EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHMT2013/0031

BETWEEN:

COLIN ALDRIDGE

Petitioner

-AND-

ALIX ALDRIDGE

Respondent

Appearances: Mrs. Marie Lou Creque, Counsel for the Petitioner
Ms. Mishka Jacobs, Counsel for the Defendant

2019: January 30th

JUDGMENT

[1] **Ellis J:** By Order granted on the 21st January 2014, the Court ordered:

(1) The Petitioner shall have sole custody of the minor children of the family.

1. Gabriela Aldridge born on 6th June, 1996

2. Laura Alexis Aldridge born on 23rd February, 2006

3. Thomas Blyden Aldridge born on 13th January, 2009

(2) The Petitioner shall maintain the minor children of the family until they reach the age of 18 years.

(3) The Petitioner shall pay the education expenses until the children complete tertiary education.

(4) The Petitioner shall pay all medical insurance and medical expenses in respect of the children.

(5) The Petitioner shall obtain the Respondent's agreement in writing in the event he wishes to remove the children from the Territory.

[2] This Order was made in circumstances when the Respondent indicated her consent to the terms and the Petitioner assured the Court that while he has primary care and control, the Respondent has had reasonable access to the children.

[3] By Notice of Application filed on 28th May, 2014, the Applicant seeks to have the Order varied in the followings terms:

1. That the Parties be awarded joint custody, with care and control to the Applicant and weekend visitation to the Respondent.

2. That the children shall not be removed from the Territory unless the Parties agree in writing.

3. That the Respondent pay the sum of $350.00 in maintenance of the said children.

4. That the Respondent pay half (½) of the educational expenses of each child.

[4] In considering this Application, the Court has taken into consideration the following Affidavits of the Applicant – 28th May, 2014, 29th May, 2014, 24th May, 2017, 29th November, 2018, 25th January, 2019 and the Affidavits of the Respondent – 20th January, 2015, 10th February, 2017, 16th January, 2019.

[5] The Court has also considered the 2014, 2015 and 2017 reports from the Social Development Department, as well as sundry medical reports from Dr. June Samuel, Dr. Torno and Dr. Rubaine. Finally, the Court has considered the legal arguments of counsel in the matter.

[6] The Court is satisfied that this Applicant must be considered in two (2) stages:

Stage (i) Whether the Court has the jurisdiction to vary the consent order.

Stage (ii) If yes, whether the Court should vary the terms of the order in the terms sought by the Applicant.

[7] A consent order is made in matrimonial proceedings where both parties have agreed the terms of their settlement and consent to an order being made without the need for a court hearing. It therefore provides a mechanism for making an informal agreement legally binding and enforceable in the court. Thereafter the contractual basis derives its legal affect from the terms of the actual

consent order. As such, they must be treated as orders of the court and dealt with as far as possible in the same way as non – consensual order. [1]

[8] A court's power to vary non-consensual orders is prescribed in the **Matrimonial Proceeding and Property Act 1995.** Section 30 of the Act provides that if the court's order falls within the list of those specified in section 30(2) (a)-(e), it can be varied in accordance with the terms of that section.[2] However, if the order does not fall within that list, the order cannot be varied by the Court of first instance. Instead, as a final order, it can be challenged on appeal or set aside on specific grounds, e.g. on the ground of fraud and mistake; fresh evidence property admitted or material non-disclosure. See: **De Lasala v De Lasala**[3]

[9] The Order which is the subject of this case, is a final order which is clearly not within the list of orders prescribed in section 30(2) of the Act and so it follows that the Court has no jurisdiction to vary it. This ruling would therefore dispose of this Application. However, in the event that the Court is wrong on this point, the Court will then go on to consider whether assuming it had the jurisdiction to vary, it should properly be done in this case.

[10] The Applicant's case sets out an evolving basis for variation. These are dealt with in turn.

[11] First, the Applicant advanced that she was without legal representation and did not understand the legal implications of the Order. The Court is satisfied having reviewed the transcript of the proceedings of 21st January, 2014 that there is no merit in this assertion. At page 4 of the transcript, the Applicant indicated unequivocally that she did not wish to have legal representation. She indicated that she was aware of the terms of the Order and that she did not feel the need to seek legal advice. Rather, she indicated that she had read the order and felt that it is was okay. Notwithstanding this assurance, the Court took pains to review the terms of the Order for her benefit. At pages 5 – 7, sole custody is explained, at page 7 – primary care and control, at pages 7 – 8 - reasonable access and maintenance at pages 8 – 9. The Court is therefore satisfied that the Applicant was well aware of the legal implications and understood them completely.

[1] Thwaite v Thwaite [1982] 1 Fam 1
[2] Brister v Brister (1970) 1WLR 664
[3] (1980) AC 346

[12] The Applicant also appeared to indicate that she was unduly influenced because she had been persuaded that her mental health condition would militate against the grant of custody. There can be no doubt that the Applicant's admitted mental health condition would have in fact carried significant weight in any application for custody and access/visitation. In the Court's judgment, this would not be a basis upon which the Court could vary the Order.

[13] More recently, the Applicant has advanced that the Respondent conspired with medical personnel to keep her in a drugged and unstable state. However, save for this bare allegation, the Applicant had provided no evidence to support or corroborate this rather serious and eleventh hour allegation.

[14] The Applicant finally alleges that there has been a change in the circumstances since the date of the 2014 Order. She points to the fact that she is now gainfully employed; has a fixed place of abode; her mental health condition has stabilized with counseling and medication and she has completed co-parenting counseling.

[15] Section 30(7) of the Act provides that a court is entitled to have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order. In the Court's judgment while a court is obliged to take these factors into account, once it has determined to exercise its powers to vary, the Court is not satisfied that this would in and of itself be a basis to exercise its jurisdiction under section 30.

[16] Indeed, the Applicant has provided the Court with no authority to support this. However, in the most recent case of **Birch v Birch**[4], the English Supreme Court after considering section 31 of the Matrimonial Causes Act 1973 [the equivalent of section 30 of the BVI Matrimonial Proceedings and Property Act], observed that Parliament has not made a change of circumstances a condition of the exercise of the Court's jurisdiction to vary an order under section 31(2) of the Matrimonial Causes Act.

> "The Court held an undertaking was a solemn promise which a litigant volunteered to the court. A court had no power to impose any variation of the terms of a voluntary promise. A litigant who wished to cease to be bound by his undertaking should apple for release from, or discharge of, it and often he would accompany his application for release with an

[4] (2017) UKSC 53

offer of a further undertaking in different terms. Further, in circumstances in which an undertaking could have been framed as an order, it would be illogical for answers to questions about the existence and exercise of the jurisdiction to grant release from it to be different from answers to questions about the existence and exercise of the jurisdiction to vary any such an order. Parliament had not, in section 31(7) of the Act concerning variation of orders for financial relief or elsewhere, made a change of circumstances a condition for exercise of the jurisdiction to vary an order under section 24A. Nevertheless, unless there had been a significant change of circumstances since the order had been made, grounds for variation of it under s 31 were hard to conceive."

[17] Having said this, the Court is satisfied that the Court's jurisdiction regarding the matter of custody is derived from two statues, namely Matrimonial Proceedings and Property Act and the Guardianship of Infants Act Cap 270 of the Laws of the Virgin Islands.

[18] Section 44 of the Matrimonial Proceedings and Property Act 1995:

"(1) The Court may make such order as it thinks fit for the custody and education of the child of the family who is the age of eighteen:

a) In any proceedings for divorce, nullity of marriage or Judicial separation, before the granting a decree or at any time thereafter (whether in the case of a decree of divorce or nullity of marriage, before or after the decree is made absolute);

b) Where in any such proceedings are dismissed after the beginning of the trial, either forthwith or within a reasonable period after the dismissal;"

[19] Section 44 of the **Matrimonial Proceedings and Property Act 1995** therefore gives the Court a wide discretion to make any order it sees fit in the circumstances of the case in respect of custody, access, or financial provision.

[20] This provision reinforces section 11 of the Guardianship of Minors Act which also makes it clear that the Court may make such orders as it thinks fit regarding custody of any infant and the right of access of either parent. However, section 3 of that Act provides that in exercising its discretion, the Court shall regard the welfare of the child as the first and paramount consideration. It provides as follows:

"Where in any proceeding before the Court the custody or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, 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."

[21] The import of the term "*shall regard the welfare of the infant as the first and paramount consideration*" has been judicially considered. The classic construction of this provision is found in the judgment of Lord Mac Dermott in **J v C**[5] where he stated:

> "The second question of construction is as to the scope of meaning of the words '…shall regard the welfare of the infant as the first and paramount consideration.' Reading these words in their ordinary significance, and relating them to the various classes of proceedings which the section has already mentioned, it seems to me that **they must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationship, claims and wishes or parents, risks, choices and other circumstances are taken into account and weighed the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood.** That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed." Emphasis mine

[22] In determining an application of this nature, the first and paramount consideration is therefore the welfare of the child. 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"***[6]

[23] 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"***[7]

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[5] [1970] A.C. 668

[6] Op. Cit p. 177

[7] d'Auvergne J in Alvin Hodge v Maguerite Densie Hodge 33/2002 referred to in the case of Neville Clairmonte Brathwaite Jr v Angeline Sherrzar Brathwaite nee Paul BVIHMT 2001/0069 unrep.

[24] The Court has taken into consideration all of these factors and in doing has determined that the Application for variation should be dismissed. In coming to this conclusion, the Court has not ignored the significant strides made by the Applicant since the Order of 2014. There is no doubt that she has worked diligently to improve her emotional and mental stability and her financial and employment position. She has also taken steps to improve her parenting skills and to build on and cement her relationship with the Children.

Age and wishes of the children

[25] As at the date of the hearing, Gabriella was 22 years old and is therefore no longer relevant to the Application. Laura was 12 years old and Blyden was 10 years. The Court determined that they were old enough to be heard on the Application and to have their wishes taken into account.

[26] The Children made it clear that while they love both their parents, they do not wish to have any change in the status quo. They point to the stability, structure and predictability of their current lives and they attributed them to their father's influence. They reiterated forcefully that they wish to remain in the care and control of their father and that they wish him to have physical as well as legal custody. Although they agreed that the current access and visitation arrangements in place are ad hoc and not regulated, they indicated that they are content with the current level and regularity of access.

The wishes of the Parents

[27] Both Parties had an opportunity to give written and oral evidence. Their positions are unequivocal and the Court has taken this into consideration.

Conduct of the Parents towards each other

[28] The Court is satisfied that the relationship and interaction between the Parties has improved in recent times. No doubt the passage of time since the decree nisi and the co-parenting counseling has assisted this. However, they are clear tensions which remain and this was evident from their demeanor in Court and from their own evidence which discloses an inability to reach a consensus

ad idem on minor issues regarding access and visitation. Given the nature of the application, this is of concern to the Court especially in light of the fact that both parties have undergone co-parenting counseling.

[29] The Social Development Department's Report of 2017 makes it clear that the Parties do not communicate effectively. Rather, attempts at open communication quickly crumble with each side attempting to win some perceived battle by taking digs at each other.

Conduct of the Parents toward the Children

[30] The Parties both assert that they have a loving relationship with both children. It is clear that the children are thriving in the care of the father. He has a solid relationship with both of them and they have also endorsed that view wholeheartedly. On the other hand, the Court is satisfied that while the relationship between the Applicant and Bylden very good, the relationship between the mother and Laura is strained at times. This is corroborated from the evidence of both the Applicant and Laura herself. There have been allegations of physical abuse of Laura by the Applicant which required the intervention of law enforcement. The Social Development' Department Report of 2017 however indicates that this investigation proved to be inconclusive. The Court is satisfied that that relationship continues to be complex but is improving. However the disparate treatment of the children by the Applicant is and should be a matter of concern.

Health of the Children and the Parties

[31] There are no significant health issues which arise in regards to the Children. From all accounts they are healthy and finally adjusting to the dissolution of their Parent's marriage. Similarly, no issues arise in regards to the Respondent's health. The Applicant on the other hand has been diagnosed with major depressive disorder. She is required to undergo legal counseling and her condition is being treated with medication. There appears to be some improvement in her condition which is expressed to be in remission however the Social Development Department has raised concerns that her attendance at counseling is irregular and seems to be dependent on her attendance at Court and her pursuit of this application. The Court is concerned about this because

it is clear that her course of treatment should not be tied to the success of her application but rather to the best interests of the Applicant and her Children.

Material Standards that the Children expect – Maintaining the Status Quo

[32] Both Parties are gainfully employed. The Respondent owns several successful businesses and his financial position appears to be secure. The Court has had a chance to review the Social Development Department's Reports and it is clear that he is well able to maintain the Children. Since the Order of 2014, he has done so with negligible financial support from the Applicant. The Respondent is able to provide suitable accommodation for the Children and although there was initially some period of adjustment following the Parent's separation, the children now appear to be thriving.

[33] The Applicant's position has improved significantly within recent times. She has had stable employment for the past 2 years but this is likely to change in the near future. Her monthly income is significantly less than the Respondent and it is clear to the Court that she will not be able to keep the Children in the standard of care to which they have become accustomed without significant input from the Respondent.

[34] The Applicant has recently secured accommodation in the West End although not previously reviewed by the Social Worker but it is clear to the Court that it is largely unfurnished and that the rental of $1400.00 per month is a disproportionate percentage of the Applicant's $2500.00 per month income.

[35] The Court is aware that the quality of the home life that a child will have must not be measured solely on the basis of material considerations.[8] However, the Court cannot completely ignore the obvious disparate financial positions of the Parties. The Court is satisfied that the Applicant will require significant financial support in order to provide for and maintain the children.

[8]Stephenson v Stephenson [1985] FLR 1140 at 1148

[36] Ultimately, although the term welfare includes material welfare in the sense of adequacy of resources to provide a home and comfortable standard of living and adequate care, it is clear that these are secondary matters. More important are the stability and security; the loving and understanding, care and guidance, the warm and compassionate relationship, that are essential for the full development of the child's own character, personality and talents.

[37] In deciding who is best able to meet the child's day-to-day needs, the status quo is an important consideration as additional change is often stressful for the child. A court is unlikely to change a child's routine unless there is something wrong. This is because the guiding principle behind child custody determinations is whatever that is in "the best interests of the child." If the child has become accustomed to a particular arrangement, it may be disruptive to the child to change the arrangement. From all accounts the children have adjusted to the custody arrangements which are currently in place. It is apparent that they have a strong relationship with both parents and that their current needs are being met in the current arrangements.

[38] In the case at bar, the Applicant has contended that the present custody arrangement is not suitable for the Children. The Court has been able to observe both Parties give their oral evidence during the course of these proceedings and have reviewed the combined reports of the Social Development Department which follows a thorough investigation of the Children's care and well-being, the Court is not persuaded by the Applicant's contentions, neither is the Court of the view that they would form any basis for interfering with the status quo. There is no abuse, violence or negligent care corroborated either by the social worker, the relevant educators of the children or the Children themselves. In the same way, there is no indication that the current status quo is impractical for the children in any way.

[39] On the contrary, there is sufficient evidence that the Children's needs would be better served by maintaining the current custody arrangements. Having carefully reviewed the Applicant's case and her evidence under oath, the Court is not satisfied that she has advanced sufficient details necessary in order to properly assess her proposed care plan for the Children. It is clear to the Court that she has not thoroughly thought through the logistics and the financial implications of assuming primary care and control.

Costs

[40] Generally, costs do not ordinarily follow the event in family proceedings, as they do in other forms of civil proceedings. The rationale for this would be obvious. Where the debate surrounds the future of a child, the aspiration is that in their outcome the child is the "winner" and indeed the only "winner". The Court does not wish the possibility of an order for costs to discourage those with a proper interest in the child from participating in the debate. Nor does it wish to reduce the chance of their co-operation around the future life of the child by casting one as the successful party entitled to their costs and another as the unsuccessful party obliged to pay them. It is important for the parties to be able to work together in the interests of the children both during and after the proceedings. Children's lives do not stand still, stigmatizing one party as the "loser" and adding to that the burden of having to pay the other party's costs is likely to jeopardize the chances of their co-operating in the future. Ultimately, it can generally be assumed that all parties to the case are motivated by concern for the child's welfare.

[41] In deciding how to exercise its discretion on costs, the Court has also considered principles which have been established in relevant case law. They reveal that an award of costs may be justified if it is demonstrated that the conduct of the party (before, as well as during the proceedings and/or in the manner in which a case has been pursued or defended) has been "reprehensible or unreasonable".[9] The Court is not satisfied that this matrix obtains here.

[42] For these reasons, the Court will order the Application dismissed. The current access and visitation order will remain in place and the Court will encourage the Parties to continue to work together in the best interest of their children. There will no order as to costs.

Vicki Ann Ellis
High Court Judge

By the Court

Registrar

[9] In re M (Local Authority's Costs) [1995] 1 FCR 649; Sutton London Borough Council v Davis (No 2) [1995] 1 ALL ER 65),