

**BRITISH VIRGIN ISLANDS
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

BVIHMT 2011/0044

Between

PETRA COOPER (nee' KLVACOVA)

Petitioner

and

PETER COOPER

Respondent

Appearances:-

Asha Johnson and Stacy Abel of Samuels Richardson & Co for the Petitioner

Patrick Thompson of McW Todman & Co for the Respondent

2011: 26 October, 22 November

2012: 29 February

**(Family Law – Ancillary relief – 1. custody – maintenance for infant child –2.
Monies obtained from mortgage given to wife by husband during marriage –
whether wife obligated to repay the monies to husband)**

JUDGMENT

[1] **Joseph-Olivetti J:-** Here we are concerned with two applications for ancillary relief, the first by Mrs. Cooper, the Petitioner (hereinafter “the Mother”) made April 28 2011 and the second by her former husband, the Respondent, Mr. Cooper (hereinafter “the Father”) filed on 23 May 2011. Both concerns, in the main, custody and maintenance of the parties’ child.

[2] The applications were heard jointly at two sittings - 26 October 2011 and 8 November. Judgment was reserved pending the exchange and filing of additional written submissions which was done on 22 November 2011. Both counsel are to be commended.

Relief Sought

[3] The Mother seeks orders that she be granted **sole custody** of A with reasonable access to the Father, maintenance for A in the sum of \$2000.00 per month plus half of all her educational and medical expenses.

[4] The Father in brief seeks joint custody of Sophie with primary care and control to the Mother and liberal access to him, and an order for the payment of the sum of \$50000.00 by the Mother to him.

[5] By order of 3 June 2011, joint custody of A was granted to the parties with care and control to the Mother and reasonable access to the Father. This issue of custody has thus been disposed of. I commend the parties on reaching agreement on this.

[6] I also note that an interim maintenance order is in place made 3 June 2011, whereby the Father was ordered to pay a monthly sum of \$1,000.00 as maintenance for A plus half her medical and educational expenses commencing 1 June 2011.

Issues for Determination

[7] The only issues before the Court relate to:-

- (i) maintenance for A; and
- (ii) whether the Mother should repay the Father the 50,000.00 pounds sterling as claimed by him.

[8] I shall address the maintenance issue first.

The Law on Maintenance for Children of a Marriage

- [9] The relevant law is contained in the **Matrimonial Proceedings and Property Act 1995** (“the MPPA”). Section 24 gives the court the power to make financial provisions for a child of the family.
- [10] In deciding whether to exercise its powers under section 24, and if so, in what manner, the Court is to have regard, as provided for in Section 26(2), to all the circumstances of the case including the following matters:- (a) the financial needs of the child; (b) the income, earning capacity (if any), property and other financial resources of the child; (c) any physical or mental disability of the child; (d) the standard of living enjoyed by the family before the breakdown of the marriage; and (e) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained.
- [11] And, the „tail piece“ to section 26 (2) requires the court to exercise its powers so as to place the child, **so far as it is practicable ,and** having regard to the considerations in s 26 (1) (a) i.e. the income earning capacity property and other financial resources which each party has or is likely to have in the foreseeable future and in s.26 (1) (b)-the financial needs obligations and responsibilities which each party has or is likely to have in the foreseeable future **just so to do**, in the financial position in which the child would have been if the marriage had not broken down and each of the parties had properly discharged his or her financial obligations and responsibilities towards the child.

The Facts

- [12] This is gleaned from the oral testimony of the parties and their several affidavits. The Court notes that paragraphs 4-8 of the Petitioner’s affidavit in support of her application was struck out by order of Hariprashad –Charles, J dated 3 June 2011.
- [13] The Parties hail originally from Europe, she from Slovakia and he from England. They wed each other on 23 February 2008. After the marriage, they cohabited at

Brandywine Bay in Tortola. Sometime after, the relationship between the parties began to deteriorate and ended when the Mother filed for divorce on October 26 2010. She however remained in the matrimonial home until 22 January 2011. A decree nisi was granted on 22 March 2011. There is one child of the marriage, a girl; we shall call her A, who was born on 15 February 2011. The baby thus never had a chance to know her parents in their happy state, a far from advantageous position to be thrust into.

[14] At the time the Mother filed her application, she was a deputy insurance manager (part-time) at Belmont Insurance Management Limited, Tortola (“Belmont”) earning \$5000.00 per month. She is aged 35 and now earns a gross salary of \$2500.00¹ monthly. Of her own accord and without consultation with the Father the Mother relocated to England with A in or around June 2011 where she now resides in her own home. The property is mortgaged.

[15] The Mother testified that she is now a statutory representative with Belmont working remotely via the computer, telephone and the World Wide Web. The Father does not dispute that.

[16] A is now 11 months old. The parties have expended much time and expense to have her, with the Mother having had in vitro fertilisation treatment. The Mother testified, although this was not properly documented in detail as it ought to have been, that A has a physical disability for which she receives or is receiving medical treatment.

[17] In addition to customary child care, food, clothing, miscellaneous items, the Mother testified that arrangements are needed for insurance, a nanny, and travel to enable A and the Mother to visit the Mother’s parents in Slovakia. The Father takes issue with the level of expenses claimed for A and in particular with the need for a full time nanny now when the Mother works from home.

¹ Tab 6; Exhibit PC 6 of reply of Petitioner para 2

- [18] The Mother in her affidavit in support of her application, at paragraph 19 stated that while she was residing here, her monthly expenses for the baby was \$2690. By contrast, in her Reply filed on 16 June she said that she now incurs expenditure of \$5,500.00 monthly for A and gave a breakdown of that expenditure. This at a time when she earns half of her previous salary². It is not clear how she meets those expenses.
- [19] The Mother claims that it was economically better for her to leave the Territory and to take up residence in England. This is because she says that adequate secure property was only available in the Territory in excess of \$2,200.00 and that it was too expensive to live here as her expenses exceeded her income and she had no job security. Thus, her unilateral decision to relocate plus she would be more accessible to her family in Europe. The Mother's reason for relocation seems to me in the main to enable her to be closer to family in Slovakia. She also testified that she was in the middle of receiving medical care shortly after A's birth and that such care was not available here.
- [20] It seems to the Court that this life the Mother is trying to live (in effect maintaining two homes – in England and in Slovakia for A) is one reserved for families with little or no financial constraints and is not realistic having regard to the parties' current financial position.
- [21] The Father is a director of Beacon Capital Management Limited ("Beacon"). He is aged 48. His main source of income is derived from that employment. Prior to 31 October 2011, he earned salary of \$10,150 per month. However, due to the economic climate and restructuring of Beacon, his position was made redundant on 31 October 2011³. Nonetheless, he was offered and he accepted temporary employment with Beacon for 6 months. He now holds the post of director at a salary of \$5000.00 per month on a temporary basis for 6 months⁴. This term is

² .[See her Reply filed 16 June 2011 paragraph [30]

³ Tab 11; See letter dated September 30 2011 on pg 161 Hearing Bundle

⁴ Tab 11; See letter dated September 30 2011 on pg 162 Hearing Bundle

due to expire in April. He also made disclosure of his assets, in the main several bank accounts here and abroad. He also has his own home in England from which he receives a rental income. The court notes that a disclosure order was made against him in 23 September 2011 and that he gave further information thereafter.

[22] The Mother however took issue with his financial disclosure. She alleged that the Father did not make full disclosure of his assets and expenditure. She also questioned his evidence that he is facing imminent termination of his employment.

Discussion and Conclusion -Issue 1

[23] Ultimately the court is concerned in these types of proceedings to ensure that adequate financial provision is made for the minor child having considered all the circumstances as mandated by s.24. In particular I bear in mind that the court is to take account of the financial circumstances of the parents, a fact which is sometimes overlooked by practitioners. Thus each party is obligated to make full and frank disclosure of his or her financial situation, now and in the foreseeable future. The effect of not doing so is well established as can be seen from In the case of **Raishauna Wheatley v Lawrence Wheatley 2006/0014** - *“it is well established that both parties are under a duty to make full and frank disclosure of all material facts to the court and that such disclosure is a crucial part of the investigative process in applications for ancillary relief...if disclosure is not complied with the court is entitled to draw adverse inferences, though such inferences must bear a genuine relationship to available assets”*.

[24] It is noted that the same legislative position obtains in England. See **Rayden & Jackson on Divorce and Family Matters 17th Edition Para 16.34** where it is stated that in determining suitable maintenance, the court will have to embark on a fact finding exercise to determine the financial resources of the parties existing at the time of the hearing and those resources available or capable of being acquired in the future.

[25] Having heard the Father's answers in cross-examination I am not satisfied that he was entirely frank with the court as to his financial situation. In particular I note that he claims not to have a clue about the level of his severance pay on retirement. Having regard to his qualifications and the position he held or holds at Beacon this is simply not credible. I find that he will get a significant level of severance pay having regard to the level of his earnings, his position and period of employment with Beacon.

[26] Learned counsel for the Mother, Ms. Johnson , relied on his pattern of spending in the last few months to further bolster the Mother's case that the Father has not made full financial disclosure and to question his alleged imminent loss of employment.

[27] I accept the Fathers explanation that the purpose of his trips was to keep in touch with other persons in his industry, deal with business contracts and for social purposes and that where cash withdrawals are concerned he paid his expenses mainly in cash.

[28] The court is of the view, that generally one who is said to be facing an imminent cut in finances would not be conducting his/her affairs in, as it would seem, such a lavish manner. On its face, it would appear that this spending pattern is not that of someone who is uncertain about his financial sustainability. However, considering the type of industry the Father is engaged in, the standard of living enjoyed and the need to keep business contacts and relationships, the court is of the view that one cannot just become a hermit and relinquish/abandon ties with one's social and the business worlds, especially during a time where one would be looking to fortify relationships to secure a new job.

[29] With regard to the job security of the Father, true, the Father's employer was not called as a witness to be cross examined despite the Mother's request of the Father that he was so required. Every effort ought to have been made by the

Father and his lawyers to assist the court with this issue by calling the employer or seeking the aid of the court if necessary albeit the notice was short.

[30] However, the mere fact that this was not done does not necessarily mean that the court should automatically disregard the evidence of redundancy and temporary employment. It is highly unlikely that a reputable businessman in the financial industry would in effect present misleading or false information to the Court. And the court will not lightly draw that inference against someone who perhaps was not given every opportunity to attend as a witness and testify as to the truth or otherwise of the contents of his company's letters.

[31] In any event, even if the evidence is accepted at face value only and the Father would have no job by April 2012, the court will still have to take into account his earning capacity and potential earning capacity in the future to determine his ability to maintain his child.

[32] The Father is a qualified accountant with a degree in economics and is a certified chartered accountant with 20 years plus experience as a financial comptroller. Even in the prevailing economic downturn it is not envisaged that he would be without employment for long.

[33] The Mother says that she is seeking further employment. The Mother is also a highly qualified professional holding a Bachelor of Science Degree in international trade, a Master of Science Degree in Political Economy with 10 years experience in the insurance industry⁵. I have also noted her curricular vitae which attest to the significant positions she held in the past.

[34] The Mother too gave evidence that she is likely to lose her job at the end of 2011 as a result of the reduction in Belmont's clients. Yet this was a situation of which she was well aware before her move to a more expensive location where she did

⁵ (para 20 of petitioners reply).

not have a new job lined up . This points to her not being in any desperate financial straits.

[35] The court is of the view that the parties, both highly qualified and experienced professionals, will face little difficulty in finding suitable positions when and if they are made redundant. In addition, the Mother is also considerably younger than the Father and therefore would not have certain imminent employment hurdles to consider (such as closely approaching retirement age), when looking for a job as perhaps the Father would.

[36] The court has taken into account the fact that whilst A was living in the Territory, she enjoyed a good level of care due to the parties' comfortable financial situations at the time and that every effort should be made by both parties to ensure that the child's needs would continue to be adequately met.

[37] On consideration of all the circumstances, including the reasonable needs of A bearing in mind that she is still an infant, in my opinion it is fair and just to order the Father to pay the sum of \$1500.00 per month as maintenance and that no undue hardship will be visited upon him in that respect. In addition, he is to meet half A's medical and educational needs. I accept his evidence that some National Health Services assistance is available for A in England and I have no doubt that the Mother will now see fit to make the necessary arrangements to avail herself of that help. This should not be too much to ask as whilst A lived here her Father had obtained health insurance coverage for her. I now turn to Issue 2.

Issue 2: Is the Mother obligated to repay the 50,000.00 pounds ?

[38] In short, the Father testified that during the marriage he gave 50,000 pounds sterling to the Mother to use towards purchasing a home together in Slovakia , and when those plans fell through or were abandoned, that he agreed that she could use the money towards reducing the mortgage on her house. This he explained was a more prudent economic decision than simply letting it lie in a

bank account and receiving little or no interest thereon. He said he expected her to repay this money as it was not a gift and he had obtained it himself on loan facility from his bank.

[39] The Mother, although not claiming it was a gift denied that this money was a loan or was given to her for a particular purpose as alleged and she stated that she used it for their joint benefit and for A. This the Father denied.

[40] I accept the Father's testimony on this issue. I do not accept the Mother's evidence that she did not know of the particular purpose for which she was entrusted with the money. Who receives such a significant lump sum without asking about its provenance or use? Had she been a naive young woman with no education that would have been plausible but certainly not having regard to her particular education and field of employment. In addition, I note that she produced no documentary evidence which ought to have been readily available to her of how those funds were spent. They were entrusted to her for a particular purpose. If she was allowed to use the funds in the interim to pay off her mortgage on her separate property then the only reasonable inference to be drawn in all the circumstances, especially having regard to how the monies were raised, is that she should repay the sums to the Father when required to do so. No doubt had the marriage survived it is hardly likely that the Father would have sought repayment. This does not however release her from her obligation to repay as clearly no gift was intended.

[41] Accordingly the Court finds that the Father's claim is made out and that the Mother must refund him the money.

Costs

[42] The court has discretion on costs. It seems to me that both parties have made efforts to partly resolve the matter and have each succeeded on certain issues here, therefore, in my view each party should bear his/her own costs.

Summary of Orders made

[43] To sum up, the orders made are as follows:-

- (i) The Father/Respondent is to pay \$1,500.00 monthly as maintenance for A and to meet half of her medical and educational costs until she attains the age of 18 or completes further education, whichever is later.
- (ii) The Mother is to repay to the Father the sum of 50,000.00 pounds sterling.
- (iii) Each party to bear his/her own costs.

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Rita Joseph-Olivetti
High Court Judge
Territory of the Virgin Islands