

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

BVIHMT2007/0015

BETWEEN:

MARK BAILEY

Petitioner

AND

BETTY LOU BAILEY

Respondent

Appearances:

John Carrington of Mc W Todman & Co. for the Petitioner
Tanania Small-Davies of Farara Kerrins for the Respondent

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2010: January 18, February 22, March 2
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Judgment

[1] **Joseph-Olivetti J:-** This matter has an unfortunate history through the court and to my mind highlights the need for a Family Division. On 30 January 2009 I delivered a judgment in which, among other orders, I made an interim order in respect of the education of the elder child of Mr. and Mrs. Bailey and ordered that final determination of that issue be set down for hearing in April 2009 on a date to be fixed by the Registrar. Surprisingly, the matter finally came before me on 18 January 2011 almost 2 years short of the time stated in the judgment.

[2] I feel compelled to make the following observations. The Court Office and specifically, the case managers are mandated to set the court's timetable in compliance with any directions given by Judge or Master. I do not know precisely what happened. From the file I see that fixtures were aborted on May 22, 2009 and 5 June 2009 at the request of Mr. Carrington, Counsel for Mr.

Bailey because he was going to be out to the jurisdiction. Then I remark a letter dated 29 July 2009 from Ms. Cameron of Farara Kerrins to the Registrar advising that the proposed date for hearing of 23 July 2009 was not convenient to her as she had just received conduct of the matter and was not sufficiently familiar with it. Counsel stated, “We appreciate the limitations of Her Ladyship’s schedule but will be grateful if this matter is set for a date in the future and sufficient notice be provided in relation thereto”.

[3] I also note a letter to the Registrar from Mr. Carrington, dated 28 September 2010 in which he stated that the matter of Nicola’s education remained outstanding although it had been listed on several occasions since the Judgment. He added: “It’s a matter of grave concern to the Petitioner that this should be resolved as the results show that Nicola is not making any progress at the school in Virgin Gorda” and further asked for the earliest convenient date. This letter was copied to Mrs. Small-Davis, of Farara Kerins counsel for Mrs. Bailey. We have all unwittingly done this child a real disservice and I am sorry for that. In the future the Court Office must do well to bear in mind that as we have no Family Division that matters concerning the affairs of children should be given priority listing.

[4] In my judgment of 30 January 2009 in anticipation of the April hearing. I ordered that the Principal of the Bregado Flax Educational Center “BFEC” serve a report by 15 March 2009 and gave leave to both parties to file additional affidavits on Nicola’s education by 30 March 2009. I stated that Mrs. Bailey was to ensure that the BFEC give a report on Nicola’s performance there to date and on the special facilities afforded to her. I also indicated then that the court would want to interview Nicola again. In view of what has transpired and the several reports now before me I do not think a further interview with Nicola is necessary especially as her father has indicated her wishes to the court and that has not been disputed by Mrs. Bailey.

[5] I note that as long ago as 4 March 2010 Mr. Carrington, filed an affidavit by Dr. Rubaine, a clinical psychologist. Mrs. Bailey the mother, did not file any

evidence, not even in relation to some of the observations made by Dr. Rubaine which touched and concerned both girls and were patently adverse to their present situation and reflected adversely on Mrs. Bailey's conduct.

[6] At the hearing on 18 January 2011 the father indicated that he would not object to Nicola remaining at BFEC as she had told him that she wanted to remain there and as she was nearly 17 he decided to go along with her wishes. Her mother it would appear wishes her to remain there as it was the mother who had placed her there originally. This is all very well and good, wanting to take a child's wishes into consideration. However, the court cannot simply rubber stamp a child's or a parent's wish and any order we make we must be satisfied is one that is in the best interests of the child. See section 3 of the Guardianship of Infants Act CAP 270¹ where it states that the court shall have regard to the welfare of the infant as the first and paramount consideration.

[7] In the light of Dr. Rubaine's report I could not make such an order as to do so would have been tantamount to abdicating my responsibilities. Accordingly, in order to make as informed a decision as possible I directed that the mother should be given an opportunity to submit a report from Dr. Rhymer whom she and the girls had also been seeing. (The mother had refused to see Dr. Rubaine for family counseling). I also requested an update from Dr. Rubaine. In addition, I drew both counsel's attention to the fact that Dr. Rubaine's report raised serious concerns about the younger girl as well and that the Court would re -visit her situation, albeit there was no application before the court in respect of her. The matter was adjourned to 22 February. The court has jurisdiction to vary or discharge an order with respect to children so far as it gives care to any person or provides for contact with, or the education of a child under 18 in, or in connection with matrimonial proceedings where the matrimonial proceedings are continuing proceedings for divorce in respect of the marriage of the parents of the child.²

¹ The Laws of the Virgin Islands, revised edition 1991, Volume 5, CAP 270

²Family Law Act 1986 UK, ² Nicholas Wall, G.J. Maple, Mark Overall, A.K. Biggs Rayden and Jackson on Divorce and Family Matters 17th Edition Volume 1 chapter 37.8 incorporated in our law by the West Indies Associated States. Cap. 80.

[8] On the 22 February 2011 when we reconvened we had a supplemental report from Dr. Rubaine but nothing from Dr. Rhymer. Instead, Mrs. Small-Davies, apologetically sought an adjournment on the basis that Dr. Rhymer had promised the report by 14 February 2011 as she could not meet the first date ordered of 8 February 2011. Counsel explained when that was not forthcoming; she telephoned Dr. Rhymer's office and learnt that the doctor was sick.

[9] The application for a two week adjournment was vigorously opposed on what the court considered good grounds and the court refused the application and proceeded to consider the matters before it. I remark in relation to Shelby, the younger girl, that Mrs. Small-Davies submitted that she did not take any notes about the court being concerned about the younger child on January 18 2011 and that she made no submissions in relation to her on the basis that she had no instructions. She therefore held to her position that both the Court and Mr. Carrington were mistaken.

Nicola's continuing education

[10] I shall consider the question of Nicola's continuing education first. She is 16; she will attain her 17th birthday on the 18 May 2011. Currently, she attends the BFEC on Virgin Gorda. We recall that the initial decision to send her there was her mother's and that she did so against the advice of the Ministry of Education who had initially placed the child at the Technical and Vocational Institute here on Tortola and without any consultation with her father. Part of the reason the court allowed Nicola to remain there in the interim was on the mother's evidence that the school would provide a special teacher to assist her.

[11] At the hearing of January 18, Mrs. Small-Davis handed in a letter from the principal of the BFEC dated 17 January 2011 and a letter dated 18 January 2011 from Mrs. Ketlene Bowman- Penn of Penn's Learning Centre.

- [12] The Principal stated that in January 2009 Nicola entered the school and that she came **with several reports on her medical and academic situation**. He explained that the school offered remedial classes in English and Mathematics to Nicola at that time. However, no such classes were offered in the 2009-2010 academic year as they had no teachers. The principal stated that they had 2 teachers on staff now who would be able to help and Nicola would receive help in the two core subjects of English and Mathematics. She observed that Nicola showed good participation in Physical Education and she could do good **practical exercises** in Food and Nutrition, Information Technology and Art. She also noted that progress in reading subjects is severely affected by what **appeared to be her rate of processing and memory** and that once she was expected to write a test she seems to be unable to recall or work with the information.
- [13] It was also stated that Nicola despite her challenges is interested in school and made a great effort to follow her lessons. Mrs. Ketlene Bowman-Penn letter indicates that she has been working with Nicola for two terms with English Language and Reading. She observed that she has a short attention span but finds that with positive reinforcement and practice she can sharpen her focus and build up her reading skills. She also stated that she has a charming personality and gets along well with other children who attend the centre. She submitted a recent poem written by Nicola. It is clear that much needs to be done here.
- [14] Dr. Rubaine's observations and recommendations were not refuted by any evidence before the court although it was roundly criticized by Mrs. Small-Davis. Dr. Rubaine was of the opinion that the traditional based education available at BFEC was not suitable for Nicola because of the findings of the batteries of test carried out by various professionals in the field of psychology and neuropsychiatry which she had reviewed. Those reports were already before the court and were also reviewed by the Social Worker in a very comprehensive report they submitted late for good reason. Nicola's disability

can be summed up as Mixed Expressive-Receptive Language Disorder and attention and global development language disorder.

[15] Dr. Rubaine also explained that the girl's academic difficulties have affected her peer relationships and that her **cognitive difficulties** create challenges in her navigating the nuances of peer related interactions Dr. Rubaine stated: "As a result she has difficulty maintaining friendships in her peer group who expect her to comprehend matters as they do. They lose patience with her and the friendship disintegrates. For example, Nicola has disclosed on numerous occasions she has been asked to relocate to another school, told by other students that they do not like her and on occasion have threatened to beat her up. Nicola conveys extreme distress about these negative peer interactions and when queried seems quite confused over her peer responses."

[16] I was asked by Mrs. Small-Davis in rebuttal to consider that the Principal reports that Nicola gets on well with her peers and that Nicola herself is reported to have told her father that she wants to remain at the BFEC must cast doubt on Dr. Rubaine's observations. I do not agree. As Mr. Carrington submitted, and in my view properly, there is no indication in the report that the Principal has ever had any one on one discussion with Nicola and therefore Dr. Rubaine's opinion is to be preferred to hers. In my view, any responsible principal being aware that she/he was concerned with a child whose placement at the school was only temporary and was subject to a court order would have given details of any personal interviews conducted with the child. Next, I find that Nicola herself is most likely to try to keep the peace between her parents and that might be why she chose to tell her father that she wanted to stay at BFEC rather than the truth. In my view, in reality, the child has made herself the sacrificial lamb on the altar of her parents' discord, a not uncommon stance to take for a child of a broken home much less one who is mentally challenged. I am of the view that she would have been more candid with Dr. Rubaine and I accept the doctor's findings on this without any reservation.

- [17] In my judgment on review of the reports made available to me the traditional education offered at BFEC is unable to cater for Nicola's special needs and that to allow her to continue at that school would be to her detriment. I accept Dr. Rubaine's recommendation that she be sent to an establishment where she can learn life skills and will have the ability to pursue a vocation of her choosing, Dr. Rubaine stated that Nicola has expressed interest in becoming a professional photographer and in cosmetology. (I recall in my earlier interview with her that she had also stated an interest in photography). And, she expressed the opinion that with the right support Nicola could be successful pursuing either one of these endeavors as she considered them be within her current capability.
- [18] I note that there is a dearth of suitable facilities here including the possibility of home schooling. In addition, the court, not to do a disservice to the Technical and Vocational Institute, indicated at the hearing that the court would not consider it as a viable option. This is because I have had a report about that institution to the effect that the Government itself does not recognize the certifications granted by the establishment. I reflected on that in open court at the last Assizes and no one whether from the school or the Department of Education came forward to refute that allegation.
- [19] Accordingly, the only viable option is that of having Nicola attend schooling abroad. I note that she has already lived and attended school in Canada. She is a citizen of Canada, as is her father. Mr. Bailey has once again indicated that he is still willing to relocate to Canada to facilitate this although he has expressed reservations as to how much benefit the child can derive from this because of her age but he is willing to make the sacrifice. (we recall that since the original hearing Mr. Bailey relocated here from St. Thomas to be there for his children). No doubt, we lost valuable time but I am sure that a little of the right education however late is better than nothing and what is more, Dr. Rubaine in her supplemental report did not say it is too late. Therefore, every effort must be made to help Nicola. The impression I get from the mother's insistence that Nicola remain at the BFEC in the face of the adverse report

from Dr. Rubaine and that of the school itself, is that as far as she is concerned Nicola has no special educational needs and that she is well fitted for life at BFEC. But this attempt to escape a stark reality is of no benefit to the child and begs why such a stance in the face of the wealth of reports on file documenting Nicola's special needs.

[20] Accordingly, on consideration of all the circumstances I am of the view that Mr. Bailey should be granted permission to take their daughter to Canada to facilitate her attending an establishment which would provide the help as indicated by Dr. Rubaine and I so order. Both parents are to take all necessary steps to source a suitable educational facility in Canada for Nicola and to agree on all financial and other necessary arrangements. Both are to report by Affidavit to the court on steps taken on or before 23rd March and this is to be set down for further consideration on 28 March 2011.

Concerns raised about Shelby

[21] Orders concerning custody and welfare of children are not like other orders of the court as the court has continuing jurisdiction to revisit orders. The inherent jurisdiction of the court with respect to children derives from the right and duty of the Crown as **parens patriae** to take care of those who are not able to take care of themselves³. Furthermore, I am of the opinion that if an adverse report about a child subject to the court's jurisdiction comes to the attention of the court that the court cannot turn a blind eye to it simply because no party has made a specific application to the court on the issue. It is the duty of the court under its inherent jurisdiction to see that the child is properly taken care of and to cast "a cloak of protection over the child"⁴. The important consideration is to deal with it once the parties have an opportunity to be heard. I reiterate that I drew the adverse report to the attention of counsel at the hearing on 18 January 2011, I therefore consider that the mother has had

³Nicholas Wall, G.J. Maple, Mark Everall, A.K. Biggs Rayden and Jackson on Divorce and Family Matters 17th Edition Volume 1 chapter 42.1

⁴ Nicholas Wall, G.J. Maple, Mark Everall, A.K. Biggs Rayden and Jackson on Divorce and Family Matters 17th Edition Volume 1 chapter 42.3

sufficient time to give instruction on that matter, that she did not do so is regrettable.

[22] Dr. Rubaine noted that Shelby was seen 3 times in contrast to Nicola's 7 visits and that Shelby only attends when she feels like it. She is allowed to do the same as regards visits to her father. Dr. Rubaine states at her report- "Another dynamic that must be explored is the ongoing violation of the court's visitation order, particularly as it relates to Shelby. **Shelby is allowed to decide when she will attend her every other week visitations with her father. This is unacceptable. According to Shelby, she does not attend visitations because she does not feel like it.** In my clinical opinion this is not a valid reason for refusal to attend visitations. It is imperative that children be strongly encouraged to have healthy relationships and interactions with both parents."

[23] The court was made aware of this situation before and had already indicated to the mother that, that was not acceptable.

[24] Shelby is now 10 years old. Dr. Rubaine stated further: "I have many clinical concerns about Shelby who describes herself as mean and tells me that she does not interact well with her peers at school. Further, the dynamics between Nicola and Shelby suggest to me that Shelby who is younger, bullies Nicola without much intervention on Mrs. Bailey's part." (See paragraph 11)⁵.

[25] The other major disquieting aspect is the apparent marginalization of her father. Dr. Rubaine observes at paragraph 12 of her report- "Nicola and Shelby both completed the House-Tree-Person (HTP) drawings as well as a family portrait. HTP drawings are subjective assessment tools of a client's emotional functioning. Nicola and Shelby both completed their drawings independently of each other. It is clinically significant that in both girls' drawings, the male characters were marginalized and weaker than the larger than life female characters. It is also noted the near absence of a male

⁵ Dr. Virginia Rubaine, Affidavit of 4th February 2010

presence in the family portraits. **This suggests to me that both girls are being impacted negatively by the open hostility displayed by Mrs. Bailey towards Mr. Bailey. The repercussions of this may have a lasting impact on the girls and distort their perception of healthy male/female relationship.**

[26] Dr. Rubaine also remarked:-“It is this clinician’s opinion based on the interactions of Shelby, Nicola and Mr. Bailey as well as the children’s self-report, that their father is a thoughtful and competent parent. **Mr. Bailey understands Nicola’s limitations extremely well and has been unsuccessfully advocating for the proper placement to ensure her future success. Mr. Bailey has cooperated with the therapeutic process, is open to feedback and immediately effects therapeutic goals.** His competent physical care of the girls is always evident in their grooming and mode of dress”.

[27] The court has the same positive opinions of Mr. Bailey having seen and heard him in court since we embarked on this case.

[28] Dr. Rubaine’s recommendation is that the Baileys’ would benefit from a Parental Coordinator. Dr. Rubaine explained:- “Such a person would be an impartial professional who can help both parents navigate potential landmines of hostility and resentment that may impair good decision making as it relates to Nicola and Shelby. This person would be a liaison between both parents but a special advocate for both Shelby and Nicola’s best interest”.

[29] This is well received. I therefore order that both parents make the necessary inquiries including at the Social Welfare Department as to the availability of such a professional and to agree and appoint one. A report by way of Affidavit is to be submitted to the court in this respect on or before 23 March 2011 and this matter will be further considered on 28 March 2011.

[30] Mr. Carrington told the court that the father had made a request of the mother **in January 2011** to be allowed to take the younger child to school and that

the mother agreed to consider it but had not responded to date. The mother was in court and neither she nor counsel on her behalf sought permission from the court for the mother to respond. There was silence. A caring father cannot be treated as Lazarus begging for crumbs from his ex-wife's table. Her implacable silence which was noticed not only by Dr. Rubaine, but by the Social Worker reminds me of the relentless silence of Veroschka in Leonid Andreyev's short story of the same name, a silence which had very tragic consequences for the whole family.

[31] The request is reasonable and certainly will allow Shelby and her father much needed time to heal the widening breach between them. I therefore order that Mr. Bailey is hereby permitted to take Shelby to school on mornings as he requested until he leaves the jurisdiction for Canada.

[32] Further, whenever Mrs. Bailey is going abroad for more than three days she should consult with Mr. Bailey with a view to him having the children during her absence if he can accommodate them. Again this will foster better relations with the children. This was a matter raised by Dr. Rubaine and not refuted and has been one of Mr. Bailey's continuing concerns as can be gleaned from the Court's file.

[33] **Costs**

Both parties are to bear their own costs.

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Rita Joseph-Olivetti
Resident Judge
Territory of the Virgin Islands

