

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

(CIVIL)

BVIHMT 2007/0034

Between

D Petitioner

and

D Respondent

Appearances:

Susan Demers of Price Demers and Co. for Petitioner

Mr. D in Person

2011: December 13

2012: February 8

JUDGMENT

1. **Joseph-Olivetti J:-** This is a family matter and having regard to some of the allegations raised herein which might have an adverse impact on the parties and their children if made public the court **sui motu** has ordered the court file to be sealed. In order to further protect the parties the court will refer to the Petitioner, Mrs. D (as “the Mother”), and to Mr. D as the Father. The Mother, after the parties were divorced filed an application on 5 February 2008 seeking certain ancillary relief. Happily some have been resolved in the interim leaving two main issues for determination. These are:- (1) whether Mr. the Father should be given unsupervised access to the two children of the family and, (2) whether the Mother is entitled to an interest in property in St. Vincent acquired by the Father before the marriage .

2. **Brief Procedural Background.**
3. Between its filing and final hearing on 13 December 2011 the application was adjourned on several occasions for reasons not always readily apparent from the court’s file. What is certain is that on 17 July 2008 a consent order was approved by the Hon. Ann E. Henry Ag. granting custody to the Mother and ordering the Father to contribute towards the children’s maintenance and to pay half their educational and medical expenses. Henry J. also ordered that trial of the two outstanding issues be adjourned to a date to be fixed by the Registrar. Both parties were represented on that date. I note that the Mother’s lawyer holds a Legal Aid brief.

4. On 18 November 2009, I ordered:- (i) that the two outstanding issues be adjourned to a date to be fixed by the Registrar in the new term; (ii) that prior to the hearing the Father do inform the Mother and the court whether he wished to cross-examine a witness resident in St. Vincent who swore an affidavit on behalf of the Mother (“the Mother’s witness”).

5. Subsequently after further adjournments on 13 December 2011, I granted the Father’s lawyer leave to withdraw,(he ran into difficulties with paying fees) heard the application, reserved my ruling and made an interim order granting unsupervised access to the Father every other Sunday from 9a.m -5p.m commencing 29 January 2012 until further order.

6. Introductory Facts

7. The parties (both citizens of St. Vincent and the Grenadines) entered into this marriage on 11 April 1998 in St. Vincent. The Mother then aged 21 was and is a domestic worker and the Father, then aged 26, a mason. At the time the Father lived and worked in Tortola. They both then travelled to Tortola and set up home in rented accommodation there. In the fullness of time the parties had two children, both girls, both born here, one on 14 September 2000 and the other on 7 September 2003.
8. At some uncertain period, the Mother temporarily returned to St. Vincent, took up residence in a house owned by the Father prior to their marriage and dwelt there with two children for no more than three months. They all returned to Tortola where they have lived ever since.
9. The Mother, prior to the marriage, had a daughter by another union and that child lived with the family. She was born on 17 July 1995. What can be gleaned from the evidence is that the step daughter was attending school in October 2005 and apparently made a complaint of sexual abuse against the Father. The Mother claimed she confronted the Father and he admitted the abuse and apologised and that they both spoke to their pastor who advised her to draw up an agreement for maintenance and to send him away. This she did. The Father did sign an agreement which he later reneged on. However, before this court he denied the allegation and of course is seeking proper visitation rights to his two daughters. He also alleges that soon after the Mother threw him out she openly started an affair with another man, and wonder s if that was not the motive for her actions.
10. The Mother subsequently filed for divorce on 2 April 2007 and the Decree Nisi was granted on 4 June 2007 based on an amended petition of the same date..
11. I shall now consider the first issue.
12. **Issue 1- whether the Father should be given unsupervised access to the children of the marriage.**

13. The Law

14. Section 44 (1) of the **Matrimonial Proceedings and Property Act 1997** ('the MPPA') clothes the court with authority to make an order for the custody and education of any child of the family who is under 18 years in any divorce proceedings. And, section (1) of the **Guardianship of Infants Act Cap 270** enjoins the court to consider the welfare of the child as the first and paramount consideration in making any orders touching the custody and upbringing of children. ¹
15. Now it must be said that the Mother has no objection to the Father seeing the children but objects to him having unsupervised access to them, The Mother's objection is of course based on the allegation of what she termed 'inappropriate behavior' by the Father with the step daughter sometime in October 2005. This allegation was apparently made by the step daughter herself to her teacher who reported it to the Mother. We have no evidence from the girl herself, or from her teacher or from the pastor who allegedly met with the family after the disclosure or from the doctor who allegedly saw the child or from the police to whom a report was allegedly made by the Mother. The Mother's evidence on this is that she requested no action from the Police as she thought the best way to deal with the situation was to remove herself and the children from the Father's proximity. As already stated, the Father has roundly denied this allegation.
16. Faced with this difficulty the court has several options open to it. Although this is a family matter in which an allegation of sexual abuse has been made the standard of proof remains the civil standard; she who asserts must prove it on a balance of probabilities. And it almost goes without saying that the more serious the allegation the more cogent must be the evidence relied on. See **Rayden and Jackson on Divorce and Family Matters**. 17th edn. Para 16.72 p. 505. I can therefore dismiss the Mother's claim as being

¹ "Where in any proceeding before any Court the custody or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the Court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father"

unfounded or I can summon all the persons who have any knowledge of this issue to attend to give evidence and hold a full scale trial. However, I ask myself having regard to the time that has elapsed and the nature of this allegations which do not directly affect the children with whom we are primarily concerned whether a trial would be those children's best interest. I think not. Neither of course is the first option if there is even a kernel of doubt raised about the Father's ability to look after his children properly.

17. I however remain mindful that where the welfare of children is involved that the court is called upon to act in the best interests of the child and this must necessitate taking no steps which might prove harmful to the child. From time immemorial and for good reason the court has had **parens patrie** jurisdiction which it exercises on behalf of the Crown as it is the Crown's duty to take care of those who are not able to take care of themselves. See **Rayden and Jackson op.cit.** Para. 42.1 p. 1516. Allegations of abuse, especially sexual abuse by a parent, are not to be taken lightly and likewise one cannot punish a parent on mere allegations. I do not myself have the skills to determine on examination of the Father whether the children are at risk from him but I can certainly pray in aid the help of professionals in assisting me to decide this issue. Accordingly, I deem it fit and specifically in the interests of the children who are now 11 and 8 years old that all the children of the family, including the step daughter, together with the parents attend and be interviewed by a Government psychologist to ascertain if the children are at risk in the light of the allegations.
18. The psychologist must submit a report to the court within one month hereof. The matter will be fixed for final determination on xxx March and the Court file must be sealed. The interim order on visitation will continue until further order as I have not heard any concerns voiced after the scheduled first visit..
19. **Issue 2 -Whether the Mother is entitled to an interest in property in St. Vincent acquired by the Father before the marriage.**
20. It is helpful to bear in mind the relevant law concerning financial provision for parties to a marriage on divorce. The court's jurisdiction is contained in the **MPPA** sections 23 and 25

which give the court the power to make financial provision and property adjustment orders for a party to a marriage on proceedings for divorce or nullity of marriage.

21. And, the MPPA expressly stipulates that in deciding whether to exercise the powers given by sections 23 and 25, and if so in what manner, the court shall have regard to section 26(1).

22. Section 26(1) enjoins the court to take into consideration all the circumstances of the case including:- **“(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future; (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future; (c) the standard of living enjoyed by the family before the breakdown of the marriage; (d) the age of each party to the marriage and the duration of the marriage;(e) any physical or mental disability of either of the parties to the marriage; (f) contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home under section 49; (g) any order made under section 49 (this is not applicable); (h) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage, of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.”**

23. And, the ‘tailpiece’ to section 26 (1) requires the court, **“to so exercise those powers as to place the parties, so far as it 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 had properly discharged his or her own financial obligations and responsibilities towards each other”**.

24. The Facts

25. The parties gave evidence by way of affidavits on which they were cross-examined. In addition, the Mother relied on the affidavit of the witness which stands unchallenged as the

Father indicated he has no issue with it.

26. First, it is common ground that the Father is the owner of one house lot at Belair. St. George in St. Vincent. It is also undisputed that this land was given to him by his father, while yet a teenager before his marriage. However, the land was only legally conveyed to him on 18 April 1997. See Exhibit AD1 to the father's affidavit of 16 July 2008.
27. I accept the Father's evidence that he had built a house on the land although it was not wholly complete at the date of the marriage in that that the house had an outside bathroom but no indoor toilet and face basin. The Mother in para. 11 of her affidavit of 10 June 2008 deposed that when she met the Father there was "**a structure**" on the land consisting of a living room, kitchen and one bedroom, and an outside toilet. This so called 'structure' was without doubt the house the Father spoke of yet it apparently it was difficult for the Mother to say so.
28. I find, despite the Mother's claim to the contrary, that the house was never the family home as the family' resided in Tortola. The Mother and the children only occupied the house in St. Vincent on a temporary basis for 2-3 months when the Mother returned to St. Vincent to await the renewal of her work permit.
29. Now the crux of the Mother's case is based on her allegation that she paid for the windows on the indoor bathroom, the toilet and pipes. In addition that she paid for furniture from Courts and a washing machine and that she put actual physical labour into the addition of 2 bedrooms and a bathroom. She sought support from the evidence of her witness.
30. The Mother's witness is a contractor and the Mother's cousin. His testimony is to the effect that the Mother asked him to build a bathroom for the house at Belair and that at the time the Mother resided there with her 2 daughters. He installed a toilet, ran water pipes to same, plastered bathroom walls and floor, paved the side of the yard where pipes were laid, made a concrete cover for the toilet catchment and installed 2 bathroom windows. He said the Mother paid his bill and that as far as he was aware the money came from her. The cost of this works including material was \$1,371.91, EC\$ presumably, as the work was done in St. Vincent. See MHD 4 Exhibit to Mother's affidavit 10 June 2008. The Father's

evidence on this is in essence that he sent the money to the Mother to enable her to have the indoor bathroom installed to make it more comfortable for their sojourn there.

31. Issue 2- Discussion

32. On consideration of all the evidence I find that the Mother has not proved her case for an interest in the house amounting to US\$20,000.00. It is highly improbable that with the level of her salary as a domestic worker that she was able to make any monetary contributions to the completion of the house as claimed. Her witness's evidence does not assist her as he was in no position to say who funded the work he did.

33. I accept the Father's evidence on this as he strikes me as more credible. It is clear that the person he spoke of as the Mother's uncle was really her cousin and was the person the Mother obtained to do the work and that it was at the Father's behest and that he funded it. The work was done undoubtedly to facilitate the Mother's temporary stay in the house.

34. As for the physical labour the Mother alleged she carried out on the actual construction her evidence is much too vague to accept. She gives no time frame during which she carried out that work. It could not be during the 2 to 3 months she stayed there with the two children awaiting a work permit as it is not feasible that the Father would be carrying out such work when he was away from home and not there to contribute his own labour and supervise it.

35. As to the contributions of furniture and appliances I again find it difficult to accept that the Mother bought such furniture on "lay away" from Courts. The court can take judicial notice of the fact that Courts is a large Caribbean enterprise concerned mainly in production and selling of furniture on hire purchase. I have also had regard to the nature of the Mother's employment and even if she supplemented by market gardening it is highly improbable that she had monies available to make all those purchases as she claimed having regard to her earnings.

36. I accept the Father's evidence that the only items the Mother bought was a chest of drawers and a washing machine and that she gave it to the Father's sister when the marriage broke up. Purchases of those items are not such contributions to the welfare of the family as would entitle her to an interest in property acquired prior to marriage.

37. The law on such property is well established. In **Wheatley v Wheatley** BVI CA 6/2007 the court of appeal adopted the approach of Lord Nicholls in *White v. White* and in effect held that such property is external to the marriage and the owner in all fairness should normally be allowed to keep it..See Thomas JA [ag] para. 94.

38. I am guided by the relevant sections of the MPPA referred to above and to the evidence relied on. I am not satisfied that the Mother has made out a case for financial provision on the evidence adduced by her. This was a relatively short marriage, she is under no disability, she made no contributions monetary or otherwise to the acquisition or upkeep of the house which despite her evidence was never the matrimonial home and always the property of the Father gifted to him long before the marriage. I also find that the Mother can continue to meet her financial obligations without recourse to the Father's house. Doubtless both parties contributed to the welfare of the family but they have no matrimonial assets and in all the circumstances it does not strike me that it would be just and equitable to give her an interest in this property.

39. Costs.

40. On the issue of costs, I will adopt the usual course of ordering that each party bear his/her own costs as there nothing unusual in this case to go against the general practice.

41. Conclusion

42. In conclusion; for the foregoing reasons, the orders made herein are confirmed as follows:-

- i. The Parents together with all 3 children of the Family must attend and be interviewed by a Government psychologist

- ii. The Social Welfare Department and the Ministry of Health are required to coordinate with each other and with the parents and the psychologist to set up the necessary consultations;
- iii. The psychologist must file a report with the court on or before the 7 March 2012;
- iv. the issue of visitation will be finally determined on 12 March 2012;
- v. The interim order on visitation is continued until further order;
- vi. The Mother's claim for a lump sum payment based on the acquisition of an alleged interest in the Father's property is dismissed;
- vii. Each party to bear his/her own costs.
- viii. The Court file is to be sealed .The court will draw up the order and the court office will submit it to the relevant Government departments.

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Rita Joseph-Olivetti
Resident Judge
Territory of the Virgin Islands