ST VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 582 OF 1999

BETWEEN:

VILNA MARKSMAN

Petitioner

and

CHRISTOPHER MARKSMAN

Respondent

Appearances:
Agnes Cato for the Plaintiff
Richard Williams for the Defendant

- -
2001: January 26, February 2, May 8, 17,31
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DECISION

[1] MITCHELL, J: This is an application for ancillary relief in divorce proceedings. It is presumably brought under the provisions of the Matrimonial Causes Act and the Rules made under that Act, though there is no suggestion of this on any of the filed documents.

[2] The Petition had been filed on 24 November 1999. The Decree Nisi was granted on 21 September 2000 in favour of the Petitioner. The Notice of Application for Ancillary Relief was filed on 27 December 2000. By that Notice, the Petitioner applied to the Court for the following ancillary relief:

(1) Custody of 2 of the 4 children of the marriage, namely, CHRISBERT NIGEL MARKSMAN, born on 23 January, 1986 and CHRISNA SARAH MARKSMAN, born on 9 October 1992;

(2) periodical payments for the maintenance of the said 2 children;

(3) transfer of the matrimonial home at Colinarie to the [Petitioner] with all its contents;

(4) a financial provision order;

(5) an order that the Petitioner be permitted to occupy the matrimonial home with immediate effect until the final determination of this application;

(6) costs of this application;

(7) such further or other relief as to the court may seem just.

[3] In support of this application the Petitioner filed 4 affidavits. They were –

Vilna Marksman – 27 December 2000;
Jennifer Gloster – 17 January 2001;
Deuneth Browne – 23 January 2001;
Vilna Marksman – 23 January 2001.

The Respondent filed 5 affidavits on his own behalf. These were –

Christopher Marksman – 15 January 2001;
Ephraim Marksman – 15 January 2001;
Girey James – 15 January 2001;
Keith Richards – 15 January 2001;
Ephraim Marksman – 4 March 2001;

[4] Only Vilna Marksman appeared in Chambers and was cross-examined on her affidavit evidence. Her other witnesses who filed affidavits on her behalf did not appear. Their affidavits were not tested under cross-examination, and their affidavit evidence will carry very little weight. Additionally, however, with the leave of the court, three witnesses appeared to testify orally on her behalf, and their testimony was tested by cross-examination. Those witnesses were Jonathan Peters, Erlyn Adams and Hilda Phillips. Of the witnesses who filed affidavits on

behalf of the Respondent, the Respondent himself, his brother Ephraim Marksman and Keith Richards appeared and were subject to cross-examination. The affidavit evidence of Girey James was not tested by cross-examination and therefore carries very little weight. Those witnesses who were cross-examined were cross-examined at length and with great skill. Their testimony was truly tested.

[5] The principal issue that was canvassed during this hearing was the ownership of the matrimonial home. The other reliefs sought in the Notice were not actively pursued. The testimony of the Petitioner and her witnesses was to the effect that the Petitioner and the Respondent first put a wooden house on the Crown land at Colinarie. Jonathan Peters was the elected representative for the district at the time. He was a government supporter. He testified that Government had acquired the estate from the previous owners. He had given out bits of the land to persons who needed land. No paperwork had passed between parties. He said he had the authority to do this, and I believe him. In about 1991, at the request of the Petitioner, he permitted her to move her board home onto a lot of the Crown land. That land remains still registered in the name of the Crown. Some years later, the wooden house was converted into a wall house. The position of the Petitioner is that she and her husband both worked and both shared in the cost of this wall construction. She claims that she was chased from the house by her husband's violence, and that she fled for her safety with the two minor children. She denies either that she voluntarily left the house or that her departure was prior to the construction of the wall house as alleged by the Respondent.

[6] The husband's version is that the Petitioner deserted him when they were still living in the wooden house on the Crown land. His case is that, after the Petitioner left him, his brother Ephraim and his mason friends helped him to construct the wall house in place of the wooden one, which had rotted away. He and his brother claim that his brother owns at least half of the equity in the wall house. Thus, his case is that the Petitioner's share in the equity in the wall house, if any, which he denies exists, relates only to a possible portion of his half share. In support of his

brother's claim to an interest, he exhibited an originating summons in Suit No. 562/1999 filed by him and his brother on 12 November 1999 in which they claimed declarations that they were the sole and lawful owners of the dwelling house in question and that the Petitioner had no interest in it. The Respondent's claim was that the serving of this originating summons brought on the filing of the petition, and that, as a result, the originating summons had not been proceeded with. The Petitioner responded that she had previously filed an application in the Family Court for an occupation order in respect to the matrimonial home. She exhibited a copy of the Notice of her application in the Family Court. She had published this Notice in a local newspaper. This was in lieu of serving it on the Respondent personally, as she did not know his address in Canada. This Notice revealed that her application before the Family Court had been adjourned for hearing to 20 October 1999. The Petition was filed on 24 November 1999. Her point was that, if anything, it was her application in the Family Court that had spurred the Respondent and his brother to make up the claim of an interest being held by the brother. She claims that the bringing of the originating summons was designed by the Respondent and supported by his brother to frustrate her attempt to secure the right to live in the matrimonial home. Thus, she said, it was not true that her petition had been filed only to frustrate her brother-in-law's high court proceedings, as the Respondent claimed. Her proceedings were certainly earlier than her brother-in-law's proceedings.

[7] The facts as I find them are as follows. The parties were married on 28 May 1983. They separated in March 1998 when the Petitioner was forced to leave the matrimonial home. She obtained a protection order from the Family Court against the Respondent at that time. Both the parties had previously worked as agricultural workers during the marriage. The Respondent had also found work as a watchman at various schools, while the Petitioner got a job as a cleaner at a school. The parties first built a board house. They both contributed to its construction. They moved it onto the land in question at Colonarie in about 1990 or 1991, according to Mr Peters. I prefer his evidence on the date over that of the

Petitioner and the Respondent. He knows when he was the elected representative for the constituency, and the date when he was sharing out Crown land among his supporters.

[8] Some years after the parties moved the board house onto the Crown land at Colonarie, the wall house was built in its place. There is a major dispute as to when the wall house was put up in relation to the date of the separation of the parties. The parties and their witnesses, as with most rural workers, were very hazy on exact dates for anything. She says it was in 1991, he says it was in 1997 or 1998. Their witnesses gave various other dates. Discrepancies over dates do not provide any indication as to who is telling the truth. Such discrepancy in dates is usual in these cases. The important factor is not the date. It is whether the wall house was substantially built before the Petitioner left, or after she had left the premises. The witnesses for the Petitioner were steadfast that the wall house had been built and the Petitioner was living in it before the separation in 1998. The witnesses for the Respondent were equally steadfast that when the wall house was built in 1998 the Petitioner had long left since 1997, and only the Respondent was in occupation. It is a simple question of which story is more believable. Ephraim Marksman produced receipts for building materials dated 1997 and 1998 in the name of one Christopher Maxwell in support of the Respondent's dates. He says that Christopher Maxwell is a mis-spelling for Christopher Marksman, and that these receipts were issued to him at the time when the wall structure was being built, and that they related to materials for the construction. I accept Counsel for the Petitioner's argument that anyone in the building trade, such as Christopher and Ephraim Marksman claim to be, could get access to such receipts. They could relate to anyone's house. They do not specifically state that they relate to the house in dispute. They are not proof of any monies expended by Ephraim Marksman on the property in question. Nor are they proof or the date when the wall house in question was under construction

[9] The Respondent says that the Petitioner voluntarily left the premises, that she deserted him. He says that he caught the Petitioner in bed with another man in 1997 and she left the home with her clothes and her children the following day. He says that a few months later, his brother Ephraim and he decided to build a wall house on the land in question, which house they would share. He says they did so. I accept that in January 1999 he emigrated to Canada, leaving his brother Ephraim in sole occupation of the partially built wall house. The house is still incomplete, with only the exterior wall on the weather side and one room in the interior plastered. I ask myself whether any man, knowing that his brother and his wife have just separated in bitter circumstances, would proceed to make an arrangement whereby he would invest in what had been the matrimonial home with a view to becoming a half-owner of it, by making this arrangement solely with his brother and ignoring the interest of the wife altogether. I come to the conclusion that that scenario is so unlikely as to be not credible.

[10] I believe the Petitioner that the matrimonial home was built by her and the Respondent prior to her being forced out of it. I accept that the wall house started some years before the Petitioner left. That is the important fact in this dispute. The exact year is not important. It may have been as early as 1992 or as late as 1997. Having seen and heard the witnesses, I do not believe the Respondent and his brother or their witnesses to the contrary effect. I do not believe that Ephraim Marksman put any materials or money into the house. Any work he did on the house after the Petitioner left, and there is no reason to doubt that he and his witnesses did do work as they allege, was merely as a contribution to permit him to have a place to live in the house of the Petitioner and the Respondent. I do not believe that he put anything into the house with the hope or expectation that that would give him any equity in the house. His claim to an equity in the house is something he concocted later when his brother the Respondent encouraged him to take over the property in order to keep the Petitioner and the children out of the house. In the circumstances, I find that the Petitioner and the Respondent own the matrimonial home at Colinarie in equal shares. The brother Ephraim has no

legal or beneficial interest in the matrimonial home of the Petitioner and the Respondent.

[11] The applicable law is the Matrimonial Causes Act, Cap 176 of the Laws of St Vincent and the Grenadines. Section 34 sets out the matters to which the Court is to have regard in deciding how to exercise its powers under sections 31 (financial provision orders), 32 (property adjustment orders), and 33 (orders for sale of property). The Petitioner argues that the matrimonial home is the only asset of this family. She asks that she and the children be given some security by having the home transferred to her, in which case she would forego any claim to maintenance. She points out that the Respondent has moved on with his life and has found a partner who is well able to look after him and whom he intends to marry. She urges that the fairest and most reasonable method of dealing with he present circumstances is to extinguish the interest of the Respondent in the matrimonial home and vest the ownership in the Petitioner so as to provide a home for the Petitioner and the 4 children of the family. She urges that such an order can be made subject to any overriding interest of the Crown in the land. She relies on the learning in Bromley on Family Law, 5th Edition, pages 354-357. This deals with six alternatives open to the court when the only asset is the family home and there is no capital to provide another house for the other spouse. She has referred the court to the dicta on this issue in the UK Court of Appeal decision in the case of Scott v Scott [1978] 3 All ER 65. The Respondent, in reply, urges that the Petitioner has no interest whatsoever in the house, and that the Petitioner is being "cravenous" in wanting to move into the wall house belonging to the Respondent and his brother Ephraim Marksman. The Petitioner is only entitled to a 1/3 share of her husband's interest in the house. She should not be given possession of the premises as she has moved out for over 3 years now. The Respondent is willing to maintain his children but is not able to do so until he has remarried and obtained proper residence documentation in Canada. He offers $100.00 per month per child until further order.

[12] I find that the brother Ephraim who is presently occupying the house is not doing so as of right but only as part of a device or strategy to deprive the Petitioner of her right to occupy her home. With the Respondent living abroad it would be impossible to ensure that he provides adequately for his wife and children. His past conduct towards his family further justifies the extinction of his share. He has not been supporting his children since the separation. The Respondent is happily ensconced in Canada where, if he is to be believed, he is being comfortably maintained by his current lady friend. The Respondent has moved on with his life and in reality has no further interest in the matrimonial home. It is as much in his interest to be free of his ties to St Vincent and the responsibilities to the family that he has abandoned here.

[13] The Petitioner is therefore entitled to the orders that she seeks in paragraphs 1, 3, and 5 of her Notice. The custody of the minor children of the marriage is given to the Petitioner, with reasonable access to the Respondent. The interest of the Respondent in the matrimonial home is extinguished and the entire interest in it is vested in the Petitioner, subject to any overriding interest held by the Crown. In exchange for this, the Respondent is relieved from any further responsibility to maintain his family. Ephraim Marksman is to vacate the property of the Petitioner at Colonarie within 30 days of the making of this order. A copy of the order with a penal notice attached to it is to be served on him warning him of the consequences of his not complying with this order. Liberty to apply.

[14] Costs to the Petitioner to be taxed if not agreed.

I D MITCHELL, QC
High Court Judge