

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

BVIHMT2006/0028

BETWEEN:

PATRICK ALBERT SMITH

Respondent

AND

LYDIA LAVORNE SMITH nee SCATLIFFE

Applicant

Appearances:

Richard Arthur of Hunte & Co. for the Applicant

Corine George of J.S. Archibald & Co. for the Respondent

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2011: 25 October

2012: 28 February
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Judgment

(Family Law – Ancillary Relief – Maintenance and custody of children – Interest in matrimonial home. The Matrimonial Proceedings and Property Act 1995 Sections 44, 47 and 51)

- [1] **Joseph-Olivetti J:-** In this case we are concerned with two of the almost inevitable issues which arise on the breakdown of a marriage – custody of children and ownership of the matrimonial home.
- [2] The main issues which arise are: (1) whether the custody order of 13 November 2007 which granted joint custody of the children to their parents with primary care and control to Mrs. Smith, the Mother should be varied, Mr. Smith, the Father, having made an application to do so; and (2) whether the Mother should be granted a life interest in the matrimonial home or in lieu thereof a lump sum payment.

The Basic Facts

- [3] The parties were married on 31 December 1993. They have two minor children, a boy, we shall call him "A", born 22 April 1995 and a girl "B" born 9 July 1996. The Father filed for divorce on 20 April 2006 and a decree nisi was granted on 5 February 2007. The Mother subsequently filed an application for ancillary relief on 27 June 2007 which included, *inter alia*, prayers for custody of the two children and for a life interest in the matrimonial home.
- [4] The court decided the custody issue and on 13 November 2007 granted joint custody of the children to both parents with primary care and control to the Mother. Events took an interesting twist thereafter when in or about May 2008 A left the Mother's home and took up abode with the Father. The Mother retaliated by filing a contempt application on 13 April 2009 seeking arrears of maintenance for A even though he had ceased to reside with her. To regularize matters the Father then filed an application for variation of the custody order on 18 May 2009. It is the Father's application the court is here concerned with in relation to the custody issue.
- [5] The Mother is employed with the Government of the Territory of the Virgin Islands and the Father is employed with the H. Lavity Stoutt Community College. During the currency of the marriage the parties lived together at the matrimonial home which is owned by the Father's parents, Mr. James McDonald Smith and Mrs. Ethlyn Smith. The Mother currently resides at the matrimonial home with B whilst the Father lives with A, a short distance away in his parents' home on Frenchman's Cay in a 4 bedroom 3 bathroom house. His sister and her daughter also live at the home.
- [6] I shall deal with the custody issue first.

Custody of the Children

- [7] By section 44 of the Matrimonial Proceedings and Property Act 1995 'the MPPA,' the court has the power to make any order it thinks fit regarding the custody and education of any child of the family who is under the age of 18 in any proceedings for divorce¹. And by s. 44(5) the Court has power to vary any such order at any time.
- [8] And it is well established that in such issues as custody of children that the paramount consideration is the welfare of the child. See the Guardianship of Infants Act Cap. 270 s 3.
- [9] Furthermore, in determining what is in the best interests of the child the court is entitled to take into account all the circumstances of the case including the wishes of the parents and of the child where that child is of an age that he or she can be deemed to understand the nature of the proceedings. See **Rayden and Jackson Divorce and Family Matters 17th Edn. para 36.5²**.
- [10] As already noted, since May, 2008 A has been living with the Father due to allegations of abuse he made against his mother. His move was initiated and supported by the Social Development Department who recommended the move after the Father reported the matter to them and after investigations by case worker Ms. Stacy Stoutt³.
- [11] On 5 June 2009, Hariprashad-Charles J ordered a psychological evaluation on A to be conducted by Dr. Virginia Rubaine. Dr. Rubaine in her report stated that the Mother did not cooperate with the process; she

¹ MPPA 1995 s 44

² "The Court has to have regard to the ascertainable wishes and feelings of the child in the light of his age and understanding. How far the wishes and feelings of the child should be a determinative factor varies depending on the circumstances of the particular case. The court makes its decision about the future of children having regard to, but not constricted by, the wishes of the child..." This principle is enshrined in the English Children Act 1989 but I have no doubt that it obtains here having regard to Section 3 of the Guardianship of Infants Act.

³ 8 May 2009, Affidavit of Respondent in response to contempt proceedings and affidavit in support of application to vary interim, orders

said she was unavailable at the time initial contact was made and that she would get in touch with Dr. Rubaine at a later date. She never did so⁴.

[12] After evaluating A Dr. Rubaine found that he was well adjusted due to the efforts of his father and other paternal relatives. Dr. Rubaine remarked that the Mother's non-participation in her son's evaluation could be indicative of parenting difficulties she might be experiencing with respect to both children. The doctor strongly recommended that A be allowed to remain with the Father and consideration be given to the Father being the custodial caregiver of both children with liberal visitation to the Mother.

[13] I note that A is reported by Dr. Rubaine to have expressed concerns for his sister's and his own safety at his mother's house⁵. Dr. Rubaine reported that he felt he was unfairly punished by his mother and preferred living with his father. That he saw his sister in school every day but would like to see her more. That the decision to live with his father was his own and that he describes his relationship with his Mother as unstable. That he says he is comfortable living with his father and wants the arrangement to continue. That despite this, he appears to love his mother and wishes that his parents could be reconciled. (In the court's view this is a not unusual sentiment often expressed by children of divorced parents.)

[14] The Mother, the court notes, was likewise uncooperative in making herself and B available to be interviewed by Social Workers at the Social Development Department as ordered by the court on 25 January 2011. The Department's report states that the Department was not afforded the opportunity to interview the Mother or B as the Mother failed to contact them.

[15] The Social Worker, Ms. Laurel Freeman, conducted interviews with the Father and A. The Father expressed his interest in being the primary

⁴ Bio Psychosocial evaluation of Jaamal Smith as prepared by Dr. Rubaine 11/04/09

⁵ Ibid para. 8

caregiver of both his children and expressed concerns about the Mother's ability to do so.

[16] The Mother freely admits that she is a strict parent and disciplined A when he behaved badly or had been dishonest. She maintains that he is allowed to do whatever he wants at his father's home and this is contributing to his falling grades. Significantly, she has provided no proof of falling grades. The Mother alleges that there is no supervision at the grandparents' home and in short that she wanted her son back at her home as she wanted her children to grow up together in the same house.

[17] I accept and agree with Ms. George, learned counsel for the Father, that adverse inferences against the Mother can be drawn from her lack of cooperation with Dr. Rubaine and the Social Development Welfare Officer. In fact she deliberately frustrated the Court's orders. With respect to B, Ms. George further submitted further that the Mother's behaviour was not consistent with that of a parent who had her child's best interests in mind, in that her "negative" behaviour has prevented B from being evaluated and thus B has been denied the opportunity to state her experiences and be interviewed.

[18] The Court notes that this lack of cooperation by the Mother is not only with the Court's orders. On February 11, 2010 the lawyer who had represented her since 2006 made an application to be removed from the record citing the Mother's refusal to accede to requests to meet to give instructions on this very matter. The efforts made by her then counsel are recorded in an affidavit of 11 February. On 9 March 2010 the application was granted.

Conclusion - Custody

[19] As already alluded to, it is established law that in making orders for custody or maintenance of a child the child's welfare must be the paramount consideration. The children need to be in a stable loving

environment that fosters their overall growth and well being. Having regard to all the evidence, including the two reports, this court is of the opinion that the Mother is not capable at this time of providing such an environment. Her lack of compliance with court orders and refusal to cooperate with social services does not bode well for her.

[20] I am satisfied that it is in the best interests of the children that the prior order be varied and that the Father be granted sole custody of both children with reasonable access to the Mother. He is not seeking maintenance for them from the Mother and therefore, I will not make an order for maintenance but will leave it to the Mother's good sense to assist with the children as she is able.

[21] Further, although the application for contempt is not the subject of this application I am constrained to say that it was ill-advised in all the circumstances and I trust that the Mother will be moved to take the necessary steps to discontinue it .It is in the best interests of all concerned to bring an end to this prolonged and bitter custody battle. I now turn to the Mother's claim for a life Interest in the Matrimonial Home.

Whether the Mother is Entitled to a Life Interest in Matrimonial Home

[22] Part IV of the MPPA (Sections 47 – 57) gives the court wide powers with respect to the matrimonial home.

[23] Section 47(1) of the MPPA defines a matrimonial home as

“any dwelling being used exclusively or principally as a home by one or both parties to a marriage in respect of which a decree of divorce is or has been granted, in any case where

(a) either or both of the parties or the personal representative of one of them

(i) owns the dwelling; or

- (ii) owns a specified share of any estate or interest in the land on which the dwelling is situated and by reason of reciprocal agreements with the owners of the other shares is entitled to the exclusive occupation of the dwelling or,
 - (iii) holds shares in a company which owns any estate or interest in the land on which the dwelling is situated and by reason of holding those shares is entitled to the exclusive occupation of the dwelling; and
- (b) either both of the parties owned the dwelling or specified share in land or held shares as the case may be at the date of the decree.”

[24] By the MPPA section 51 the court has power on granting a decree of divorce to make an order vesting the home (including the land on which it is situated and any land appurtenant thereto) in the parties as owners in common in such shares as the Court thinks fit **where the home is owned by either of the parties or by both of them as joint owners** and the court is satisfied that both parties have made substantial contribution to the home.

[25] The Father deposed that his parents own the home and he does not have legal ownership of the house and therefore he cannot grant a life interest in the home to the Mother. This is not disputed.

[26] Mr. Arthur, learned counsel for the Mother, sought to rely on **Eric Bobb v Karen Bobb para, 8⁶** which cited the well known “tail piece” to section 26 of the MPPA which enjoins the court in considering financial provision for a divorced party “*to exercise its powers so as to place the parties, so far*

⁶ Eric Bobb v Karen Bobb BVIHMT 2008/0039

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 been broken down and each party had properly discharged his or her financial obligations and responsibilities towards the other.”

[27] With all due respect to Mr. Arthur **Bobb v Bobb** is readily distinguishable on its facts. There, the court was concerned to ensure that the children had a home and thus ordered the father to assist with the rent.

[28] Mr. Arthur submitted further, that the Mother resided at the matrimonial home during the course of the marriage without paying rent or mortgage and it had been represented to her that this would be her home for the foreseeable future, and these assurances were by the Father and his parents and she relied on these assurances to her detriment and so never invested in property elsewhere. Counsel asked the court to consider in the alternative granting the Mother a lump sum payment if it is not minded to grant her a life interest in the property.

[29] It is not disputed that the matrimonial home is legally owned by the Father’s parents. The Mother herself admits this. See her affidavit of 27 June 2007 at para. 5 where she states that she and the children resided in the matrimonial home which was owned by the Father’s parents. She has adduced no evidence to establish that the Father has a legal interest in the matrimonial home. She must establish that he has an interest or that they both have an interest in the home to invoke section 51.

[30] The Mother in her second affidavit of November 2007 para 7, acknowledged that the Father’s parents wanted her to leave the home and she would but her husband told her during the marriage that the house was her home and she should think of it that way. She later indicated that she wanted her husband to help with 70% of her rent and maintenance as she could not afford to rent on her salary and she would need assistance when she was building and having to pay a mortgage.

[31] Furthermore, the Mother has not seen it fit to add the Father's parents or serve them with notice of this application as is required by section 51(3) of the MPPA. The court cannot simply dispose of a person's interest in property if that person is not a party to the suit.

[32] This claim to an interest in the property seems to rest on estoppel by representation. The case of *Elaine Knowles v George Knowles*⁷ is instructive. Mr John Knowles and his wife, Mrs. Elaine Knowles occupied George Knowles property in which his mother had a life interest, rent free for most of their married life (20 years). Shortly after their divorce which was sometime after the death of the mother-in-law, George Knowles served Mrs. Knowles, who had remained in possession of the matrimonial home, with notice to quit and deliver up possession. She resisted the claim and sued George Knowles. She argued that she had been led to believe, by John and his mother, that she had an interest in the property and that her improvements of over \$100,000 had been done with the expectation that she would obtain an interest in the land. George, who was supported by Elaine's ex husband John, maintained that she was just occupying the property as a licensee during her marriage to John.

[33] Sir Henry Brookes who delivered the judgment of the Privy Council stated:-

*"In the opinion of their Lordships it would be unconscionable in this case to deprive George of his property when he had done nothing at all to encourage any belief that his brother and sister-in-law could treat the property as belonging to them. While recourse to the doctrine of estoppel provides a welcome means of effecting justice when the facts demand it, **it is equally important that the courts***

⁷ Privy Council Appeal No 28 of 2007, [2008] UKPC 30, Elaine Knowles v George Knowles

do not penalize those who through acts of kindness simply allow other members of their family to inhabit their property rent free.⁸

[34] This principle is applicable here. The Father has no legal right to the matrimonial home, legal title vests in his parents who unlike in Knowles are not before the court. No doubt they allowed their son and his wife to live on their property rent free out of kindness and love of their son. The Mother's claim to a life interest in the property cannot be sustained as there is no evidence that she was ever led to believe that she would be entitled to such an interest by the owners. Her indications that she cut the yard and painted the house and did general upkeep cannot give her an interest as these acts can be said to be for her benefit as licensee only and are not of such a nature that could be said to give her any proprietary claim in the land. She has lived on the property rent free for the duration of the marriage and has benefited considerably from that arrangement to date. The Mother is a licensee, her license has been terminated by the Father's parents and she cannot resist that.

[35] It follows that she cannot be given a lump sum to represent any interest in the matrimonial home as she has none.

[36] It must also follow from my conclusion that the Mother has no interest in the property and that no order can be made to compel the Father to repair the house.

[37] The Mother sought sundry other orders. Interestingly her counsel did not submit on those and one is tempted to think that they are not being pursued. However, **ex abundantia**, I will consider them. First, her claim to an order for payment by the Father of credit card bills.

⁸ *ibid*

Credit Card Bills

[38] There is no credible evidence to support the claim for non payment of any such charges by the Father. The Father admits to having used the Mother's card for purchases for the start up of his business but he testified that he repaid the monies to her. The Mother provided the court with what amounts to letters of demand for payment from the credit card company but nothing to show who charged what. Further she did not submit any itemised bill/bills which show the different purchases. The Father testified and I accept that the Mother has never mentioned an outstanding balance to him before these applications. The claim therefore fails. Next, the claim for maintenance of her vehicle.

Vehicle Maintenance

[39] Both parties have vehicles to maintain and the Father's circumstances are not so much better than the Mother's as to make it equitable for him to assist. Further, he now has sole responsibility for the care and maintenance of the children. I cannot, in all the circumstances see that it would be just and equitable to have him assist with the Mother's car maintenance.

Costs

[40] As is the normal practice each party to bear his or his/her own costs as I have not been persuaded otherwise.

Conclusion

[41] In all the circumstances the orders made are summarised as follows:-

1. The Father is granted sole custody of the children with liberal access to the Mother and he shall be solely responsible for their medical and educational needs. A visitation schedule to be agreed

and drawn up by the parties and put before the court for approval within 10 days.

2. The Mother's claim to a life interest in the matrimonial home is dismissed.
3. The Mother's claim for payment of credit card bills is dismissed.
4. The Mother's claim for maintenance of her vehicle is dismissed.
5. The Mother is to deliver to the Father all travel and identification documents for the children forthwith.
6. Each party to bear his or his/her own costs.

[42] It is regrettable that issues concerning the welfare of children are not dealt with, with more dispatch by the Court. Delay in such matters can only be regarded as inimical to the welfare of children and goes against the principle that the welfare of the child must be the paramount consideration. Cases such as these cry out for the formal establishment of a Family Division.

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Rita Joseph-Olivetti
Resident Judge
Territory of the Virgin Islands