

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

(DIVORCE)

BVIHMT 2007/0067

BETWEEN:

LIANNA JARECKI

Petitioner

and

ELVET MEYERS

Respondent

Appearances:

Mrs. Lorna Shelly-Williams of Farara Kerins for the Petitioner

Ms. Mishka Jacobs of Mc W. Todman & Co. for the Respondent

**2008: May 9th, 15th
July 2nd**

JUDGMENT IN CHAMBERS

(Family law – divorce – application by wife for division of property, custody and maintenance – land on which matrimonial home built owned by petitioner – pre-nuptial agreement governing rights of ownership - application by husband for division of property, rental income custody and maintenance - Matrimonial Proceedings and Property Act, 1995)

[1] **JOSEPH-OLIVETTI, J:** These claims for division of property, custody and maintenance for the child of the family by the parties arise out of the breakdown of their marriage and their subsequent divorce.

[2] Ms. Jarecki, in her application¹ sought the following relief:-

- a. an order that she be granted sole custody of the child of the marriage with visitation to Mr. Meyers;
- b. an order that Mr. Meyers pays half the medical, educational and after school activities of the child of the marriage;
- c. an order that Mr. Meyers be awarded one-third of the value of the matrimonial

¹ Application filed on 18th March 2008

home less the value of the land and less any outstanding debt and that she be allowed to purchase Mr. Meyers' one-third share of the matrimonial home;

- d. an order that the \$50,000.00 given to her as a gift be placed in trust for the child of the marriage;
- e. an order that Mr. Meyers pays her the sum of \$300.00 per month as maintenance for the child of the family; and
- f. that there be no order as to costs.

[3] Mr. Meyers in opposition sought fit to make his own application² in which he seeks the following relief:-

- a. an order for a lump sum payment of one-third of the value of the matrimonial home and improvements on the land in the sum of \$291,666.67 less the outstanding debt of \$146,000.00 owed to Ms. Jarecki's mother, Carol Jarecki;
- b. an order for a lump sum payment of one-third of the proceeds of rent of the matrimonial home from the date of rental until he is paid his one- third value of the matrimonial home;
- c. an order that he pays the sum of \$150.00 for the child of the marriage plus half educational and medical expenses;
- d. an order that the \$50,000.00 given to Ms. Jarecki as a gift be placed in trust for the child of the marriage; and
- e. that there be no order as to costs.

[4] Both applications were heard together and the 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 9th May and written submissions were ordered and duly filed on 15th May and the court reserved its decision.

[5] Commendably, the parties have endeavoured to settle this dispute amicably and have reached agreement on several issues. They have agreed that the gift of \$50,000.00 made to Ms. Jarecki by her uncle as a marriage gift should be placed in trust for the child of the marriage, that Mr. Meyers will pay half the medical and educational expenses for their child

² Application filed on 2nd May 2008

upon proof of same until the child attains the age of 18 or completes her education whichever is later and that each party will bear his or her own costs of this application.

- [6] The only issues now remaining for determination are (1) the value of Mr. Meyers one-third share of the matrimonial home and whether he is entitled to a one-third share in the improvements to the land (2) how the rental income is to be divided and whether he is now due any payments in respect of the rental income (3) whether Ms. Jarecki should be granted sole custody of their child (4) the amount of maintenance Mr. Meyers should pay for their child and (5) how the furniture in the matrimonial home is to be divided.

The Law

- [7] The applicable legislation is the **Matrimonial Proceedings and Property Act, 1995** (“the MPPA”). Section 24 gives the court the power to make financial provision for a child of the family, and section 25 gives the power to make a property adjustment order for the benefit of a party to a marriage or a child of the family.

- [8] In deciding whether to order a party to make financial provision for a child under section 24 the court must have regard to the financial needs of the child, the income, earning capacity (if any) property and other financial resources of the child, the standard of living enjoyed by the family before the breakdown of the marriage and the manner in which he or she was being educated and in which the parties to the marriage expected him or her to be educated or trained. The court is called upon to exercise these powers so as to place the child in the same position as is practicable and just as he or she would have been in had the marriage not broken down and had the parties fulfilled their obligations to the child. See s.26 (2).

- [9] In respect of Mr. Meyers’ application for a lump sum payment of one-third of the value of the matrimonial home and improvements to the land he is relying on the prenuptial agreement and therefore strictly speaking the powers of the court under section 25 of the MPPA are not relied on as both parties wish to abide by the prenuptial agreement and there is nothing in the agreement which is unconscionable so as to prevent the court from giving effect to it. In addition, under section 37 the court can take into account agreements for financial provision for a party to the marriage.

The Basic Facts

- [10] The parties were married to each other on 6th October 2004. They have one child who is now aged 3. After being married for approximately three years Ms. Jarecki filed for divorce on 14th August 2007 on the ground that the marriage had broken down irretrievably due to Mr. Meyers' unreasonable behaviour. Mr. Meyers cross-petitioned, admitting that the marriage had broken down but that it was due to Ms. Jarecki's unreasonable behaviour. Ms. Jarecki's petition was granted and a decree nisi pronounced on 29th October 2007.
- [11] At the time of their marriage Mr. Meyers was 44 years old, a divorcee and Ms. Jarecki 37, unmarried. Mr. Meyers is now 48 and is self-employed. Ms. Jarecki is now aged 41 and is employed as a scientist at the H. Lavity Stoutt Community College.
- [12] Prior to their marriage the parties executed a prenuptial agreement which in a nutshell provided that any separate assets acquired by either before or after the marriage shall remain in their respective absolute beneficial ownership unless the agreement provided otherwise. (See paras. 2 & 3 – Pre-marital Deed). Both parties accept this agreement and are not seeking to vary it in any way.
- [13] Sometime in 1998 Ms. Jarecki purchased a parcel of land registered as West Central Registration Section; Block 2640B; Parcel 144 (2.250 acres). According to the terms of the prenuptial agreement Mr. Meyers is not entitled to any share in the said parcel of land.
- [14] Sometime after the purchase of the land and before the marriage the parties commenced construction of the matrimonial home on the land. In the prenuptial agreement (see Clause 6) they agreed that Mr. Meyers' direct and indirect contributions towards the construction of the matrimonial home would entitle him to a one-third share of the entire cost of the construction of the house or in other words to a one-third share in the value of the house itself and not the land.
- [15] The prenuptial agreement in Clause 7 also provided that in the event of the dissolution of the marriage either party shall have the option to purchase the interest of the other in the matrimonial home and land at **the prevailing market price** as determined by an independent valuer as agreed between the parties or otherwise approved by the President of the BVI Bar Association. The parties do not dispute this but they cannot agree as to the value of the matrimonial home and they have not sought the assistance of the said

President as contemplated in the prenuptial agreement.

- [16] The parties lived in the matrimonial home although it was incomplete in certain areas. Differences arose between the parties and Mr. Meyers left the matrimonial home in January 2007. Ms. Jarecki continued to reside in the matrimonial home which consists of two units, the smaller is occupied by Ms. Jarecki and the child of the marriage while the larger unit which is the main house is currently rented at a monthly rent of \$3,500.00. This unit was rented from April 2007 and Mr. Meyers was in charge of collecting the rental income and depositing the monies into the parties joint account from April to November 2007. The monies from that account were used by Mr. Meyers to pay the insurance and taxes, and for repairs and maintenance to the house, this he did until November 2007.
- [17] Ms. Jarecki took over collection of rent and repairs from November 2007. Since that time she has done extensive repairs to the matrimonial home totaling \$10,892.25³ using monies for the rental income. The joint account at the date of the hearing has a balance of \$4,426.99.

The Issues

- [18] I shall now consider the first issue which is what is the value of Mr. Meyers' one-third share in the matrimonial home.
- [19] Four reports, all with different valuations were presented to the court. Ms. Jarecki and Mr. Meyers obtained a valuation in September 2007 from BVI Development Consultants Ltd. The valuer in arriving at a valuation figure considered the cost approach, sales comparison approach and income approach and concluded that the value of \$862,000.00 derived from the sales approach most aptly represents the current fair market value of the property. The valuer valued the land at \$245,000.000 and the house at \$617,000.00.
- [20] About two months later Ms. Jarecki obtained a second report from BCQS. In ascertaining the value of the property the valuer first considered the three recognized methods of proper valuation: the cost approach, the income approach and the comparable approach. The valuer then applied the cost approach and the comparable approach and valued the property at \$845,000.00 (\$245,000.00 – land; \$590,000.00 – building).
- [21] Mr. Meyers obtained two further reports. The first is dated January 2008 from Smith Gore

³ See Exhibit LJ 4, 2nd Affidavit

Overseas Ltd. The method of valuation employed in determining the **replacement cost valuation** was the direct cost based on actual or typical construction costs of similar properties and indirect costs by applying 15% of direct costs. The total direct and indirect cost for the house is **\$670,970.00** rounded to **\$675,000.00** as per the market value by the cost approach.

[22] The second report dated April 2008 is also from Smith Gore Overseas Ltd. The valuer considered the income approach, the replacement cost approach and the comparable sales approach. The valuer concluded that the replacement cost valuation of the property along with site improvements and the value of the land is \$915,000.00 after taking into consideration the current cost of construction. However, the valuer concluded that the comparable sales approach provides the most reliable support of market value while the replacement cost valuation and the income approach provide secondary support and accordingly valued the property along with structures and site improvement in the amount of \$1,125,000.00 (\$250,000.00 – land; \$875,000.00 - house).

[23] Clearly each valuation puts a different value on the property. Ms. Jarecki does not accept the two reports from Smith Gore Overseas Ltd. Her Counsel suggests using the report from BVI Development Consultants Ltd less the value of the land along with the report from BCQS and to split the difference between her and Mr. Meyers. (See para. 16 Petitioner's submissions)

[24] I have considered the reports and I am mindful that it is well established that valuation is not an exact science. Further the valuers were not called to be cross-examined by either of the parties and therefore, the court does not have the full benefit of the reasons for the variations. Mr. Meyers objected strongly to using the other reports and is adamant that the court must use the second report from Smith Gore Overseas Ltd as it is the most recent and represents the true value of the property.

[25] Having regard to the terms of the prenuptial agreement which speaks to the prevailing market price and having considered the reports I am satisfied that the report from BVI Development Consultants Ltd represents the true and fair prevailing market value of the matrimonial property. Moreover, it was based on this valuation that the property was insured. There is no suggestion from either party that the property was underinsured. I will therefore accept this report. According to this report the land is valued at \$245,000.00

and the house at \$617,000.00.

[26] I therefore award Mr. Meyers the sum of \$205,666.67 as representing his one-third share in the house which is the share he is entitled to according to the prenuptial agreement which has not been challenged. With respect to his claim for a one-third share in the improved value of the land I am not satisfied that he has made out a claim for same. The prenuptial agreement clearly envisaged that he should have no share in the land and to now award an interest will strike at the heart of the agreement which ostensibly both parties have not challenged. Physical improvements to the land must inure to the benefit of the owner unless otherwise contemplated by the agreement. Furthermore, in arriving at the value of the home the fact that it sits on improved land has been taken into account.

[27] For completeness, sometime before the marriage Mr. Meyers secured a loan from Mrs. Carol Jarecki, the Petitioner's mother in the amount of \$250,000.00. This loan was used to purchase a restaurant and beach room business which Mr. Meyers now operates as his separate property. Mr. Meyers properly bore the responsibility of meeting the monthly payments but has been delinquent in paying this debt. The balance of this loan as at February 2008 was \$146,101.00. He has asked the court to deduct this sum from his share of the matrimonial home. I will therefore order that the remainder of his debt to Mrs. Carol Jarecki including any interest accruing be deducted from the payment of his one-third share of the matrimonial home (\$205,666.67) and the balance only paid to him. Ms. Jarecki is allowed to buy Mr. Meyers's one-third share of the house within two months from the date of this judgment or at such further time as the parties may agree.

[28] I shall now consider the second issue which is how the rental income is to be divided and whether any monies from that income is now due and owing to Mr. Meyers.

[29] Ms. Jarecki says that it was agreed between her and Mr. Meyers that the rental income should be applied towards the repairs and maintenance of the matrimonial home and that the remainder of the proceeds of the rent would be divided as to one-third to Mr. Meyers and two-thirds to Ms. Jarecki.⁴ Mr. Meyers says differently, he says that the rental income was to be divided **before** the payment of any maintenance and repairs. He complains that Ms. Jarecki's bills were being paid from the rental income and that he has not collected his share of the rental income since the home was rented. He is now claiming his one-third

share of the rental income from the inception of the rental arrangement.

[30] Ms. Jarecki says that Mr. Meyers was the only person to access the account from April through November 2007 and that she never withdrew any monies until she required money to pay for maintenance costs.

[31] I find that Ms. Jarecki's personal bills are not being paid from the rental income. I take full account of the diligent accounting done by Ms. Jarecki. Mr. Meyers took no issue with the accounts. These accounts reflect that the rental income is being channeled to do repairs for the matrimonial property and that her electricity bills are charged to her credit card. I also find that the rental income was to be divided as to one-third to Mr. Meyers and two-thirds to Ms. Jarecki after first paying for repairs and upkeep of the matrimonial property. The balance of \$4,426.99 in the joint account at Banco Popular⁵ represents the balance of the rental income available for distribution between the parties at the date of the hearing. Mr. Meyers is entitled to one-third of that. I therefore award Mr. Meyers the sum of \$1,475.66 representing his one-third share of the rental income as of that date. In addition, Ms. Jarecki is to pay him one-third of any rental collected less maintenance of the house until she has purchased his share in the house.

[32] Now to the third issue which is whether Ms. Jarecki should be granted sole custody of the child of the family.

[33] Ms. Jarecki claims that Mr. Meyers does not take equal responsibility for the child of the marriage. In particular that she has the burden of caring for her financially and is only reimbursed by Mr. Meyers months later, that he spends slightly less than one-third of his time with the child and that he allows the child to overnight with the babysitter at the babysitter's home. I have considered Mr. Meyers' explanation about this overnight arrangement which is that they did this during the marriage to allow their daughter to attend church with the babysitter. (The parties may care to reflect on what message they are sending to their daughter if in her eyes churchgoing is relegated only to help so to speak).

[34] Section 44 gives the Court the very wide power to make **“an order as it thinks fit for the custody and education of any child of the family who is under the age of eighteen.”**

⁴ See para. 19, 2nd Affidavit

⁵ See Exhibit LJ 4, 2nd Affidavit

The accepted learning in custody matters is that the court shall regard the welfare of the child as paramount and that the Court must have regard to all the circumstances of the case including the wishes of the parents and of the child if that child is of age to do so in determining what is in the best interests of the child. The child is three years old, too young for her wishes to be considered. See Section 3, Guardianship of Infants Act.

[35] I have considered all the circumstances of the case and in particular Ms. Jarecki's concerns that the child overnights at the babysitter's home whenever she is in the care of Mr. Meyers, that Ms. Jarecki is not from the BVI and that in her field of work she might be required to travel sometimes.

[36] I find on the evidence that Ms. Jarecki has been the constant caretaker of the child since her birth and that she is a capable and loving mother. I also find that though Mr. Meyers loves his daughter and is interested in her welfare he is unable to give her the level of care and attention she needs because of the role he plays in his business which obviously demands a lot of his time. Further I find that he has not lived up to his financial obligations as his financial contributions are not timely. A child's basic needs cannot be deferred until a later date and it is unfair to put the burden on the other parent. Both parties have a duty both legal and moral to maintain their child.

[37] Undoubtedly, children of tender years benefit from the love, guidance and care of both parents equally and joint custody will be in the child's best interest. There is nothing on the evidence which persuades me that Mr. Meyers' behaviour is so inimical to the child's welfare so as to deprive him of a full say in her care and upbringing. In all the circumstances I am of the view that it is in the child's best interest to award custody to the parties. I therefore award joint custody of their daughter to both parties with care and control to Ms. Jarecki. Mr. Meyers is to have liberal access at specific times to be settled between the parties having regard to their work constraints. For the avoidance of doubt each parent is to have equal access to the child during her school vacations and it is recommended that because of her tender years that she should spend half of each vacation with both parents rather than alternate vacations.

[38] Now to the fourth issue which is the amount of maintenance Mr. Meyers should pay for the child of the family.

[39] Ms. Jarecki seeks an order that Mr. Meyers pay the sum of \$300.00 per month as

maintenance for their child.

[40] I have considered Ms. Jarecki's and Mr. Meyers' present financial situation. Ms. Jarecki earns \$3,677.75 (gross) per month to be augmented by yearly increments. Ms. Jarecki claims she has total monthly expenses of \$2,860.00. From this sum I have deducted the amount of \$300.00 for after care activities as the child of the marriage is not presently enrolled in any such activities although I appreciate that this is contemplated when the child attains the appropriate age. This leaves her with a surplus of over \$1,000.00 from which the necessary taxes and insurance fees has to be deducted.

[41] Mr. Meyers is now paying monthly school fees for two children of his first marriage in the amount of \$1,166.67 and half of their child's school fees in the amount of \$241.21 monthly. In addition to that he has recurring monthly expenses of \$1,600.00. Whilst Mr. Meyers does not pay himself a salary from his business he states that the business earns \$130,000.00 per annum and that the income is used to pay business expenses, his bills and other living expenses. He further says that his business expenses totals approximately \$100,000.00. Mr. Meyers has not presented any form of proper accounting for his business. I find it bordering on the miraculous that according to Mr. Meyers' his business makes a profit of \$30,000.00 per annum only when he has expenses totaling \$3,007.88 plus he has the obligation of paying Mrs. Carol Jarecki each month for the loan he received. I find that all Mr. Meyers bills are being paid from the business account and that the \$100,000.00 expenses includes all his personal bills and other living expenses. I therefore do not accept that he has made full disclosure of his income and will draw the adverse inference that he earns more than he has disclosed.

[42] On the whole of the evidence it is clear that the parties enjoyed a fairly comfortable standard of living and still do and that they both expected their child to have the benefit of that had the marriage survived and had each party met his or her obligations to their child.

[43] Having regard to Mr. Meyers' financial position I find that the sum of \$300.00 is not unreasonable and that he has the financial means to make that payment. Mr. Meyers is therefore ordered to pay Ms. Jarecki the sum of \$300.00 per month as maintenance for the child of the marriage. In addition he is ordered to pay half the costs of her after school activities when she commences those activities upon proof.

[44] I shall now consider the fifth issue which is how the furniture in the matrimonial home is to

be divided.

[45] Mr. Meyers is now claiming a one-third share of the furnishings in the matrimonial home. In August 2004 Ms. Jarecki's mother loaned the parties the sum of \$80,000.00 to complete and furnish the matrimonial home. Ms. Jarecki says that \$50,000 of this sum was paid from their joint account between July and November 2005 and that she bore the responsibility of repaying the balance of \$30,000.00 which she paid off on 30th June 2006 with interest of \$3,209.94. Ms. Jarecki also says that when Mr. Meyers left the matrimonial home he removed all the tools valued at \$10,000.00 from the property which were bought for construction and maintenance of the matrimonial home. Mr. Meyers says that the tools were purchased from his personal funds and belong wholly to him.

[46] I do not accept his explanation that he bought the tools out of his personal funds and that they are his property. I find having regard to how the parties constructed the home and managed their affairs that Ms. Jarecki has a two-thirds share in them. She gave a value of \$10,000.00 which I accept. Mr. Meyers therefore has to pay her \$6,666.67. This sum is to be set off against the value of his one-third share in the home.

[47] The parties gave no evidence as to how the \$80,000.00 was apportioned between construction and furnishings. I will treat \$50,000.00 of the loan as having been used to complete the matrimonial home and the remaining \$30,000.00 as having been applied to furnishings. In keeping with the parties agreement of how the shares in the matrimonial home is to be apportioned I will award two-thirds of that sum to Ms. Jarecki. As she repaid the entire sum of \$30,000.00 plus interest (\$3,209.94) it follows that Mr. Meyers will have to pay her one-third of that amount in the sum of \$11,069.98. This sum is to be set off against the value of his one-third share in the home.

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

(1) Ms. Jarecki is to pay Mr. Meyers the sum of \$205,666.67 (less the debt owed to Mrs. Carol Jarecki) representing his share of the matrimonial home within 2 months from the date of this judgment or at such further time as the parties may agree.

(2) Ms. Jarecki is to pay Mr. Meyers the sum of \$1,475.66, being his share of the

proceeds in the joint account at Banco Popular in the sum of \$4,426.99 within 7 days from the date of this judgment. In addition Ms. Jarecki is to pay him one-third of any rental collected less maintenance of the house until she has purchased his share in the house.

- (3) In respect of the furnishings in the matrimonial home Ms. Jarecki is awarded the sum of \$11,069.98. That sum is to be set off against Mr. Meyers one-third share in the home.
- (4) Mr. Meyers is to pay Ms. Jarecki the sum of \$6,666.67 representing her share of the tools purchased for constructing the matrimonial home. That sum is to be set off against Mr. Meyers one-third share in the home.
- (5) Joint custody of the child of the marriage is granted to both parties with care and control to Ms. Jarecki and liberal access to Mr. Meyers.
- (6) Mr. Jarecki is to place the \$50,000 given to her by her uncle as a gift on the marriage in a trust for the child of the marriage.
- (7) Mr. Meyers is to pay \$300.00 per month as maintenance for the child of the marriage.
- (8) Mr. Meyers shall pay half the medical and educational expenses of the said child of the marriage and half her after school activities upon production of proof of same until the child attains the age of 18 or completes her education whichever is later.
- (9) Each party is to bear his or her own costs.

Rita Joseph-Olivetti
Resident High Court Judge
British Virgin Islands