence that the trial court may exercise personal jurisdiction over an out-of-state defendant.⁸ When, as in this case, the trial court does not hold an evidentiary hearing to determine the motion to dismiss based on personal jurisdiction, the plaintiff is only required to establish a *prima facie* case for personal jurisdiction.⁹ The plaintiff is entitled to have his allegations taken as true and have disputed facts drawn in his favor.¹⁰

Here, accepting all of Husband's representations as true, the Court can exercise jurisdiction over Wife only if Husband can demonstrate that Wife's contacts with the Virgin Islands fall within the purview of the Virgin Islands Long Arm Statute and such contacts have sufficiently satisfied due process requirements. Husband argues that he has satisfied the requirements of the Virgin Islands' long-arm statute, specifically subsection (a)(1) which confers personal jurisdiction over a person who "transact[s] any business in this territory." He contends that Wife transacted business in this territory when she directed her bills to the Virgin Islands, communicated with Husband and others in his Virgin Islands office, received wire transfers from the Virgin Islands, filed taxes jointly with Husband in the Virgin Islands in years 2009 and 2010, and obtained health and dental insurance under his company's Virgin Islands plan.

Transacting any business in this territory

is a term of art which means less than doing business but more than performing some inconsequential act. It requires that a defendant engage in some type of purposeful activity within the territory. To invoke jurisdiction over a non-resident defendant under subsection (a)(1) of the Virgin Islands Long Arm Statute, a court must determine whether the claim which is being pursued arises from the non-resident defendant's, or its agent's, forum related activities, and whether there are enough contacts arising out of such activities as are required to justify the assertion of jurisdiction over the defendant..¹¹

Virgin Islands case law on the issue of transacting business involve a higher threshold of "transacting business" than Wife's actions. When a defendant was found to transact business, the matter involved activity like selling items to a Virgin Islands' company¹² or acting as an agent for a company in the Virgin Islands before the United States Senate.¹³ Indeed, even relying on the cases that Husband cites to, Wife's actions do not meet the threshold. It is true that those cases, like this case, involve communication between a Virgin Islands plaintiff and a non-resident defendant through phone calls and wire transfer. However, they also involve substantial

⁸ Molloy at 172.

⁹ Id.

¹⁰ Metcalfe v. Renaissance Marine, Inc., 566 F.3d 324, 330 (3d Cir. 2009).

¹¹ Hommel v. Scott, 35 V.I. 32, 35-36 (Terr. Ct. 1996) (internal citations and quotation marks omitted)

¹² In re Kelvin Manbodh Asbestos Litig. Series, 47 V.I. 267 (Super. Ct. 2005).

¹³ Molloy v. Indep. Blue Cross, 56 V.I. 155 (V.I. 2012).

dealings in commercial interests such as negotiating a sale for a high-priced item¹⁴ or wiring funds (approximately \$500,000.00) into the territory pursuant to a business agreement.¹⁵ The respective courts in these cases based their findings of personal jurisdiction on the defendant's communication directed to the forum *coupled with* the receipt of substantial revenue. In this case, Wife's communication with Husband and his office, or Wife's filing of joint tax returns in this jurisdiction, without more, does not rise to this level of "transacting business," especially considering that the contacts did not involve a commercial interest. Husband's own assertion that he separated Wife from all of his Virgin Islands business interest defeats the argument that she transacted business in the Virgin Islands.

C. Minimum Contacts

Even assuming Wife's acts fall within the specifics of the Long-Arm Statute, Husband's claims must satisfy the due process inquiry. The defendant must have taken "action ... purposefully directed toward the forum State."¹⁶ The relationship with the forum must arise out of contacts that the defendant herself creates with the forum State.¹⁷ The focus is on the defendant's "minimum contacts" with the forum State itself, not the defendant's contacts with persons who reside there.¹⁸ It is essential that there be some act by which the defendant purposely avails herself of the privilege of conducting activities within the forum, thus invoking the benefits and protections of its laws.¹⁹

Here, Wife's contacts with the forum do not satisfy due process requirements. Importantly, Husband was the providing spouse as Wife did not work or earn any income since the beginning of the marriage. Under this arrangement, it was necessary for Wife, as the dependent spouse, to interact with Husband regardless of where he was domiciled. However, Wife's contact with Husband was limited. As Husband claims, there was a breakdown of the marriage before he moved to the Virgin Islands to the extent that he contemplated divorce. The parties ultimately agreed to live separately and had no significant personal contact since Husband's relocation. It is inconsequential then, that the bank accounts and health insurance were based in the Virgin Islands because Wife did not "purposefully direct" her action to this forum, as much as she directed action to her husband. In other words, Wife did not unilaterally create a relationship with the Virgin Islands. The parties' tax planning underscores this finding—while the parties jointly filed taxes in the Virgin Islands in 2009 and

¹⁴ Metcalfe v. Renaissance Marine, Inc., 51 V.I. 1219, 1231 (3d Cir. 2009); Epstein v. Fancelli Paneling, Inc., 55 V.I. 150 (Super. Ct. 2011).

¹⁵ HCB, LLC v. Oversee.net, 52 V.I. 894 (D.V.I. 2009).

¹⁶ Power v. Blue Serenity, LLC, No. ST-13-CV-523, 2014 V.I. LEXIS 113, at *3 (Super. Ct. Dec. 8, 2014) (quoting Asahi Metal Indus. Co., Ltd. v. Super. Court of Cal., 480 U.S. 102, 112 (1987)).

¹⁷ Atrium, V.I., LLC v. Atrium Staffing, LLC, No. ST-17-CV-194, 2018 V.I. LEXIS 76, at *46 (Super. Ct. Aug. 9, 2018).

¹⁸ Id. at *46-47.

¹⁹ In re Najawicz, 52 V.I. 311, 337 (V.I. 2009) (quoting BP Chems. Ltd. v. Formosa Chem. & Fibre Corp., 229 F.3d 254, 260 (3d Cir. 2000)).

2010, Husband does not claim that Wife filed taxes in the Virgin Islands once the parties began filing separately.

The facts here, as presented by Husband, bear similarities to the facts in Kulko v. Superior Court of California.²⁰ In Kulko, the U.S. Supreme Court found that a California court had no personal jurisdiction over a nonresident father living in New York. The Court reasoned that by merely sending his daughter to live in California and paying child support, the father had not purposefully availed himself of any benefits from the forum state. Similarly, here, it cannot be said that Wife, while communicating with Husband to receive support, has sought a benefit from this territory that could reasonably render her liable to litigation here. The essential element of personal availment is missing, thus due process is not satisfied.

III. The Virgin Islands is an inconvenient forum.

Wife also requests that Husband's action be dismissed and deferred to New York under the doctrine of *forum non conveniens*. Under Title 5 V.I.C. §4905, when the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just.

In applying the doctrine, the Court must determine the existence and availability of an adequate alternative forum.²¹ If there is such an alternative forum, then the court should consider all relevant private and public interests and decide whether they weigh for or against plaintiff's chosen forum. To guide trial courts in this inquiry, the United States Supreme Court has specified the private and public factors that should be considered.²²

A. Alternative Forum

First, a determination of *forum non conveniens* would not leave the parties without a remedy. The court in New York has established that New York has personal jurisdiction over Husband and has provided that Wife may renew her action should this Court find that it lacks personal jurisdiction over Wife.

B. Private Interests

Next, the relevant private interest considerations are (1) the relative ease of access to sources of proof; (2) the cost of obtaining attendance of witnesses; and (3) all other practical problems that make trial of a case easy, expeditious and inexpensive. Given the parties' dispersed assets, factors (1) and (2) weigh only slightly more in favor of maintaining the litigation in this jurisdiction since Husband's significant businesses are located in the U.S. Virgin Islands. However, there are also businesses in the British Virgin Islands, a marital home in New York, and it is not disputed that there are other significant assets spread throughout the United States and the

²⁰ Kulko v. Superior Court of California 436 U.S. 84, 97(1978).

²¹ 5 V.I.C. § 4905 annot. 3; Dickson v. Hertz Corp. 19 V.I. 501, 1983 U.S. Dist. LEXIS 18526 (D.V.I. 1983).

²² C & C/Manhattan v. Sunex Int'l, 42 V.I. 3, 12 (Terr. Ct. 1999) (referencing Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947)).

world. Thus evidence and witnesses would presumably exist in various locations. Furthermore, in the age of modern technology, the location of evidence matters a great deal less in the forum analysis.²³

Under factor (3), practical concerns regarding the cost and expediency of litigation support a finding of undue hardship for Wife. Husband, as the monied spouse, can more easily travel to New York for divorce proceedings and is accustomed to travelling there for business. On the other hand, Wife has only traveled to the Virgin Islands twice, for brief stays. Given her financial dependence on Husband, her travel to the Virgin Islands to defend this matter will likely be costly and could require Court intervention, similar to the New York proceedings. In New York, the court recognized Wife's need for legal resources and awarded her \$50,000.00 in attorney's fees, "until she is able to re-orient herself to the action pending in the [Virgin Islands]."²⁴ Likewise, litigation in this jurisdiction would require even more in legal resources and the burden on Wife would be of much greater proportion than the convenience to Husband of having the litigation proceed in his chosen forum.²⁵

Finally, and most significantly, Wife asserts that in the absence of personal jurisdiction over Wife, the parties could be subject to a divisible divorce whereby the marriage will be dissolved. However, the issues incident to the divorce would then be adjudicated in another jurisdiction. This weighs heavily against the interest of having an easy, expeditious and inexpensive trial. While the Court is authorized to grant summary judgment for divorce and leave remaining issues for another jurisdiction, the Virgin Islands divorce statute promotes resolution of matrimonial issues in one forum.²⁶ Moreover, the weight of the law in multiple jurisdictions disfavors a divisible divorce, absent a few narrowly drawn circumstances, for a number of reasons. Among them, this process splinters legal proceedings, stops the accumulation of marital property, raises the possibilities of delay in resolving the outstanding issues, and makes an ex-spouse vulnerable to economic coercion. The parties have already been embroiled in a divorce proceeding for over two years and the issues in dispute involve an expansive estate. A divisible divorce judgment in this Court would only protract litigation, rather than deter it, resulting in judicial inefficiency.

C. Public Interests

Turning to the public interests, the relevant considerations are (1) the administrative difficulties resulting from court congestion; (2) the local interest in having controversies decided at home; (3) and the avoidance of

²³ Epstein v. Fancelli Paneling, Inc., 55 V.I. 150, 168 (Super. Ct. 2011).

²⁴ Page 14 of the New York order.

²⁵ Trotter v. 7R Holdings, LLC, 68 V.I. 818, 823 (3d Cir. 2017) (quoting Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981) (internal quotation marks omitted)).

²⁶ See V.I. CODE ANN. tit. 16, §109(7). Prior to the amendment to § 109, the family court did not have the jurisdiction to distribute marital real property beyond the marital homestead. In amending the statute, the Legislature clearly expanded the jurisdiction of the court in divorce matters to distribute all marital property. This streamlined the process to require only one court's participation for greater judicial and economic efficiency. Thompson v. Thompson, 64 V.I. 71, 75 (Super. Ct. 2016).

unnecessary problems in the application of foreign law.²⁷ Taken together, the factors are neutral— (1) Husband argues that New York's courts are uniquely congested. However, like most other trial courts, this Court also has a full divorce docket and finite resources; (2) the issues here are not so connected to the forum to compel community interest;²⁸ and both New York and the Virgin Islands apply similar principles of equitable distribution.

Weighing the private and public factors, the Court finds that the balance of conveniences outweighs Husband's choice of forum. Although the public interest factors are largely neutral, the private factors, particularly the ease and efficiency of trial, favor New York as the appropriate forum.

IV. Conclusion

Notwithstanding the presumption in favor of Petitioner/Husband's choice of forum and the discouragement of forum shopping, this matter will be dismissed in the interest of substantial justice. Based on the above findings, the Court concludes that it cannot exercise personal jurisdiction over Wife and that the Virgin Islands is an inconvenient forum to adjudicate this divorce proceeding. Consequently, Wife's motion to dismiss shall be granted. A separate order consistent with this Opinion shall follow.

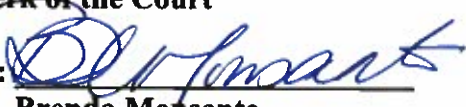
It is hereby

ORDERED that copies of this Memorandum Opinion shall be directed to Henry L. Feuerzeig Esq. and Laura C. Nagi, Esq.

DATED: April 15, 2019


DEBRA S. WATLINGTON
Judge of the Superior Court
of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court

By: 
Brenda Monsanto
Court Clerk Supervisor 4/15/19

²⁷ *Trotter v. 7R Holdings, LLC*, 68 V.I. 818, 823 (3d Cir. 2017) (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981) (internal quotation marks omitted)).

²⁸ Compare to *C & C/Manhattan v. Sunex Int'l*, 42 V.I. 3, 13 (Terr. Ct. 1999) (finding that the local community had a strong interest in the proceedings because it involved the renovation of Government House, a focal point, both physically and figuratively of Christiansted, St. Croix's downtown revitalization efforts).