

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

BVIHMT2011/0052

BETWEEN:

TOUCHE DANIEL MC LEAN

PETITIONER

AND

ANNISHA ASHMETTE JACOBS- MC LEAN

RESPONDENT

Appearances:

Asha Johnson of Samuels Richardson & Co. for the Petitioner
Tamara Cameron of Farara Kerrins for the Respondent

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2012: May 16

2012: July 17, 25
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Judgment

**(Ancillary Relief- Custody and Maintenance of Children – Children ages 5 and 3-
Guardianship of Infants Act Cap 270-Matrimonial Proceedings and Property Act 1995)**

- [1] **Joseph-Olivetti J:-** This case raises issues of custody and maintenance of children on the divorce of their parents. As is rapidly becoming the norm both parties have made application for custody of their two minor children and as is also the norm both applications were heard together. At the close of the hearing on 16 May the court sought the benefit of a social welfare report which was not forthcoming until July 17 due to the exigencies of the relevant Government Department. The parties made written submissions and I have had no indication that they having been served with the report wished to make additional submissions.

[2] **Relief Sought**

[3] The Father filed first on March 22, 2012. He seeks sole custody with primary care and control to himself and reasonable access to the Mother and payment by her of the monthly sum of \$200.00 per child for maintenance and half of all educational and medical expenses. The Mother in turn seeks joint custody of the children with primary care and control to herself with reasonable access to the Father together with the same amount of maintenance for each child and the same relief in terms of their medical and educational expenses.

[4] **The Law – Custody**

[5] The Matrimonial Proceedings and Property Act, 1995 (“the MPPA”) gives the court power to make custody orders in divorce proceedings. The Act does not lay down any criteria to inform the exercise of that power and so we are guided by the **Guardianship of Infants Act Cap.270 s.3** which stipulates **that** in all matters concerning issues relating to custody of a child, the welfare of the child is of paramount importance and that no parent has a superior claim to custody. And the case law makes it abundantly clear that each case is to be decided having regard to its own particular circumstances.

[6] **The Law - Maintenance**

[7] Financial provision for children on the dissolution of a marriage is governed by the MPPA Sections 23, 24 and 25, give the court power to make financial provision for a child of the family. The power is discretionary; the court must consider all the circumstances and pay particular attention to the factors set out in section 26 (2). These are:- (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; (e) the manner in which he/she was being and in which the parties to the marriage expected him/her to be educated or trained.

[8] And Section 26 (2) mandates the court to, “so exercise those powers as to place the child, so far as it is practicable and, having regard to the considerations mentioned in

relation to the parties to the marriage in subsection (1) (a) and (b), just to do so, in the financial position in which the child would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards the child.”

[9] **The Facts**

[10] Mr. Touche Mc Lean and Mrs. Annisha Mc Lean, hereafter, ‘the Father’ and ‘the Mother’ respectively were espoused on 4 November 2006. They were very young aged 22 and 21 respectively. In the fullness of time they were gifted with two children, a daughter born 7 March 2007, now aged 5 and a son born 28 November now aged 3.

[11] The Father is self-employed and works in the main at home although he also works as a taxi driver at times. The Mother is now a data base applications coordinator at the H. Lavity Stoutt Community College, “the HLSCC”. The Government of the Territory of the Virgin Islands at the Mother’s request offered her a scholarship to pursue further education as she was of the view that better academic qualifications would enhance her value in the workplace and enure to her family’s benefit as well. She deferred the scholarship in the interests of the children at first then in August 2009 she accepted the offer as if she had postponed it further she would have lost the opportunity.

[12] Therefore, in August 2009 the Mother clearly with the reluctant agreement of the Father, commenced studies at the University of the Virgin Islands in the United States Virgin Islands, “the USVI”. Both parties agreed that the children would remain in the care of the Father whilst the Mother was in the USVI. However, such was her love and dedication to her family that she travelled home almost every weekend and spent all her school holidays at her home with them doing all necessary chores and taking care of her husband and the children with her husband’s help. She attained her Bachelor’s Degree in May 2012 and thereafter returned to the Territory. Ironically, despite his seeming opposition to the Mother’s quest for further education the Father also took time to obtain further academic qualifications at the HLSCC and his Mother assisted him with the care of the children. The Father is reported to be expected to complete an associate’s degree in computer science from the HLSCC in June, 2012.

- [13] The parties' marriage broke down in or around July 2011 and the Father moved out of the matrimonial home into an apartment owned by his parents. The Father filed divorce proceedings on 17 August 2011, the Mother cross-petitioned and a decree nisi was granted on 26 January 2012. The parties continued to share custody and care of the children with the children remaining with their Father during the week and with their Mother on her weekends and holidays home from school. The more recent arrangement now that the Mother is back in the Territory is that the children spend alternate weeks with each parent, a situation which the welfare worker does not view as providing the necessary stability in the children's lives and one which both parents seem to find untenable as a permanent solution.
- [14] During the course of the marriage up to and until the Mother commenced her studies both parents contributed equally to the care and upbringing of the children. The fact that the Mother does not drive and so was unable to assist by taking the children to school or do other chores that involved driving does not detract from that, as I am satisfied that despite the attempts of each to disparage the other that each did what was in his or her power to assist with care of the family and the household. It is also undisputed and to be expected and I accept that the children developed a very close bond with the Father whilst the Mother was at college and that he took very good care of them with the aid of his Mother at week-ends and school holidays.
- [15] It is evident that both parents love and care for their children. The Mother admitted that she committed adultery aided in some respects by the Husband's lack of support for her academic aspirations and that that contributed to the breakdown of the marriage. She also alleges however that there had been physical confrontations both before and after, five to be exact, but the Father claims there had been only one or two which were caused by the revelation of her adultery. Even one or two is one too many and I accept the Mother's evidence on this. The Mother testified that the Father beat her so severely on one occasion that she sustained injuries including a broken nose and that the children witnessed that incident.

- [16] The Mother further alleges that the Father has refused to allow the children to attend counseling sessions after witnessing the incident. She alleges that their daughter told her that she recalled "*how her daddy made her mommy's nose bleed*". The Father denies this, saying that the children were locked in a bedroom and could not have witnessed that event. The Mother's reply was that he would lock them in when he beat her but they opened the door and saw what was happening. I also note that the social welfare report refers to the daughter making a similar remark to her teacher.
- [17] To my mind even the possibility of the children having witnessed or even heard the altercations ought to have impressed upon the Father the need to obtain counseling for them. This shows that he is prepared to put his own interests over that of the children's where their respective interests might conflict. In my judgment the possibility of the children having witnessed acts of violence in the home cannot be excluded and the Mother is to arrange with the Social Development Department (Mrs. Daniel-Dawson assigned social worker) for counseling for the children forthwith.
- [18] I am satisfied that both parents can provide adequate housing for their children according to their evidence and that of the welfare worker. The children are not of an age or understanding whereby their wishes can be ascertained and taken into account therefore I have not interviewed them. However I note from the report that the social worker interviewed the children, which is laudable, and that they appear to be very happy to be with each of their parents.
- [19] With respect to custody, I have considered all the circumstances and find that both parties love their children and are capable parents and that each has the ability to continue to contribute to their children's development. However, a serious note of concern was sounded by the fact as I find that the Father abused the Mother on more than one occasion and that the children might have witnessed at least one incident when the Father struck the Mother and caused her nose to bleed. I note especially in regard to the social welfare report that there were proceedings in the Magistrates court and that the Father was ordered to attend the UN sponsored programme Partnership for Peace, a 16 week programme. He is reported to have said that he garnered no benefit from it and

considered him having to attend it as a “**nightmare**”. That is surprising and worrying. It seems to me that the Father has not accepted any responsibility for the abuse of his wife as according to the report he continues to maintain that her injuries were self-inflicted and therefore with that mindset he could not have hoped to benefit from that programme. Anyone who abuses another betrays emotional stability and there is the real concern that if in the future the children should go against his wishes that the Father might be tempted to resort to violence to impose his own wishes. This is too grave a risk to be chanced. I note that his mother readily admitted that the Mother had told her of the violence and she is to be highly commended for not seeking to shelter her son by denying any such knowledge.

[20] A further concern is the Father’s belief which apparently mandates that he not seek medical attention for the children. He is not in any way qualified to detect or treat childhood or any other illnesses and therefore he cannot be trusted to have the children’s’ welfare as the most important factor in his dealings with them. I note the report referred to the Mother’s information that the doctor was worried that at 5 years their daughter weighed only 48.5 lbs. I remark too that the Father’s mother was also concerned about her son’s views on doctors and rightly so.

[21] Therefore, having heard and observed the parties and on a consideration of all the evidence, in my judgment the children are of such tender ages that they should be reared together and the Mother is best suited to have sole custody and primary care and control of them. Joint custody might have been feasible if the parties were even remotely **ad idem** on how to raise their children. However, I am very much aware that each party has very different ideas on the children’s care and upbringing – they differ on basic care like nutrition, health and education and I cannot see in view of the very acrimonious relationship that exist how a joint custody order would be in the best interests of the children. Accordingly, the Mother shall have sole custody of the children. However, it is critical that the Father have reasonable access to them to enable him to continue to foster the close bond he has developed with them and we recognize that they both love their children and that the children have the inalienable right to know and have the love and care of each parent. Accordingly, the Father is to have reasonable access to

include visitation every weekend and half of all school holidays and is to be kept informed of all major decisions affecting the children.

[22] With respect to maintenance, I have considered the needs of the children and the other factors mandated by the MPPA. I note that they do not suffer from any disability. In particular I have taken into account the financial position of the parties and their earning capacities. The Mother currently is employed at the HLSCC and earns an annual salary of \$36,651.26. A significant increase since her new position. She provided a letter from HLSCC attesting to that. The Father is self employed and he says he earns annually \$40,000.00; a remarkable rise from his position in 2011 as recorded in the initial social inquiry report. However, he did not produce any documentation to support this, not even tax returns but I accept that he is in a good financial position to support his children. I note that he submitted through the social worker a bank statement showing him to be in good financial standing.

[23] I find that the figure proposed by both is adequate to provide for the children .I therefore order that the Father shall pay to the Mother the monthly sum of \$200.00 as maintenance together with half of all their educational and medical expenses upon production of invoices or receipts, in respect of each child of the marriage until such time as each child attains the age of 18 years and thereafter for a minimum period of 3 years from the date on which each child commences tertiary education.

[24] **Costs**

[25] Costs lies in the court's discretion. Having regard to the financial position of the parties I am of the view that each should bear his/her own costs.

[26] **Summary of Orders**

[27] The orders made can be summarized as follows:-

[28] The Mother is to have sole custody of the children of the marriage with primary care and control to the Mother and reasonable access to the Father to include visitation every weekend and half of all school holidays and he is to be kept informed of all major

decisions affecting the children to include weekend visitation and half of each school vacation.

[29] The Father is to pay to the Mother the monthly sum of \$200.00 per child as maintenance together with half of all educational and medical expenses upon production of invoices or receipts, in respect of each child of the marriage until such time as each child attains the age of 18 years and thereafter for a minimum period of 3 years from the date on which each child commences tertiary education.

[30] The parties are to arrange with the Social Development Department (Mrs. Daniel-Dawson assigned social worker) for counseling for the children forthwith and the counselor is to submit a report to the court through the department of social development at the end of the counseling sessions no later than three months from the date hereof.

[31] Each party shall bear his/her own costs.

[32] **Postscript**

[33] I am grateful for the thorough report submitted by the Social Development Department which proved invaluable and thank them for the help given to the court over these past seven years. I also thank both counsel for their very lucid and cogent written submissions and the wealth of authorities cited.

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Rita Joseph-Olivetti
Resident Judge
Territory of the Virgin Islands