

EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(DIVORCE)

CLAIM NO. BVIHMT2011/0003

BETWEEN:

LOUANN SMITH nee HODGE

Petitioner

And

LESTER KENDALL SMITH

Respondent

Appearances:

Ms Anthea Smith of Sabals Law for the Petitioner
The Respondent in person

2013: October 1
2014: January 16th
January 24th

JUDGMENT

[1] **BYER J.:-** On the 26th day of July 2003 the Respondent and the Petitioner were married. The marriage lasted a short period of 8 years and out of that union a daughter was born to the Petitioner on the 12th December 2003 to whom I shall refer in this judgment as the child.

[2] It is not denied by either party that the marriage was marred by a tumultuous relationship as between the parties as a result of a self admitted substance abuse problem suffered by the Respondent throughout the tenor of the marriage.

[3] By application filed on the 23rd May 2012, subsequent to the making of the decree nisi in the proceedings, the Petitioner has sought to claim several issues of ancillary relief essentially dealing with the custody of the said child. This was the sole issue to be determined by this Court together with the peripheral considerations upon any such application having to be considered.

The Petitioner's Case

[4] In the application filed by the Petitioner, she sought to pray before this Court for sole custody of the child, the payment of the sum of \$300.00 per month for the maintenance of the said child until she shall reach the age of 18 or complete tertiary education, for the Respondent to contribute equally to the tertiary expenses of the child and all other medical and educational expenses of the said child.

[5] The Petitioner's application was supported by her evidence contained in the affidavit of the 23rd May 2012.

[6] The Petitioner in this evidence put forward her version of events which led to the breakdown of the marriage and to substantiate her claim for sole custody. In so doing at paragraph 4.1 she stated **"...in the presence of the child while I was about to leave the supermarket [the Respondent] ...threw two packs of photocopying paper and a grocery bag containing items at me"** and at 4.2 **"I have overheard the Respondent telling our daughter on the telephone that he is going to kill me. I have also overheard the Respondent telling our daughter that since she wants to stay with me he is not going to do anything for her, he will not call her or visit her"** and further at 4.4 **"while our daughter was in the Respondent's care he has left her at the home of one of her class mates while he went to a local bar"** and finally at 5 **"our daughter has discussed the Respondent's behavior with me and has questioned why her father is behaving in such a way and saying bad things to her; and has expressed to me that she no longer enjoys spending time with him"**

[7] The Petitioner filed a further affidavit on the 25th February 2013 which in essence was the response that she wished this Court to consider in relation to the Affidavit that had been filed by the Respondent in response to the substantive application.

[8] This affidavit of the Petitioner reiterated that the living conditions and home of the child had been the same one that the child had been in since birth which is owned by the child's maternal grandmother. She further averred that the maternal grandmother was a retired teacher and was

entirely capable and responsible in looking after the child despite the allegations of the Respondent. The Petitioner beyond this evidence then went on to specifically answer claims made by the Respondent in what purported to be the counter claim by the Respondent. It appears to the Court that these claims have now been in large measure abandoned by the Respondent during the currency of these proceedings and as such the Court has no intention of examining that evidence in detail at this juncture.

- [9] The Petitioner also presented to the Court a tape recording of the threats she said had been issued by the Respondent to her and on which she sought to rely to show his volatile character.

The Respondent's Case

- [10] The Respondent having represented himself during these proceedings filed no formal counter application to that filed by the Petitioner but did file affidavits in response to those filed by his estranged wife.

- [11] The first affidavit was filed on the 21st June 2012. In his evidence the Respondent never attempted to contradict the version of events that was put forward by the Petitioner in her affidavit specifically the instances recounting his alleged behavior. The Respondent instead put to this Court his wishes as to what he wanted regarding the living conditions of the child and further sought to claim the repayment of monies expended during the marriage in maintenance payments made to the child of the Petitioner who was not a child of the Respondent, monies used to remodel the Respondent's parent's home and the removal of the Petitioner's name on all his land documents in relation to land that had been inherited by him. He also requested that the Petitioner desist from utilizing a certain label in reference to him when in conversation with the child.

- [12] Subsequent to the filing of this affidavit the Respondent filed a second affidavit on the 25th March 2013 and reiterated his wishes or demands regarding the accommodations of the child, his claims as to the repayment of monies expended during the marriage and his desire to spend more time with the child.

- [13] It is however noteworthy that at no time before this Court either in writing or in the oral submissions made by the Respondent did he ever seek, allude or claim to make an application for custody in his favour.

The Petitioner's Submissions

- [14] The Petitioner by her attorney has sought to impress upon this Court the considerations that this Court will have to take into account for the purpose of a custody application.

- [15] The Petitioner has sought to rely on statutory rights which allow her to make this application as well as the findings of a report of the Social Development Department which was ordered by Ellis J on the 26th February 2013 and produced on the 17th May 2013.
- [16] The Petitioner has submitted to this Court, that in order for this Court to consider this application the Court must be cognizant of the welfare of the infant and to the conduct of the parents, the wishes of the mother and the father and by so doing relied on section 11 of the Guardianship of Infants Act Cap 270 of the British Virgin Islands.
- [17] Further the Petitioner has submitted, that the child has been in her care since her birth and that she is a well adjusted child doing well in school. The Petitioner has sought to also impress on this Court that the present status quo should remain intact, while taking into consideration the findings of the Social welfare department that the child is in fact afraid of the Respondent.
- [18] The Petitioner has also submitted that in coming to its decision, the Court should take notice of the relative behaviours of the Petitioner and the Respondent. The Petitioner has categorised herself as the primary caregiver of the child during these years when the Respondent has battled with his addiction. Further she submits to this Court that even after the filing of these proceedings the Respondent has failed to properly participate in the same namely failing to subject himself to the Social development department to participate in the evaluation process. The Petitioner submits that this is a pattern of behaviour on the part of the Respondent and that the Court is entitled to take it into account and draw whatever inferences may be necessary in the circumstances.
- [19] In general, the Petitioner has submitted to this Court that she is the parent with whom the child should continue to reside. She has therefore asked that this Court grant her sole custody and her incidental prayers.

The Respondent's Submissions

- [20] Despite being given an opportunity to respond to the submissions of the Petitioner, the Respondent failed to do so. This Court is however not prepared to infer that this failure was due to a lack of interest on the part of the Respondent but rather as a result of lack of legal assistance.
- [21] However the Court on the 16th January 2014 gave the Respondent a further opportunity to make submissions. At that time the Respondent had received treatment at an off island facility. At that hearing the Respondent although not responding specifically to the submissions issued an apology to the Petitioner and expressed deep regret for the hurt and harm that he may have caused.
- [22] He also admitted that he was in contact with the child and that visitation was working well in the present situation.

The Court's Analysis and Findings:-

[23] The application that this Court is being asked to consider, is never an easy one in which one parent is seeking to be considered in a better light than the other parent, with respect to a child which is usually loved and cherished by both parties.

[24] This application is governed by the provisions of the Matrimonial Proceedings and Property Act 1995 and section 44 thereof which states in part :

"The Court may make an order as it thinks fits for the custody and education of any child of the family who is under the age of eighteen..."

[25] Custody has been defined in the book by Lystra Kodilyne "The Judicial approach to child custody issues in the Commonwealth Caribbean"¹ at page 223 as "...the rights and duties associated with bringing up the child at the present and in the future...power to control the child's education, his religious upbringing and the management of his property until the child attained his age of majority or in the case of a female child , until marriage"²

[26] The term custody has therefore been recognized as indeed a nebulous term to pin down, but has been generally accepted, as the ability to make decisions for that minor child over whom the power of custody exists. The Court therefore being very aware, that this is indeed an awesome responsibility to be conferred on any individual, must be guided by the enshrined principles in the law and in particular the legislation which sets the framework to make and determine these applications.

[27] Under the provisions of the Guardianship of Infants Act Cap 270 of the Territory of the British Virgin islands, section 3 states *"where in any proceeding before any Court the Custody or upbringing of an infant...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"*. This provision must be read together with section 11 which states *"The court may*

¹ Commonwealth Legal studies (Butterworths 1992)

² Referring to the case of Hewer v Bryant [1970] 1 QB 357

upon the application of the mother of any infant ...make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent having regard to the welfare of the infant and to the conduct of the parents and to the wishes as well of the mother as of the father ...”

[28] This Court therefore is well cognizant that in determining an application of this nature the first and paramount consideration is the welfare of the child. The learned author Zanifa Mcdowell³ sees that in so determining what would be considered as the welfare of the child, the court must pay close attention to the physical, mental, material and religious wellbeing of the child.

[29] It has however been long recognized that the welfare of the child though of “paramount importance” is not exclusive and must take into account other just as important considerations. The “*other considerations include the wishes of the child old enough to be considered, the wishes of the parent, conduct of the parents towards each other and the child ,maintenance of the family unit, material standards and advantages which the child reasonably expects or preserving the status quo in the child’s life*”⁴

[30] This was further enunciated by the words of d’Auvergne J who said “*...much weight is now given to the child’s sex, age, the physical emotional and educational needs, the likely effect on the child with regard to any change in his circumstances and any harm he or she may be at risk of suffering as a result of the change*”⁵

[31] I will consider each of these as they impact in this case at bar

Age/Wishes of the Child

[32] At the start of the proceedings in October 1 2013 the Court conducted a private audience with the child in the absence of the parties and their legal counsel in order to get a sense of the child after having read the Social Welfare report.

[33] The Court met an articulate 10 year old who expressed in no uncertain terms that she loved her father and was not afraid of him contrary to the indications made in the Social Welfare report and

³ Elements of child law in the Commonwealth Caribbean (University of the west indies press) at p.177

⁴ Op. Cit p.177

⁵ D’Auvergne J in Alvin Hodge v Maquerite Denise Hodge 33/2002 referred to in the case of Neville Clairmonte Brathwaite Jr v Angeline Sherrzar Brathwaite nee Paul BVI HMT2001/0069 unrep .

the evidence of the Petitioner and whose wish was to spend more time with her father. There was no expressed desire to live with him but to see him more often.

- [34] The Court is well aware that the tender age of the child must be considered in evaluating the wishes of the child but this Court is not of the view that they can be completely disregarded and will not now do so.

Wishes of the Parents

- [35] Each party was given an opportunity to cross examine the opposing party on the affidavits filed.
- [36] In that cross examination the Petitioner made it clear that she had no intention to keep the child away from the Respondent. This is endorsed by the application that has been filed on behalf of the Petitioner stating that there is to be “**reasonable access**” to the Respondent with sole custody to the Petitioner.
- [37] The Respondent in his own words and under cross examination has himself made no claim for sole custody what he has said before this Court is “*I love my daughter. Nothing could be worse if you take my daughter away from me*”. There can be no other unequivocal words than those of a father in this position.
- [38] Indeed there is no intention of this Court to take this child away from the Respondent as this application does not ask this Court to exercise its mind to that, and this Court is duty bound to take the clearly expressed wishes into consideration.

Conduct of the Parents towards Each Other and the Child

- [39] This Court has heard the evidence of both sides. It is clear, as has been clear from the start, that the Respondent has always taken responsibility for his substance addiction. He has never tried to hide it and has admitted that he has taken treatment for the same.
- [40] Under cross examination by Counsel for the Petitioner, he stated categorically that he was going for treatment after the conclusion of the Court matter, which occurrence did in fact happen. This was confirmed at the further hearing held in this matter on the 16th January 2014.
- [41] However what is clear and is now uncontroverted is that the Respondent during the period leading up to the breakdown of the marriage, and even after the breakdown, behaved in such a way that both threatened the Petitioner and embarrassed the child. This unfortunately cannot be minimized in its impact on the family unit.

[42] The Court itself has now seen the difference that the treatment has made to the Respondent but the Court has to take judicial notice that this is a process on the part of the Respondent to which he has to be completely committed. It was very evident from the evidence and the Respondent himself that the Respondent can enter into a different “state of mind” as he so eloquently called it before this Court. This being so, the Court must in the long run act for and in the best interest of this child.

[43] There has been no evidence of behavior of the Respondent to the child other than perhaps exposing her to a sense of embarrassment but nothing to show that there may have been an attempt to put the child in actual danger. I therefore can make no finding as against the Respondent in this regard.

Maintenance of the Family Unit

[44] There has not been any evidence placed before this Court showing that either parent is in a better financial position than the other. This is indeed telling. The Court must therefore consider that the parents are equally financially able.

Material Standards that the Child Expects/Preserving the Status Quo

[45] The child has lived at the home of her maternal grandmother since her birth. This is the only home she has known even when her parents were together as they resided there as a married couple.

[46] There has been no evidence led that the accommodations are substandard save and except the unsubstantiated claim by the Respondent in his affidavits in response. The report of the Social Welfare Department, which is the only independent one that we have has stated that the accommodations are adequate.

[47] This Court would indeed be slow to place a 10 year old child in a new environment especially when there has been nothing put before the Court to indicate the state of any alternative accommodations. There has been no evidence before this Court on this issue and the Court will not speculate on the same.

[48] Having looked at this matter in its totality I have also considered the sex and age of the child. In the Caymanian case of Stephenson v Stephenson and Johnson⁶ Summerfield CJ stated “ *In all cases the paramount consideration is the welfare of the child and the court must look at the whole background of the child’s life and all the circumstances of the case ...more important*

⁶ [1980-83] CILR 93

however is the fact that the child is a female or tender years . There can be no doubt that other things being equal the interests of such a child are better served by placing her in the care and custody of her mother . The special relationship and bond between a very young child and his or her mother can rarely be duplicated by the father. And as a girl growing up the example and home training of the mother is better suited to her needs while maturing into a young woman.”

- [49] This Court is of a similar view. That by no means translates into a finding by this Court that the Respondent in this matter is either unfit or the “impeachable” parent as it is called in the plethora of authorities. What this Court does however find, is that this child having resided all her life with her mother, being on the cusp of young womanhood, is better suited to remain with her mother.
- [50] The Court therefore makes that order and grants custody to the Petitioner with liberal access to the Respondent.
- [51] The Respondent will however have to be consulted with regard to the educational and all travel plans outside of the jurisdiction by the Petitioner and the child.
- [52] In addition there having been no resistance to the application for the maintenance sum, which must be attributable to the retention of custody of the child, I also award the sum of \$300.00 per month to be paid by the Respondent commencing on the last working day of the month following the delivery of this decision, being February 2014.
- [53] Further, the Petitioner having agreed to transfer all her interest in the said properties of the Respondent inherited from his father, I also order that the Petitioner shall within 2 months at the expense of the Petitioner transfer her interest in Block 3139B East Central Registration Parcels 353 and 355 to the Respondent.
- [54] The said orders of the court are therefore as follows:
1. Sole custody of the child is awarded to the Petitioner with liberal access to the Respondent with a visitation schedule to be worked out between the parties for weekend and school holiday visits;
 2. That the respondent is to pay to the Petitioner the sum of \$300.00 per month as maintenance of the child until the child shall reach the age of 18 or complete tertiary education;

3. That the Respondent is to share equally in the cost of all tertiary education of the child upon consultation with the Respondent;
4. That the Respondent is to pay half of all medical and educational expenses of the child;
5. That the Respondent is to be consulted and notified of all travel arrangements concerning the said child;
6. The Petitioner shall within two months of the delivery of this judgment transfer all her interest in Block 3139B East Central Registration Parcels 353 and 355 to the Respondent;
7. Each party to bear his or her own costs;
8. Liberty to apply.

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Nicola Byer
High Court Judge