SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO.16 OF 2005

BETWEEN:

DALE SYLVESTER HORNE

Appellant/Respondent

and

ANNIS ANITA HORNE nee LEWIS

Respondent/Petitioner

Before:

The Hon. Mr. Brian Alleyne, SC	Chief Justice [Ag.]
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh Rawlins	Justice of Appeal

Appearances:

Mr. Samuel Commissiong for the Appellant
Ms. Paula David for the Respondent

2006: January 30; 31;
February 20.

JUDGMENT

[1] **BARROW, J.A.**: On the respondent's application for ancillary relief the master ordered that the matrimonial home be transferred to the respondent absolutely (I shall refer to the respondent as the wife and the appellant as the husband), that the husband pay $167,500.00 representing the entire balance due on the mortgage on the home, and that the husband pay costs of $7,000.00. Counsel argued essentially that the award was unfair in that it took away the husband's one half share in the home plus a bit more than half of all the other assets that the husband owned while leaving the wife's assets untouched.

[2] Notwithstanding the criticisms by counsel for the husband of the brevity of the master's decision the relevant facts can be stated briefly. The parties were divorced in 2003 after almost 20 years of marriage. The wife was aged 43 and the husband was aged 47 at the date of the decision (June 2005). Their two daughters were born 19th September 1983 and 1st July 1986 which made them 21 years and 18 years of age at the date of the decision. The elder child was employed and the younger child was at school. The husband left the matrimonial home in 1998 and the master accepted that he never gave any money to the wife for the children's support.

[3] In 2001 the employment of the husband with the telephone company was terminated and he ceased earning a monthly salary of $4788.00. He also ceased making the payments of $1,302.79 towards the mortgage that he had continued to make after he left home. The husband received lump sum payments of $125,246.72 ("the termination payments") from his former employers. In April 2000 the husband's father was murdered and the husband's evidence is that he is entitled to a share in the estate that amounts to $206,807.33. The master apparently treated the husband as having total assets of $327,000.00, apart from his share in the matrimonial home

[4] For her part the wife was earning a salary of $48,972.00 annually. The master found that her expenses amounted to about $20,000.00 annually. I have looked at the wife's affidavit sworn on 30th October 2003, from which I deduce this figure was taken (since there is no other source for it), and it appears that the correct figure for her annual expenses is $34,000.00.[1] This leaves the wife with something like $15,000.00 for the year or $1,250.00 monthly to pay for all the other things beyond the basics that are stated in her affidavit, which were: food and clothing, utilities, medical and dental, school uniform, transport, other expenses for the children such as games, music, extra lessons, insurance, income tax, and transportation and gas. The wife is a senior public officer who expects to receive

[1] The affidavit is found at page 180 of Vol. 2 of the Record of Appeal. The total at the end of page 181 is $19,364.00 but the expenses continue over the page and total $33,573.00

an unquantified amount upon the termination of her employment and this is to be remembered when considering the relative position of the parties.

[5] The husband claims to have been largely unemployed since his termination. In his affidavit of means he stated that "most" of the termination payments of $125,246.72 that he received has been spent. He stated that these moneys had been the sole source of his survival since he ceased employment. He stated "[m]ost of it has been spent since I have had to pay rent, utility bills, help financially with my children and satisfy other general financial obligations during the past 2 years since it has proved impossible for me to find work." In December 2003 the husband obtained employment as a contract driver at an annual salary of $21,600.00. The husband has started another family. The husband also claimed that he has provided and still provides regular financial assistance to the daughters and estimated the value of this assistance at $300.00 per month for both. None of the assertions made by the husband was challenged on cross-examination or was materially contradicted by other evidence.

[6] The master accepted the matrimonial home as having a value of $230,000.00 and this has not been challenged. The balance owing on the mortgage was $167,500.00 and that left a net worth in the home of $62,500.00. The mortgage payments have not been made since 2001 and the husband wonders why the mortgagee has not moved to exercise its power of sale.

[7] From that financial picture it is clear that the wife, since 2001 when the husband lost employment, has been earning significantly more than the husband. His evidence indicates that this is likely to continue. At present the wife earns more than double what the husband earns. There is a strong likelihood that it was the wife's recognition of this disequilibrium that made the wife declare at the outset of her oral testimony that what she wanted by way of ancillary relief, in relation to the home, was for it to be transferred to her and the outstanding debt secured by the mortgage to be jointly serviced by the husband and herself. Instead, the master

ordered that the husband alone should liquidate, not service, the outstanding mortgage debt.

[8] Counsel for the husband submitted that the master did not take the relative earning power of the parties into consideration and it is a submission that I must accept. There was no advertence to it in the master's reasons for decision. Instead, it appears, the master simply proceeded on the basis that the husband had assets of $327,000.00. The master did not advert to the husband's uncontradicted evidence that he had spent most of the termination payments on meeting the daily expenses of living since he ceased earning an income – an assertion that has the ring of likelihood to it. By failing to advert to the lesser income and lesser earning potential of the husband, and to the alleged depletion of the moneys that the husband had received, the premise of the master's decision was wrong. The result at which he arrived was necessarily wrong. It is for that reason that this court, in my respectful view, must interfere and determine what is a fair order in all the circumstances and in accordance with section 34 of the **Matrimonial Causes Act**.[2]

[9] I am quite conscious of the case that Ms. David, counsel for the wife, marshalled in her helpful submissions on appeal: that the husband had significantly understated his assets and income, and that the master was entitled to treat the husband as having more assets than he stated. If this was what the master did he ought to have so stated, not least to clarify that this is what he did and so enable the parties to decide whether to accept or to challenge the finding of fact. As the master's judgment stands there is no finding that the husband's property comprised moneys and income greater than what he stated and the fairness of the master's order must be judged only against the facts that he found.

[10] The only property that the parties owned in common was the matrimonial home; indeed, it was apparently the only material asset of substance that either of them owned. The matrimonial home will often call for special consideration, particularly

[2] Cap. 176 of the Revised Laws, 1990.

so when one of the parties has no other place to live. Our courts will always be astute to ensure that upon the break-up of the marriage both parties have a roof over their heads. This approach was expressed by Stamp L.J. in **Martin v Martin**[3] in these words:

> "It is of primary concern in these cases that on the breakdown of the marriage the parties should, if possible, each have a roof over his or her head. This is perhaps the most important circumstance to be taken into account in applying s 25 of the Matrimonial Causes Act 1973 when the only available asset is the matrimonial home. It is important that each party should have a roof over his or her head whether or not there be children of the marriage".

The husband's repeated proposal in his statements that the matrimonial home be sold and the balance of the proceeds after discharging the mortgage debt be shared equally supports the argument of counsel for the wife that the husband must be satisfied with the roof that he has over his head. He makes no reference to a need for one; he does not ask to be allowed to occupy the home; rather, he wants it sold. In contrast, the wife seeks to continue to occupy the matrimonial home.

[11] The master's order that the home be transferred into the sole name of the wife was therefore in accordance with principle. That transfer represents a payment of $31,000.00 by the husband to the wife, using the value of the net worth of the home. It is clear that the wife cannot make the monthly mortgage payments of $1,302.79[4] in view of the earlier finding that what was left to her after meeting her basic expenses was less than that sum.

[12] Because the husband has no other property from which to draw it is unavoidable that financial provision for the wife must draw upon the husband's inheritance. Contrary to the submissions of counsel for the husband, it is proper in such circumstances to draw upon property acquired by a party even after the

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[3] [1977] 3 All ER 762 at 765.

[4] It is recognized that with 4 years' arrears of instalments to be brought current the payments would not remain at that rate unless the loan is rewritten.

breakdown of the marriage: see **Hughes v Hughes**.[5] The master was therefore correct in principle to have had regard to the husband's inheritance of $206,807.33 in considering the husband's property. However, the award that the master made of $167,500.00 was excessive when it is considered that this would leave the husband with only $39,307.33. In contrast with that sum and whatever the husband may have left over from the termination payments, the wife would end up with a home having a net value of $230,000.00 and her future retirement payments untouched.

[13] Instead of the master's order that the husband alone pay the entire mortgage balance, I think the wife's proposal that they jointly pay the mortgage is fair. I would order that the husband pay one-half of the present outstanding mortgage balance. This should amount to something in excess of $83,750.00, which would have been the figure when the master made his decision. This leaves the husband with roughly $123,000.00 from his inheritance plus whatever remains of the termination payments and leaves the wife with a net worth in the home of approximately $145,750.00 and the prospect of her retirement payments. I bear in mind that the wife may choose to refinance the loan so as to permit her to pay the balance owed by smaller, and therefore manageable, monthly instalments.

[14] It remains to observe that in her petition for divorce the wife applied for financial provision for the children. Her petition was dated 18th September 2002 and the elder child was then already 19 years of age. Section 38 (1) of the **Matrimonial Causes Act** prohibits the making of a financial provision order and an order for a transfer of property in favour of a child who has attained the age of eighteen except in the case of a child who is or will be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation. The elder child was not then receiving further education but wished to study in the United States of America.

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[5] (1993) 45 WIR 149 at 153.

[15] At the date of the petition the younger child was 16 years of age and was attending school. At the date of the master's order for ancillary relief (10th June 2005) this child was already 18 years of age and had probably just completed "A" level exams at the community college. She wished to study law. The husband supports the educational ambitions of both daughters but his view is that the children need to wait a while before they proceed to university. I think it is reasonable and fair to treat both children as coming within the exception in the Act in favour of children over eighteen years of age who will be receiving instruction at an educational establishment even though there were no definite plans for how their ambitions will be met.

[16] Section 38 (2) of the Act limits the term of an order for maintenance for a child to the period beginning with the date of the making of the application for the order in question. This means it was permissible for the master to have made a retroactive order that took effect from the date of the petition (18th September 2002). The master specifically stated that he was making no order for the maintenance of the daughter who was still at school as he had considered the need to provide for her in making his order that the husband transfer his interest in the matrimonial home to the wife. The master had earlier stated that the order that he had made in relation to the lump sum payment took into account the fact that the husband had not maintained his daughters since he left the matrimonial home.

[17] The order that I would make would reduce the lump sum payment by half and I have considered whether this would still make sufficient provision for the fact that the husband had not maintained his daughters since he left home. Having considered the limit on the term for which financial provision for the children can be made I am satisfied that no account should be taken of the husband's failure to maintain the children before the date of the petition. To go beyond that point would be doing exactly what the legislation prohibits. I see no hardship in that decision because it was always open to the wife to apply for maintenance for the children without waiting to file a divorce petition. There is no need to speculate why she did

not do so then; it is enough to recognize that she could have done so and may have had good reason for not doing so.

[18] The master's order treated the transfer of the husband's share in the matrimonial home as adequate provision for the younger child. The net worth of that share is $31,000.00. That figure is seen in perspective if it is divided by the number of months between the date of the petition and the date of the master's decision (33 months): it would equate to monthly maintenance payments of $939.00. I see the transfer of that share as adequate provision in respect of both children, given the husband's means, especially when coupled with the order for the husband to pay one half of the outstanding mortgage.

[19] In the premises I would allow the husband's appeal by varying the master's order in part. Instead of ordering that the husband pay the balance at the date of decision of $167,500.00 I would order that the husband pay one half of the balance of the mortgage loan on the matrimonial home at the date that he makes the payment. Any payment that the wife may have made or may make to account of the loan since the date of the master's decision is to be excluded from the computation of the balance. I would remit this matter to the High Court for that court to work out the terms of this order including the time for compliance.

[20] I would depart in this instance from the normal rule that the successful party on an appeal should be awarded costs, because of how the husband's case was conducted. The master stated in his decision that he had directed the parties to file written submissions by a specific date and that he received submissions on behalf of the wife but none on behalf of the husband. Counsel sought to evade responsibility for the decision reached by the master by contending that while counsel had a duty to the court to file submissions when ordered to do so in the end it was purely the responsibility of the judicial officer to arrive at the correct decision. That is a proposition that I firmly reject.

[21] It is easy to imagine the outrage of counsel in a scenario where the other side has been permitted to make written submissions but he was prohibited from doing so. The injustice in that scenario is the likelihood that any decision adverse to the party prohibited from making submissions would have resulted from the adjudicator not having the arguments of one side balanced by the arguments from the other side. In the instant case the failure on behalf of the husband to comply with the master's direction to file written submissions produced precisely the same likelihood: that the master's decision may have resulted from not having the arguments for the wife balanced by the arguments from the husband. I have been persuaded to the decision that I have reached by the submissions on behalf of the husband. Therefore, it is not just possible but probable that the master would have been similarly persuaded if he had the benefit of the submissions that he ordered. Because this appeal may have been avoided, I would order the husband to pay the costs of the wife on the appeal in the sum of $2,500.00.

Denys Barrow, SC
Justice of Appeal

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Hugh Rawlins
Justice of Appeal