

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

(DIVORCE)

BVIHMT 2006/0012

BETWEEN:

CECIL ALBATO HODGE

Petitioner

and

PATRICIA LARTIA HODGE

Respondent

Appearances:

Mrs. Lorna Shelly-Williams of Farara Kerins for the Petitioner
Ms. Susan Demers of Price-Findlay & Co. for the Respondent

**2008: January 11th, February 11th
and 26th and April 25th**

JUDGMENT IN CHAMBERS

(Family law – divorce – application by wife for division of property and increased maintenance – land on which matrimonial home built not owned by parties – other property inherited by husband during the course of the marriage – whether wife entitled to share in inherited property – whether maintenance should be increased – Matrimonial Proceedings and Property Act, 1995)

[1] **JOSEPH-OLIVETTI, J:** This claim for division of property and increased maintenance by Mrs. Hodge arises out of the breakdown of the parties' marriage and their subsequent divorce. Mrs. Hodge, in her application sought the following relief:-

- a. an order granting her custody of the children of the marriage with reasonable access to Mr. Hodge;
- b. an order granting her periodical payments for the maintenance of the children of the marriage including payment of a portion of the rent;
- c. an order granting her a property adjustment order;
- d. an order that Mr. Hodge pay the costs of this suit; and

- e. such further and other relief as the Court thinks just and proper.
- f. maintenance for herself;
- g. a lump sum representing one half share of the family assets and the value of any benefits lost as a result of the divorce.

[2] Both parties relied on their several affidavits on which they were cross-examined. As is not unusual in these matters they called no witnesses. The matter was heard on the 11th January 2008 and written submissions were ordered and duly filed on 11th and 26th February and the court reserved its decision.

Facts

[3] The parties were married to each other on 21st December 1991. They were judicially separated in 2000 although there were attempts at co-habitation afterwards but Mrs. Hodge eventually left the home in August 2004. Mr. Hodge filed for divorce on 3rd March 2006 on the ground that the marriage had broken down irretrievably due to Mrs. Hodge's unreasonable behaviour. Mrs. Hodge cross petitioned, admitting that the marriage had broken down but that it was due to Mr. Hodge's unreasonable behaviour. Mr. Hodge's petition was granted and a decree nisi pronounced on 31st May 2006. The decree absolute was obtained on 15th June 2007.

[4] The parties have two children aged 14 and 13 respectively. Mr. Hodge has since re-married and Mrs. Hodge now has another child who was conceived prior to the petition for divorce.

[5] The only issues now remaining for determination are (1) whether maintenance for the children should be increased (2) how the matrimonial property and lands are to be divided between the parties and (3) whether Mrs. Hodge should in addition be granted maintenance for herself although this last was not actively pursued.

[6] The parties have very sensibly agreed that custody of the children and provision for their maintenance do continue in accordance with the Magistrate's order of 13th December 2000 which was obtained by the wife save insofar as the request for increased maintenance remains to be decided. Further, the parties have agreed that Mr. Hodge will pay half the educational expenses of the children upon proof of same until the children attain the age of 18 or complete their education whichever is later. It is remarked that the Magistrate's

- order, inter alia, granted custody of the children to Mrs. Hodge and ordered Mr. Hodge to pay \$400.00 per month as maintenance for the children until they attain the age of 18 and to pay half their medical expenses upon proof of same. In addition it was ordered that Mrs. Hodge was to occupy the matrimonial home with the children.
- [7] However, in 2004 Mrs. Hodge left the matrimonial home with the children allegedly because of Mr. Hodge's violent behaviour and the Magistrate's Court order was varied to the extent that Mr. Hodge was ordered to pay \$325.00 towards her house rent. See the order, CH2 to Mr. Hodge's affidavit of 8th June 2007.
- [8] At the time of their marriage Mr. Hodge was 26 years old and Mrs. Hodge 24. Mr. Hodge is now aged 42 and is employed as a school teacher at the BVI High School and Mrs. Hodge is aged 40 and is employed at the Deputy Governor's Office.
- [9] Prior to the marriage the parties co-habited for about 2 years in the home of Mr. Hodge's aunt at Hope Hill. Differences arose between Mrs. Hodge and the aunt and permission was given to the parties to move into an old wooden house belonging to Mr. Hodge's grandmother on the grandmother's land. They paid no rent. Sometime after living in the wooden house permission was given to the parties to construct the matrimonial home on the said land which is registered as East Central Registration Section; Block 3139B; Parcel 259 Lot 150 (.246 acres). Mrs. Hodge was well aware that Mr. Hodge was not the owner despite his misleading description of himself as owner on the application to develop the land. No doubt he had a **spes** that he would inherit a portion of that land hence their decision to build. However, as it turned out this land was later transferred to Mr. Hodge's aunt, Mrs. Blyden, in May 1999 although Mr. Hodge and his new family continue to reside there rent-free.
- [10] Mrs. Hodge says that construction on the home began in 1989 but I do not accept this as it is not borne out by the plans she relied on (PH1 to her affidavit of June 14, 2007 in reply) which show that the application for permission to build is dated 5th November 1991. Having regard to the loan referred to below I am of the view that the construction started in or about May 1991. I also find that the old house was not renovated as Mr. Hodge claimed but demolished and rebuilt.
- [11] In May 1991 Mrs. Hodge secured a loan from Chase Manhattan Bank now First Bank BVI in the amount of \$8,100. Of the proceeds, \$2,000 was used to open a certificate of deposit

- to secure the said loan, \$1,000 was retained by Mrs. Hodge for her personal use and \$5,000 was given to Mr. Hodge to assist in building the matrimonial home. Mr. Hodge bore the responsibility of meeting the monthly payments of \$225.00 by depositing his salary each month at First Bank. The loan was repaid in full by Mr. Hodge by direct debit from his salary but I accept that the parties pooled their earnings from which their household expenses were met thus Mrs. Hodge can be said to have made financial contributions to the mortgage as well.
- [12] The matrimonial home was built by Mr. Hodge with the assistance of his uncle. Mr. Hodge claims that he spent approximately \$50,000 of his money to construct the matrimonial home. I remark from the application to develop that the estimated cost of construction was \$95,000.00. Thus, the loan formed a very small percentage of that cost. I also accept that each used income from additional sources to supplement their income - Mrs. Hodge sold tarts while Mr. Hodge sold vitamins to assist with the family's finances.
- [13] Throughout the early years (1994-1997) of the marriage Mr. Hodge attended college in England. Mrs. Hodge and their child accompanied him. On the completion of Mr. Hodge's studies he returned to the BVI with the children whilst Mrs. Hodge remained in England and attended college there during the period 1997 to 2000. She subsequently attended school in Barbados from 2000 to 2001. The problems in the marriage apparently surfaced during Mrs. Hodge's sojourn from home. In real terms the parties cohabited for about 8 years prior to the judicial separation in 2000 and then for 4 years after
- [14] When Mrs. Hodge left the matrimonial home Mr. Hodge allowed her to take all the household furnishings valued at approximately \$12,000.00. Subsequently, Mr. Hodge in addition to being required to pay half of her rent was also ordered to supply her with various items for her apartment – 2 beds, refrigerator, dryer and dining table.
- [15] The parties did not specifically give evidence as to how the household bills were paid but it can be inferred that they both bore the responsibility of paying the bills and contributing to the welfare of the family.
- [16] In April 2005 long after the parties separated Mr. Hodge purchased shares in a company named Desaltech Enterprises Limited. Mrs. Hodge also claims that Mr. Hodge has a time-share in Prospect Reef but Mr. Hodge claims that this share is non-existent as the company has been closed.

- [17] In May and June 1999 respectively two parcels of land registered as East Central Registration Section; Block 3139B; parcels 260 Lot 151 (0.247 acres) and 228 Lot 14 (0.434 acres) were transferred to Mr. Hodge. Parcel 260 was transferred to him from Ms. Ileta Lettsome as trustee and the stated consideration was love and affection. Mrs. Hodge has taken no issue with that.
- [18] Mr. Hodge claims that Parcel 228 too was transferred to him for love and affection as recited on the face of the transfer. This transfer on its face is from Lucille Adina Blyden, Joyce Vanterpool Nobles and Freddie A. Vanterpool. It is signed by Walter Blackman as attorney for the transferors and is dated 28th June 1999. See CH12.
- [19] Mrs. Hodge however disputes this and says that they bought the land. She produced a copy receipt showing that parcel 228 was purchased for \$15,000 from the estate of Mr. Hodge's aunt in June 1999. The receipt I accept is signed by the said Mr. Blackman as appears from a comparison of the signatures on the receipt and that on the transfer. I reject any inference by Mr. Hodge that the receipt is false.
- [20] I therefore find that parcel 228 was not transferred for love and affection but for the sum of \$15,000.00 which Mr. Hodge paid from his own funds. The evidence is that since 1997 to 2001 Mrs. Hodge was at school and she has given no evidence that she contributed any monies towards that purchase only the bald statement that the funds came from their joint account. She has not told us what monies if any she contributed to the joint account during these years therefore I can attach no weight to the inference relied on that she contributed financially to the purchase of Lot 228.
- [21] Now to Mr. and Mrs. Hodge's present financial situation. First they have a joint account with a balance of \$1,922.12. Mr. Hodge earns \$3,459.36 (net) per month. He is now paying maintenance for the children of the marriage which includes contribution to rent in the sum of \$725.00 per month. He also pays \$300.00 per month into a college fund for the children of the marriage. He has recurring monthly expenses of \$2,698.32. (I have not included payment for his credit card loans). This leaves him with a shortfall of approximately \$263.00 each month. However he is married and doubtless his spouse can be expected to assist financially.
- [22] Mrs. Hodge earns \$3,572.00 (net) per month plus she receives \$725.00 per month for maintenance for the children. Mrs. Hodge claims she has total monthly expenses of

\$4,415.99. From this sum I have deducted the amount of \$120 for lab fees and \$350.00 for medication as she has medical insurance and \$200 for miscellaneous as she has not indicated to what this relates. This reduces it to approximately \$3,745.00. This leaves her with a surplus of \$552.00. In addition I take into account that she has a right to seek financial assistance from the father of her third child whether she chooses to pursue that or not.

The Law

- [23] The applicable legislation is the **Matrimonial Proceedings and Property Act, 1995** (“the MPPA”). Sections 23 and 24 give the court the power to make financial provision for a party to the marriage and child of the family. Section 25 gives the court power, inter alia, to make a property adjustment order for the benefit of a party to a marriage or a child of the family.
- [24] In deciding whether to exercise the powers given by sections 23, 24 and 25 the Court must have regard to all the circumstances of the case including the following matters stipulated in Section 26 which are:- (a) the present or foreseeable future income, earning capacity, property and other financial resources of each party, (b) the present and foreseeable future financial needs, obligations and responsibilities of each party, (c) the standard of living enjoyed by the family before the breakdown of the marriage, (d) the age of each party and the duration of the marriage, (e) the physical or mental disability of either party, (f) contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home, (g) any order made under section 49 (not applicable), and (h) the value to either party, of any benefit (for example, a pension) which, that party will lose as a result of the dissolution of the marriage.
- [25] The ‘tail piece’ to section 26 requires the court to exercise its powers so as to place the parties, so far as is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each party had properly discharged his or her financial obligations and responsibilities towards the other. This duty should be carried out in a just and practicable way having regard to the conduct of the parties.
- [26] It is clear from these provisions that the court has a wide power to make property adjustment orders and other financial relief orders and that those powers can be exercised

at any time either before or after the grant of a decree absolute of divorce. The power is to be carried out having regard to all the circumstances of the case with the aim of achieving a just and practicable result.

[27] Lord Nicholls of Birkenhead in the English case of **White v White**¹ which considered similar legislation said:-

“as a general guide, equality should not be departed from, only if, and to the extent that there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination.”

[28] Lord Nicholls further used the concept of fairness and stated that:-

“divorce creates many problems. One question always arises. It concerns how the property of the husband and wife should be divided...the outcome ought to be fair in all the circumstances...”

[29] To my mind this dicta is equally applicable to the construction of the MPPA as the MPPA emphasizes the need to arrive at a just and practicable result having regard to all the circumstances, this can concisely be translated as a fair result with all that that concept invokes.

[30] Further, Lord Nicholls in **White** made it clear that a distinction ought to be made between matrimonial assets and inherited property, that is, property acquired by one spouse before the marriage or during the marriage by gift or succession or as a beneficiary under a trust. He said that in fairness where the property still exist the spouse to whom it is given should be allowed to keep it and that conversely the other spouse has a weaker claim to such property. However, he confirmed that such property is a factor to be considered as it represents a contribution made to the welfare of the family by one of the parties and that the judge should decide how important it is having regard to when it was acquired and the circumstances.

[31] In short the parties are substantial income earners and there is the real possibility that their earning power will increase in the future as is customary in the BVI government system which caters for periodic review of salaries and enjoyed a fairly comfortable standard of

¹[2001] 1 All ER 1

living during the marriage.

- [32] Applying the foregoing principles, first, should Mrs. Hodge be awarded a share in Parcel 260 which I find to be an inheritance or a gift? Doubtless, in the normal course of events a spouse would expect some benefit from the inherited property of another spouse. However, in the circumstances of this case I find that at the time Mr. Hodge was gifted Parcel 260 the marriage was in difficulties. It can hardly be inferred then that he intended Mrs. Hodge to benefit from this inheritance. In any event even if I were minded to give her some small share in it as representing some of the benefits she might have expected to share I am mindful that she received all the furniture and effects from the matrimonial home. This to my mind balances out and therefore I find that she is not entitled to any share in Parcel 260.
- [33] Now to Parcel 228. Parcel 228 was purchased when Mrs. Hodge was at school in England and at a time when Mr. Hodge was in the BVI working and caring for the children of the marriage. She admitted in cross-examination that she made no financial contributions to its acquisition. However, there is no dispute that during the early years of the marriage Mrs. Hodge contributed significantly to the welfare of the family. Therefore, having regard to all the circumstances including the fact that she has lost any interest in the matrimonial property other than in the furnishings and that Mr. Hodge and his new family continue to benefit from it. I will award Mrs. Hodge a half share in Parcel 228.
- [34] Mrs. Hodge claims an interest in the matrimonial home. The matrimonial home as I have found was built on land inherited from Mr. Hodge's family and it was constructed by the joint efforts of both parties. However, the fact remains that they do not own the land on which the house was built and that was something known to Mrs. Hodge at the very outset. It seems inequitable for Mr. Hodge's family to have conveyed the land to Mrs. Blyden which transfer automatically included the house without seeking some compensation from the Hodges but I leave that to the conscience of Mrs. Blyden. Mrs. Hodge received all the furnishings and the court cannot make any award in respect of this property as it is not vested in either of the parties.
- [35] In relation to the other assets – shares in Desaltech, the time share at Prospect Reef and the joint account in which Mrs. Hodge claims a share, I find that Mrs. Hodge is not entitled to any share in the Desaltech shares as they were purchased in 2005, some years after

the legal separation and after she had left the home. She made no contributions to with respect to the Prospect Reef investment. I accept Mr. Hodge's evidence that the company no longer exists and therefore I make no order as to the timeshare interest either.

[36] The other family asset is the monies in the joint account. This should be divided equally as Mr. Hodge accepts.

[37] Mrs. Hodge seeks an order for maintenance for the children and variation of the Magistrate's order as her rent has increased. This court has the power to vary a Magistrate's Court Order and to grant an increase in maintenance. See **Myra Audlyn Lewis v Simon Peter Lewis**². The intention of the magistrate was that Mr. Hodge should contribute equally to the rent. It is a given that rent does not remain static. If the rent has increased as I accept it has, from \$650.00 to \$850.00 then I find that he must continue to bear his half share of the increased cost and I so order. I trust too that failure increases will not be a cause for contention.

[38] Mrs. Hodge did not actively pursue her claim for maintenance for herself. The court has power to order either party to make provisions for the maintenance of the other spouse. See section 23 of the MPPA. However, when looking at the overall circumstances of the parties and in particular the factors specifically to be adverted under section 26 and taking into account the half share of Parcel 228 now awarded to Mrs. Hodge in all the circumstances I consider it is fair that Mr. Hodge should not be ordered to make any further provision for her maintenance.

[39] In conclusion, having regard to all the circumstances of the case I find it just and equitable to make the following orders:-

- (1) Custody of the two children of the marriage is granted to Mrs. Hodge with reasonable access to Mr. Hodge;
- (2) Mr. Hodge is to continue pay \$400.00 per month as maintenance for the children of the marriage and half their medical expenses on production of receipts until they attain the age of 18;
- (3) Mr. Hodge shall pay half the educational expenses of the said children upon production of proof of same until the children attain the age of 18 or complete their

² Suit No. 31 of 1987, Grenada

education whichever is later;

- (4) Mr. Hodge is to pay half the rent of the premises where the children now reside with their mother, currently the sum of \$425.00 per month.
- (5) Parcel 228 is to be held by Mr. and Mrs. Hodge as tenants in common in equal shares and the Registrar of Lands is hereby directed to amend the register to reflect this.
- (6) The proceeds in the joint account at First Bank in the sum of \$1,922.12 is to be divided equally between the parties.
- (7) Each party is to bear his own costs.

Rita Joseph-Olivetti
Resident High Court Judge
British Virgin Islands