

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHMT2015/0069

BETWEEN

NADIA DEIDRA HERCULES NÉE ALEXANDER
of Arnos Vale

PETITIONER

and

KAHAMOL DWITE HERCULES
of Queen's Drive

RESPONDENT

Appearances:

Ms. Paula David of counsel for the petitioner.

Ms. Samantha Robertson of counsel for the respondent.

2017: Oct. 16
Oct. 19

JUDGMENT

INTRODUCTION

[1] **Henry, J.:** Mr. Kahamol Hercules and Mrs. Nadia Hercules are two relatively young people, both in their early 30s. They fell in love and got married¹ at the ages of 23 and 22 respectively. Their union produced two children Reshaun Dwite aged 7 and Tyler Chad aged 4. Sadly, the marriage did not

¹ 29th August, 2009.

last. In 2015, Mrs. Hercules petitioned the court for a divorce, custody and maintenance of the children. A decree nisi of divorce was granted in October of that year². Since then, the husband and wife have been able to agree aspects of the ancillary matters and a consent order was made on 16th October, 2017 granting joint custody and making arrangements for the children's education and healthcare expenses to be shared equally. It also contained provisions as to how much time each parent would have the boys during the school holidays.

[2] They were unable to agree who would have primary care and control of the children and the contributions that each parent would make to the other aspects of their maintenance. Mrs. Hercules proposed that the children continue to live with her and that they spend three weekends each month with the father. She also sought an order that Mr. Hercules pay to her \$500.00 per month as maintenance. Mr. Hercules urged that the children spend two weeks with him every month and two weeks with their mother. He contended that such an order would obviate the need for him to pay Mrs. Hercules any maintenance.

[3] After considering all of the circumstances, the court determined that Reshaun's and Tyler's interest is best served by granting primary care and control to the mother with reasonable access to the father.

ISSUE

[4] The sole issue is what order should be made for the care, control and maintenance of Reshaun Dwite and Tyler Chad?

ANALYSIS

Issue – What order should be made for the care, control and maintenance of Reshaun Dwite and Tyler Chad?

[5] Before making a final order of divorce, the court must satisfy itself that satisfactory arrangements

² On 26th October, 2015.

have been made for the welfare of any minor children of the family.³ Such orders seek to comprehensively address as far as practicable all of the child's physical, financial, social, religious, educational and other needs, having regard to the evidence. Throughout the court's deliberations, the child's best interest remains its principle consideration.⁴

[6] The court looks at the parties' respective ages, whether they or the children suffer from any physical or mental disabilities; their incomes, earning capacities, properties and other financial resources; as well as their needs, obligations and responsibilities; and the length of the marriage. As much as possible, the court takes into account the parties' respective contributions to the family's welfare and the value of any benefit that either party will lose as a result of the dissolution of the marriage.⁵

[7] The court must have regard to the child's financial needs; his income, property, other financial resources and earning capacity; the standard of living the family enjoyed before the breakdown of the marriage; and the manner in which the child was being or was expected to be educated or trained by the parents⁵.

[8] The court must examine all the circumstances including the parties' behavior towards the child. It tries to ensure as much as reasonably practicable and just, that the order effectively places the child in the position in which he would have been if the marriage had not broken down, and each party had properly discharged his or her financial obligation towards him.⁵ It is important to note that neither parent has a superior right or authority in respect of the child's upbringing⁶.

Accommodation

[9] Reshaun and Tyler live with their mother and maternal grandparents at Arnos Vale. Mrs. Hercules did

³ Matrimonial Causes Act, Cap. 239 of the Revised Laws of Saint Vincent and the Grenadines, 2009 ('the Act'), sections 64 and 65, the Law of Minors Act, Cap. 232, of the Revised Laws of Saint Vincent and the Grenadines, 2009, section 12 (1).

⁴ J. v. C. [1970] A.C. 686. The Law of Minors Act Cap. 232 of the Revised Laws of Saint Vincent and the Grenadines, 2009.

⁵ Section 34(2) of the Act.

⁶ Section 4 of the Law of Minors Act.

not describe the accommodation and she was not asked about those arrangements. She did indicate that she pays no utilities or rent and is assisted financially by her parents in this regard. From her account, the living arrangements appear to be adequate. In the absence of contrary assertions, I infer that they are.

[10] Mr. Hercules rents a two bedroom apartment at Queen's Drive. He did not offer any details about the other amenities. Reshaun and Tyler stay there with him on weekends and during their holidays. It is expected that Mr. Hercules would maintain suitable housing to comfortably accommodate his sons whenever they visit and himself. Mrs. Hercules did not raise any issue with the suitability of his current lodgings. I therefore infer that they are acceptable.

[11] Mr. Hercules pays a monthly rental of \$600.00. Mrs. Hercules contended that he should consider identifying more economical housing. Doing this she argued, would reduce his expenditure and make it possible for him to afford a greater contribution to the children's maintenance. Mr. Hercules did not comment on this suggestion.

Marriage

[12] The Herculeses were both very articulate and presented their respective positions in a forthright and confident manner. They did not appear to be suffering from any mental or physical disabilities and neither indicated that they were subject to any such health related concerns. The husband and wife expressed no concerns about the children's mental or physical abilities save that they considered that Reshaun needed regular and consistent assistance with school work. They had arranged for him to have additional classes in the last academic year. Both parents expressed satisfaction with his subsequent performance. This is not unusual and therefore raises no alarms regarding his intellectual capacity or mental health.

[13] Mrs. Hercules was of the view that Reshaun would need daily extensive supervision with schoolwork. She claimed that she and her mother provide this support consistently. She lamented that Mr. Hercules does not seem to be inclined to do likewise. She expressed concerns that Reshaun's academic performance would suffer substantially if he was allowed to live half of each month with his father or visit him more than 3 weekends each month.

- [14] Mr. Hercules insisted that he is equally diligent in reviewing Reshaun's school work and tutoring him. I believe that both parents provide tutelage to Reshaun. It is impossible to conclude that his scholastic improvement is attributable to the efforts of one or the other. I am inclined to the position that Reshaun benefitted equally from their joint guidance.
- [15] The Herculeses had a very short marriage, lasting only 6 years. Mrs. Hercules characterized it as stressful due in large measure to Mr. Hercules' alleged financial irresponsibility. Mr. Hercules expressed no opinion regarding the state of their brief union.
- [16] Mrs. Hercules testified that her mother made loans to Mr. Hercules during the marriage which he did not honour. He was not asked about it nor did he dispute this. My only observation is that in-laws are sometimes asked to assist particularly young couples as they make their way in life. To the extent that a loan or two is outstanding, this court is not required to make a ruling on such matters. In the circumstances, I draw no adverse inference regarding Mr. Hercules' moral proclivities or financial acumen.
- [17] Neither spouse claimed that he or she would lose any benefit as a result of the breakdown of the marriage. I find that there is likely to be no such loss. Similarly, neither party shed any light on the standard of living the family enjoyed before the breakdown of the marriage. Based on the scant details supplied, they appear to have operated as a working class family and with their family's assistance are aspiring to and are being or will likely be absorbed into the middle class.

Finances

- [18] There is no evidence to suggest that the couple acquired any real or personal property or any significant savings during the union. Mrs. Hercules owns a motor vehicle but she explained that she intends to sell it. Mr. Hercules bought a vehicle after the marriage broke down, but has been without its benefit for some time. They both rely on public transportation or other means of travel. Mr. Hercules explained that because he does not live on the bus route, he has been unable to collect the children during his allotted weekend visitations.
- [19] Mrs. Hercules earns a basic monthly gross salary of \$2100.00. From May to mid-July each year she receives between \$400.00 and \$1000.00 monthly in overtime pay. She explained that her overtime

pay in non-peak months is approximately \$200.00. Mr. Hercules' gross monthly salary is \$3,476.33. He gets a monthly overtime pay of about \$150.00.

[20] Mrs. Hercules estimated her monthly expenses to total \$2816.50⁷ including the sum of \$600.00 for groceries for the children and \$400.00 for lunch and snacks for Reshaun. Tyler's daytime meals are provided under the schools meal programme and are covered by his school fees. Mr. Hercules represented that his monthly expenditure amounted to \$3,874.39⁸ which resulted in a deficit of \$638.06. He exhibited a bundle of copies of receipts and a loan agreement. No certified copies were presented as required by the Evidence Act⁹ or rules of court. In some instances, no connection to Mr. Hercules appeared on the face of the document. They therefore do not assist the court. However, Mr. Hercules' testimony as to his indebtedness to financial institutions was led in evidence by Mrs. Hercules' legal practitioner Ms. Paula David. It was credible and is accepted.

[21] Early in 2017, Mr. Hercules obtained a loan to purchase land. It matures in 2027 at which time he will own all the legal and beneficial interests in that property. Mr. and Mrs. Hercules did not provide any documentary exhibits of grocery bills, personal hygiene budget or medical expenses. For the most part, the recurrent charges they described seemed reasonable. In other instances, they appeared inflated as in the case of personal grooming and hygiene. The court notes that most hygiene products by their nature need to be replaced maybe every quarter and not monthly.

[22] Similarly, Mrs. Hercules' estimation of the value of groceries and snacks for her sons, and Mr. Hercules' vacation related spending are items which could be reasonably revised downwards. The court also notes that both Mr. and Mrs. Hercules have represented that their usual monthly expenses routinely exceed their income.

⁷ Comprising loan payment - \$500.00; personal grooming and hygiene - \$150.00; driver's licence - \$12.50; motor vehicle maintenance - \$166.00; haircuts for the boys - \$40.00; lessons for Reshaun - \$50.00; Tyler's school fees - \$150.00; Reshaun's textbooks - \$33.00; stationery - \$40.00; clothing and shoes for the boys - \$320.00; medical, optical and dental - \$185.00; bus fares and lunch - \$220.00; and food for children - \$1000.00 inclusive of snacks.

⁸ Consisting of rent - \$600.00; electricity \$99.46; telephone - \$105.50; groceries - \$300.00; personal hygiene - \$150.00; gasoline - \$200.00; insurance - \$28.83; licence - \$62.25; driver's licence - \$8.33; medical - \$10.42; loans - \$1132.89; pension plan - \$263.82; savings/shares - \$20.00; hire purchase - \$55.00; children's lessons - \$250.00; vacation travel and spending - \$316.67; car maintenance - \$81.22.

⁹ Cap. 220 of the Revised Laws of Saint Vincent and the Grenadines, 2009.

- [23] They testified that they rely on their parents to supplement their lifestyles. While this might be so, I am of the considered opinion that they can each take steps to curtail unnecessary spending which would allow them to live within their means. It might take some sacrifice either way. Such an approach should be investigated by them both.
- [24] All things being even, Mr. and Mrs. Hercules are poised to maintain or advance in their respective careers based on work performance, the economic climate in their professions, place of employment and the domestic market. Realistically, one would expect their fortunes to improve as they mature.
- [25] Their salary slips reflect that they contribute to a pension fund at their respective places of employment and the national insurance service scheme. Accordingly, they would expect to receive pension and retirement benefits at the relevant times. No sufficient details were provided to enable the court to conduct a comparative analysis of such benefits. Be that as it may, the court is satisfied that their economic future is on firm footing, if they continue in present employment until the applicable retirement periods.
- [26] There is no evidence that their children have much in the way of savings. The children are not employable and therefore will not realize income or earnings for the foreseeable future. I refrain from making a finding in the absence of documentary or other evidence to support or belie such reality.
- [27] Mrs. Hercules testified that \$500.00 per month can adequately cover each child's realistic monthly food and related needs. She contended that Mr. Hercules should be ordered to pay half of that sum. Mr. Hercules maintained that he cannot afford that amount. He gave no indication of what sum he considered to be adequate. He admitted that his declared budget contained no figure representing the children's clothing needs. He explained that he gets clothing from his relatives.
- [28] Mrs. Hercules stressed that she was concerned that Mr. Hercules does not provide nourishing meals for the children when they are with him. She described them as being voraciously hungry whenever

they return from a visit with their father. He was not asked about this. I make no finding that they are so deprived.

[29] Both parents evince an intention to secure the best standard of living for their children. In this regard, their keen attention to Reshaun's education is commendable and is to be encouraged with respect to both sons. More than likely, Reshaun and Tyler would have benefitted from their parent's guidance and support materially, financially, emotionally and otherwise had the marriage not broken down. They are entitled to those benefits notwithstanding the breakdown of the marriage.

Maintenance

[30] Mrs. Hercules submitted that her request for \$500.00 is modest and eminently reasonable given the children's needs and the parties' respective incomes. She contended that the solution to Mr. Hercules' financial difficulties is for him to accept that he must put his children's needs before his wants and learn to manage money properly.

[31] Mr. Hercules argued that Mrs. Hercules lives rent free, pays no utility bills and is therefore in a better financial position than he. While it is true that Mrs. Hercules has no utility expenses, this does not mean that the boys do not consume part of the utility services at her parents' home. The court cannot discount this expense as not being accrued. Indeed, the responsibility to supply those needs is Mr. and Mrs. Hercules', not her parents.

[32] I am concerned that Mr. Hercules committed himself substantially to binding financial obligations earlier this year which would likely affect his ability to properly provide for his sons. Having regard to all the circumstances, I am inclined to conclude that it was pre-meditated, deliberate and possibly designed to place part of his earnings out of the court's reach in the instant case. He cannot be rewarded by an order placing the full responsibility on Mrs. Hercules' shoulders.

[33] On the other hand, I am hard-pressed to agree with Mrs. Hercules that the children's needs for nourishment and clothing cannot be met by a smaller sum. I take into account that she and Mr. Hercules have already agreed to equally share medical and educational expenses. It must be

remembered that maintenance orders are for the benefit of the minor children and not for the parent with care and control. I am satisfied that Reshaun and Tyler's reasonable monthly maintenance needs for food, clothing and related matters can be met by a total of \$400.00 each, which Mr. and Mrs. Hercules should share equally.

Care and control

[34] Mr. Hercules submitted that the court should make an order similar to that made by the Family Court in 2015, where care and control of the children was alternated between the parents for equal periods from month to month. Mrs. Hercules argued that in a 2016 decision, the High Court in Dominica in the case of **Treasha Marsha Massicotte v Ashley Arthurton Massicotte**¹⁰ granted joint custody to both parents with care and control to the father, based largely on the mother's history of outbursts of anger in the presence of the child.

[35] She added that in **Touche Daniel McLean v Annisha Asmette Jacobs-McLean**¹¹ the High Court of the British Virgin Islands having heard evidence that the husband refused to acknowledge an incident in which he beat the wife in the presence of the children, concluded that the welfare of the children would be better served if they were under the custody, care and control of the mother with reasonable access to the father.

[36] Mrs. Hercules testified that on July 6th 2017, Mr. Hercules behaved aggressively towards in the presence of the children. She recounted that he had come to her home to collect the boys and as he was driving away pulled up next to a vehicle in which she was seated with a male friend and proceeded to use indecent and threatening language against her friend. She recounted that he had a cutlass lying across his lap. This incident was not put to Mr. Hercules and he did not address it while testifying.

[37] While Mrs. Hercules did not allege that Mr. Hercules behaved aggressively towards her on that occasion, his failure to rebut this serious allegation does not go unremarked. I believe Mrs.

¹⁰ DOMHMT2012/0081, paragraphs 37 to 47.

¹¹ BVIHMT2011/0052, paragraphs 15 to 20.

Hercules and infer from Mr. Hercules' conspicuous silence on the matter that this happened. Such conduct is harmful to impressionable minds and should not have taken place. Although the evidence did not reveal that this type of behavior is routinely displayed by Mr. Hercules, he likely can benefit from anger management counseling and would be well-advised to undergo such a programme.

[38] In all the circumstances of this case, it seems to me that Reshaun and Tyler can best be served from having a stable, consistent and grounded home environment as opposed to being shuttled from mother to father every few weeks.

[39] In my opinion, such frequent moving lends itself to disorientation and instability. I therefore reject Mr. Hercules' suggestion that an order be made for the children to spend half of their time with him and half with Mrs. Hercules. Apart from the parents' concern about Reshaun's challenges with school work, it appears that he and Tyler are well-adjusted and progressing normally.

[40] I am satisfied that it is in their best interest to promote their optimum well-being by maintaining the present living arrangements, with liberal access to their father. It is accordingly ordered that Mrs. Nadia Hercules shall have primary care and control of the minor children Reshaun Dwite and Tyler Chad. Reasonable access is granted to Mr. Kahamol Hercules to include visitation every weekend.

[41] Mr. Hercules will be required to contribute equally to the children's economic welfare. Mr. Kahamol Hercules is ordered to pay to Mrs. Nadia Hercules \$200.00 each month as maintenance for:

- (a) Reshaun Dwite until he completes his studies at the chosen secondary school or subsequent tertiary education at a local college, or until he attains 18 years, whichever occurs later; and
 - (b) Tyler Chad until he completes his studies at a secondary school or local college or until he attains 18 years, whichever occurs later;
- such payments to commence on 31st October, 2017, and to continue each and every month thereafter on the last Friday of each month.

ORDER

[42] It is declared and ordered:

1. Mrs. Nadia Hercules shall have primary care and control of the minor children Reshaun Dwite and Tyler Chad. Reasonable access is granted to Mr. Kahamol Hercules to include visitation every weekend.
2. Mr. Kahamol Hercules shall pay to Mrs. Nadia Hercules \$200.00 each month as maintenance for:
 - (a) Reshaun Dwite until he completes his studies at the chosen secondary school or subsequent tertiary education at a local college, or until he attains 18 years, whichever occurs later; and
 - (b) Tyler Chad until he completes his studies at a secondary school or local college or until he attains 18 years, whichever occurs later;such payments to commence on 31st October, 2017, and to continue each and every month thereafter on the last Friday of each month.
3. Mrs. Hercules' application for a lump sum payment for Reshaun Dwite and Tyler Chad is dismissed.
4. Mr. Kahamol Hercules and Mrs. Nadia Hercules shall bear his or her own costs.

[43] I wish to thank counsel for their submissions.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar