

BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 11 OF 2003

BETWEEN:

MAURICIO HANDLER-RUIZ

Appellant

and

MICHELLE DIANE HAYDON

Respondent

Before:

The Hon. Mr. Brian Alleyne, S.C

Justice of Appeal

The Hon. Mr. Michael Gordon, Q.C

Justice of Appeal

The Hon. Mr. Ian D. Mitchell, Q.C

Justice of Appeal [Ag.]

Appearances:

Ms. Lorna Shelly-Williams and Mr. Akhail Khan for the Appellant

Mrs. Margaret Price-Findlay instructed by Ms. Susan Demers for the

Respondent

2004: June 10; 11;

2005: February 16.

JUDGMENT

- [1] **ALLEYNE, J.A.:** This appeal was against an order of the learned trial judge in an ancillary relief proceeding. The appellant, the petitioner in the court below, appealed against the order of the learned trial judge that (a) the respondent be granted custody of the two children of the marriage with access to the appellant in accordance with the schedule agreed by the parties; (b) the appellant pay a lump sum of \$20,000.00 to the respondent as representing her share in the business, the boat and for the value of any benefits lost as a result of the divorce; (c) the appellant continue to pay the monthly rental of the apartment; (d) the appellant pay the children's school fees; (e) the appellant maintain the insurance policy on his life for the benefit of the maintenance benefits; (f) the appellant pay the annual airfare to the United Kingdom for the children.

- [2] The respondent cross-appealed against the ruling of the learned trial judge that (a) the appellant pay the sum of \$500.00 (US) per month as maintenance for her until 31st March 2004; the appellant pay a lump sum of \$20,000.00 representing her share of the business, the boat and the value of any benefits lost as a result of the divorce; (c) both parties bear their own costs.
- [3] By the time the appeal came on for hearing the respondent, a citizen of the United Kingdom, had migrated to that country with the children and the circumstances had changed in a number of ways. The respondent is now employed on a part-time basis in England, earning £168.00 pounds sterling per week, and the children are enjoying free education under the British educational system. The respondent is an experienced banker, with a banking degree.
- [4] The parties were married on 20th February 1992, and the children were born on 1st July 1997.
- [5] The appellant has a degree in fine arts and has worked as a photographer and boat captain. The parties together established and ran a business in the Virgin Islands before the divorce. They earned a combined income of \$50,000.00 to \$55,000.00 per annum out of the business, and each paid approximately equally towards the household expenses. After the birth of the children the respondent stayed home to care for them.
- [6] At the hearing of the appeal the appeal against the order for custody was withdrawn, and the parties agreed that the respondent would have sole custody of the children, with the appellant having reasonable access and visitation rights, to be agreed between the parties. We are informed that no agreement on these details has been arrived at, but the appellant's requests to visit with the children have never been denied or resisted. Custody and access are not issues in the appeal.

[7] The appeal against the order for the payment of rent for the respondent's apartment has also been withdrawn, the parties having agreed that since the respondent has migrated to the United Kingdom with the children and has made independent satisfactory residential arrangements, this aspect of the court's order be discharged by consent. The same applies in relation to the children's school fees in light of the fact that they have access to free education in the United Kingdom.

[8] With regard to the learned judge's order that the appellant pay the airfare to the United Kingdom for the children annually, this order is also discharged by consent, in light of the fact that the children now reside in the United Kingdom with their mother. It was also agreed that the 1999 Mitsubishi Mirage car be awarded to the respondent, and it is so ordered.

[9] The remaining issues for consideration in this appeal are therefore

- (a) The order for the payment of a lump sum of \$20,000.00 to the respondent as representing her share in the business, the boat and for the value of any benefits lost as a result of the divorce. (Both the appellant and the respondent have appealed this order)
- (b) The order for the appellant to maintain the insurance policy on his life for the benefit of the maintenance benefits. As to this, the appellant says that the children are the beneficiaries of the insurance policy or policies on his life. He has undertaken to maintain the insurances and to retain the children of the marriage as the sole beneficiaries of the said insurance policy or policies. We accept this undertaking and order that insurance policies on the life of the appellant subsisting at the date of the order be maintained throughout the duration of the appellant's life, for the exclusive benefit of the children of the marriage or the survivor of them in the event of the earlier death of either child.
- (c) The order that the appellant pay the respondent the sum of \$500.00 per month as maintenance for herself until 31st March 2004 (respondent's cross-appeal).
- (d) That each party bear his/her own costs (respondent's cross-appeal).

The lump sum

- [10] Both appellant and respondent have appealed against the order of the learned trial judge, which was made at an ancillary relief hearing in January and February 2003, and the judgment delivered on March 14th of the same year. The learned judge found as a fact that the parties cohabited from late 1988, and got married in February 1992. The wife earned more than the husband for several years before they were married and contributed significantly to the expenses of the household. After the birth of the children, who were sickly and required constant care and attention, the wife decided to give up her employment and to stay home with the children until they attained school age.
- [11] In her judgment, the learned trial judge found that the husband had failed to fully disclose all his assets to the court. She held, correctly, that the court is entitled, in that circumstance, to draw inferences adverse to him.¹ At the same time the learned judge found 'that the (husband) does not have the various assets and monthly income that the (wife) claims he has and receives.'
- [12] It is not disputed that the proceeds of a joint account in the sum of \$88,000.00 was divided between the parties, as to 55% to the wife, and the remaining 45% to the husband. She has also been given the newer of the two vehicles owned by them, he keeping the older.
- [13] The wife obtained the entire contents of the matrimonial home (furniture etc.) upon the parties separating. The only item which the husband wished to have are two Bose speakers. It appears from the evidence (page 95 of the transcript, Tab 47, page 97, Tab 48) that the husband has made reasonable alternative arrangements which have not been accepted by the wife, for no reason that appears on the evidence. The learned judge made an order in this respect. I would order that the

¹ Payne v. Payne [1968] 1 All ER 1117; Livesey v. Jenkins [1985] 1 All ER 106; Vanterpool v. Vanterpool [2000] Civil Suit No. 29 of 1999, BVI.

learned trial judge's order that the wife deliver to the husband the two Bose speakers be affirmed.

- [14] The learned judge found further that the wife assisted the husband in the initial setting up of the photography business and is therefore entitled to a share of that business and to a share in the boat, which, she found, is not an asset of the company. She rejected the husband's valuation of the boat at between \$8,000.00 and \$10,000.00, without giving any reason. I have been unable to find any evidence to the contrary, except that the husband purchased the boat for \$8,000.00 and installed a new engine for \$7,000.00. There is also evidence that a great deal of money is owed on the boat, and that efforts to sell it have been unsuccessful. There must remain great doubt as to the value of the boat. In my view nothing turns on whether the boat is a company asset or a family asset. I agree with learned counsel for the wife that in either event it must come into the accounting. The wife admitted in evidence that she had made no contribution towards its purchase, maintenance, storage or repairs.
- [15] The learned trial judge did not think that the wife was entitled to either $\frac{1}{3}$ or $\frac{1}{2}$ of the said assets. The learned judge adopted section 25 of the Matrimonial Proceedings and Property Act 1995 as the law governing property awards on the dissolution of marriage, and section 26 as providing the standards to be applied in making the award. Learned counsel for the husband submits that it is unclear how the figure of \$20,000.00 was arrived at.
- [16] Learned counsel for the wife made much of the fact that the husband mixed personal and business expenditure on his credit cards, and was unable adequately to separate the two, or to prove the extent of his income by reference to income tax returns or otherwise. Despite the unsatisfactory evidence on the issues concerning income and assets, and the absence of a full and detailed explanation by the learned judge as to the basis of her award, however, neither party was able to demonstrate irrationality in the award or the application of wrong

principle in relation to the exercise of her discretion in that difficult area. For myself, I can find no reason to interfere with the exercise of the learned trial judge's discretion, and I would dismiss both the appeal and the cross appeal on that issue.

[17] In all the circumstances of this case, it seems to me that the learned judge's award of maintenance for the wife for a limited period was reasonable, and I would affirm limitation of that award in terms of quantum and time.

[18] In the result, I would affirm the learned trial judge's order that the wife be granted custody of the children of the marriage, with access to the husband in accordance with a schedule to be agreed by the parties, with liberty to apply in the absence of agreement; that the husband do pay to the wife the sum of \$500.00 per month as maintenance for herself until 31st March 2004; that the husband do pay a lump sum of \$20,000.00 to the wife as representing her share in the business, the boat and for the value of any benefits lost as a result of the divorce; that the wife be awarded the household furnishings located at the matrimonial residence with the exception of the two Bose speakers, which are awarded to the husband; that the husband do pay the sum of \$1200.00 monthly as maintenance for the two children of the family until they attain the age of 18 or if pursuing further education.

[19] The order for the transfer of the lease of the matrimonial residence, the order that the husband pay the children's school fees and annual air fare to the United Kingdom and maintain medical insurance for the wife and children are discharged. It is ordered, in keeping with the husband's undertaking in that regard, that the husband maintain the existing life insurance policies on his life for the sole benefit of the children of the family.

[20] I would order that each party bear their own costs of the appeal.

Brian Alleyne SC
Justice of Appeal

I concur.

Michael Gordon, Q.C.
Justice of Appeal

I concur.

Don Mitchell, Q.C.
Justice of Appeal [Ag.]