

THE EASTERN CARIBBEAN SUPREME COURT

**IN THE HIGH COURT OF JUSTICE
DIVORCE**

SAINT LUCIA

CASE NUMBER: SLUHMT2022/0163

BETWEEN:

T.M.

Petitioner

-and-

E.M

Respondent

Before the Honourable Mr. Justice Alvin Pariagsingh

Appearances: Mrs. Kim St. Rose for the Petitioner
Mr. C. Vern Gill for the Respondent

2024: May 17
May 29

JUDGMENT

Ancillary relief application for joint custody with care and control, property settlement, maintenance, maintenance pending suit, return of business stock and costs.

[1] **PARIAGSINGH, J** : - “Courts do not operate on any rights of either parents to custody, but on the right of the child or children to be placed in an environment most conducive to their welfare. The court ought to make an order in the best interest of the children involved. In other words, this court must consider what is the best for the benefit of the child and not the benefit of the parents. I intend to bear this in mind as a golden thread which runs through the case.” ¹

¹Per Persad – Maharaj J; Gopee v Gopee (HCA 19 of 1991) (Trinidad and Tobago) (unreported) reproduced as the margin note to Chapter 10 ‘Custody of Children’ in the book Elements of Child Law in the Commonwealth Caribbean by Zanifa Mc Dowell.

CUSTODY/ CARE AND CONTROL:

- [1] The petitioner, mother seeks an order for joint custody with care and control of the child of the family to her. She also seeks an order that the respondent, father contributes towards the maintenance of the child.
- [2] The child of the family, EM, was born on December 18, 2006 (the child). She will attain the age of majority in approximately six months. She is currently a student at Sir Arthur Lewis Community College. When the marriage between the parties broke down in June 2022, the mother left the matrimonial home. The circumstances and manner in which the mother left is disputed, but the child remained with her father at the matrimonial home. She has lived in that house all her life. She is a healthy young woman with no physical or mental disabilities.
- [3] It is undisputed that the child's accommodation and facilities at the former matrimonial home are better than those she has at her mother's apartment.
- [4] Custody of a child involves two elements: the overall vesting of rights and responsibilities for the child, or the 'whole bundle of rights and power over the child,' terminating when the child attains the age of majority, and the narrower element of actual possession of the child's person, commonly referred to as 'care and control'. Arguably, the narrower sense derives from the broader sense. The parties are ad idem on the boarder sense and have agreed to joint custody of the child. It is her care and control that is in issue.
- [5] There are five main rights which flow from an order for custody. They are:
 - 1) The right of physical control over the child;
 - 2) The right to discipline the child;
 - 3) The right to control the education of the child;
 - 4) The right to protect the child; and
 - 5) The right to make medical decisions affecting the child.

- [6] None of the rights vested by a custody order are absolute and are subject to the veto by the court if appropriate. These main rights will be shared by the parties as they have agreed to joint custody.
- [7] The principles applicable to the consideration for the grant of custody are summarised in **Elements of Child Law in the Commonwealth Caribbean** as follows:

“WELFARE OF CHILD FIRST AND PARAMOUNT CONSIDERATION

Crucial to an understanding of the subject matter, is the principle first enunciated by equity, and later in the UK Infants Acts, adopted by West Indian jurisdictions, that in any dispute relating to a child the court must regard the child's welfare as the first and paramount consideration. This principle applies whether the dispute arises under the infants acts, matrimonial causes acts, summary maintenance acts, affiliation acts, wardship proceedings, or other proceedings affecting the child.

The statutes under which custody may be applied for in the various territories of the region vary and statutory provisions are not uniform. Nevertheless, the central principle applicable in all cases, is the same, that is, the welfare of the child is the first and paramount consideration. This principle has been elucidated by Lord MacDermott in *J v. C* thus:

...

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, relationships, claims and wishes of 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 ... That is of first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed.”

- [8] **Section 42 (1) of the Divorce Act of the Laws of Saint Lucia** (the Act) gives the Court the power to make such order as it thinks fit for the custody and education of any child of the family who is under the age of 18.

[9] A non-exhaustive list of principles to be considered in custody cases, which I adopt, was set out in the case of **Durity v Benjamin** ² as:

- 1) Behaviour and characteristics of the parties
- 2) Child's education
- 3) Whether the child is suffering from any serious illness
- 4) Accommodation and material advantages
- 5) Satisfaction of the child's basic needs
- 6) Whether the custody application is bona fide or not
- 7) Wishes of the parent and if possible, wishes of the child
- 8) Sex and age of the child and ages of the parents
- 9) Religion of the child
- 10) Happiness of the child
- 11) Future prospects of the child if granted to one parent
- 12) Question of access to the unsuccessful party
- 13) Whether the new partners of the parents will be amenable to looking after the child

Behaviour and characteristics of the parties:

[10] In my view, from the evidence and having observed the manner and non-evasiveness of the respondent, his open and frank answers, and forthrightness, I am satisfied that his behaviour and characteristics are better suited to have care and control of the child. There is no doubt that both parties love and care for the child, but it is obvious that the petitioner does not share the same relationship with the child as the respondent. Whilst it was suggested in cross-examination that this closeness may be attributed to the respondent being somewhat lax with the child, I do not accept this.

²HCA 1596 of 1993 (unreported)

[11] I find the petitioner to be an evasive witness who was fixated within communicating one narrative regardless of what was asked. She appeared to be unwilling to accept any criticism of her parenting style often giving defensive answers.

[12] Having interviewed the child and having heard her responses to my questions, I am even more convinced that the petitioner is an overly strict disciplinarian who often loses her cool in dealing with the child.

[13] I find that the petitioner's behaviour and characteristics are not conducive to the overall well-being and happiness of the child. It appears that whilst her intentions are good, her methods have only caused the child to lose respect for her and have further eroded a strained relationship.

The child's education:

[14] The child's education is in good stead. Both parties have invested their time and efforts in ensuring that the child's education is properly looked after. The petitioner seems to have been the greater driving force behind the child's education during the marriage, owing to her having more time due to her working pattern. The child has a clear idea at 17 years old of the career path she wants to pursue and is well on her way to achieving this. The child's education favours her continuing in the trajectory she is currently on without change in her physical environment.

[15] At present the child attends school and spends time with her mother on afternoons after school. During this time the petitioner's evidence is that she would prepare a meal for the child and wait for her being picked up by the respondent. She also spends time with her grandmother with whom she appears to also have a very good relationship.

Whether the child is suffering from any serious illness:

[16] There is no evidence that the child is suffering from any serious illness. It is noteworthy that when the child did have a medical issue, the child communicated the issue to her father who made arrangements for her medical treatment and asked the child to inform her mother so that she could accompany her to the doctor.

[17] This is to my mind instills the sense that the child is comfortable communicating with her father on all issues including sensitive matters of a personal nature.

Accommodation and material advantages:

[18] It is undisputed that the child's accommodation and material advantages are greater when she is with her father. Since the father has remained in the former matrimonial home, the child has not been deprived of the luxuries she has become used to, including her room, her own bathroom, and her own space in a modern house.

[19] When the child is with her mother, she stays in a two-bedroom apartment at the bottom of her grandmother's house. Though she seems to be okay with staying there on evenings and some nights, the accommodation and material advantages are better with her father.

[20] The material advantages of the child remaining with the father is that her regular routine will not be interrupted. If the mother is to reassume residence at the former matrimonial home, no doubt some adjustment time would be necessary.

Satisfaction of the child's basic needs:

[21] Both parties are equally capable of satisfying the child's basic needs. Their salaries are comparable, and when the fact that the father pays the loan for the former matrimonial

home is taken into account, it seems that the mother may have more disposable income than the father.

[22] The status quo has been that the father has not abdicated or shunned his financial responsibility for the child from her birth up to the present time. There is no suggestion by the mother that the father does not satisfy or is not capable of satisfying the child's basic needs. In fact, she complains that he spoils the child. I also note that the mother in her application seeks maintenance for the child if she is granted joint custody.

Whether the custody application is bona fide or not:

[23] The application for custody, in my view, is bona fide. I have no doubt that both parties are genuinely seeking the same, that is, the best interest of the child. I have not heard or seen anything in the evidence from the parties that makes me doubt the bona fides of the application.

[24] The Court did, however, form the view that the mother's application for care and control is intractably linked to her application for property settlement, in particular, her bid to re-enter the former matrimonial home and to be given the opportunity to purchase it.

Wishes of the parent and if possible, wishes of the child:

[25] Both parties wish for care and control. The parties are, however, not at a point in their relationship where there can be meaningful communication between them about the child. Whilst there seems to be less reservation on the part of the father, the resentment of the mother towards the father is obvious. This makes joint custody slightly complicated. This complication is, however, mitigated by the child being so close to the age of majority and being able to express her view and be a conduit for communication between the parties

[26] The wish of the child has been considered by this Court. The child is a few months short of 18 years old and in tertiary education. Similarly, to the position of the Court in **Haloute v Adamira**³ that a 14 year old boy was capable of expressing his wish on who should be granted custody of him, I am of the view that the wishes of the child in this case, being a very articulate young woman of 17 years, ought to be taken into account.

[27] She was very clear in articulating her views. Her wish is not to choose between her parents as she loves them both. Her preference is, however, clear that she wishes to continue to live with her father.

Sex and age of the child and ages of the parents:

[28] The child is a young woman of age 17 years who will be 18 years in December of this year. She is not reliant on either parent for her day to day physical needs and is not physically or mentally impaired or requires any special needs. Whilst a particular diet is suggested having regard to a certain medical condition, she has no specific needs.

[29] I accept the father's evidence that the child cooks for herself but that he ensures that she has food to eat. I note that the child herself indicated that after school her grandmother prepares a meal for her. No emphasis was placed on any need for a special diet although it was raised during cross examination of the father.

[30] The parties are both middle-aged persons who do not appear to suffer any mental or physical disability that would affect their ability to care for the child if given custody, care and control.

Religion of the child:

[31] There was no evidence led about the religion of the child.

³HCA No. 233 of 1989 (Barbados) (unreported)

Happiness of the child:

[32] The child is clearly happier with her father in the former matrimonial home. I accept that the child was not coaxed or influenced in any way by either parent. It is clear to this Court that she has a better relationship with her father. There is open and free communication between the respondent and the child. More importantly, the child has a healthy respect for her father.

[33] Regrettably, she appears to struggle in her relationship with her mother. I accept the respondent's evidence that the child's relationship with her mother has been fractured by the lack of mutual respect between them stemming inter alia from ineffective discipline methods and communication generally.

[34] I note that the father has enrolled the child with a professional and I am hopeful that this treatment will cause a shift in the dynamics in the relationship the child has with her mother and by extension, the parties with each other.

Future prospects of the child if granted to one parent:

[35] If care and control is granted to one parent, the future prospects seem to be on a path of putting this matter behind them and continuing to work on repairing the relationship between the petitioner and the child. The Court is not of the view that giving care and control of the child to the respondent will negatively affect the future prospects of a meaningful relationship between the petitioner and the child.

Question of access to the unsuccessful party:

[36] There is no real issue of access to the petitioner. In the foreseeable future, the child and both parties reside in Saint Lucia. There is no suggestion that any party has prevented or restricted access to the child. In any event, the child will attain the age of majority in

a few months. She is a young adult who can and does exercise access on her own accord.

Whether the new partners of the parents will be amenable to looking after the child:

[37] The evidence is that the child does not want the respondent's new partner and child to move into the former matrimonial home with her. The respondent's evidence is that he is aware of the wishes of the child and has not facilitated a relationship between the child and his new family.

[38] The Court has some concern with this state of affairs. As uncomfortable as forming that relationship may be, the fact is that the respondent has a new partner and a child, and this fact will not change. A relationship between siblings is important and ought to be encouraged. The Court strongly suggests that counselling be afforded to the child to accept her additional sibling and the possibility of the blended family.

[39] There is no evidence that the new partner of the respondent will be amenable to looking after the child. However, having regard to the short space of time between the making of this order and the child attaining the age of majority, I do not see this as an impediment to him being granted custody. The child of the family is the only child of the petitioner, and there is no evidence that she has a new partner. This factor does not arise for consideration on her side.

Conclusion:

[40] Having considered the evidence, the law, and the applicable principles, the Court is of the view that the parents have been co-parenting the child successfully despite their inability to communicate effectively with each other. This is commendable. The welfare of the child is best served by the making of an order for joint custody with care and control of the child in favour of the respondent/father.

[41] Both parties will also continue to be responsible for her financial welfare until she attains the age of 18 or completes tertiary education, whichever is later.

PROPERTY MATTERS & MAINTENANCE:

[42] The only asset of the parties' subject to this application is the former matrimonial home and its contents. The crux of the dispute is whether the petitioner should be allowed to return to the matrimonial home and be permitted to purchase the respondent's half share, or whether it should be the reverse. This, of course, is contingent upon the existing loan being paid off.

[43] The law regarding the division of community property in this jurisdiction is well established in the decision of Michel JA in **Lesfloris v Lesfloris**⁴, where it was held that:

"In accordance with article 1192 of the Civil Code, the property of parties to a marriage in Saint Lucia is either community property or separate property. If it is community property, then each party owns a community moiety or half share in the property; if it is separate property, then it is owned entirely by one or the other of the parties."

[44] The incomes of the parties are comparable. The petitioner earns approximately \$9,000 per month, while the respondent earns approximately \$11,000-\$12,000. When the loan payment is deducted from the respondent's salary, their incomes are comparable. I accept the respondent's evidence that the loan has been paid by him in the main for its subsistence.

[45] The respondent appears to have a higher earning capacity even though the petitioner seems to be more qualified than him. Over the years, he has maintained a steady stream of income and diversified his income through several business ventures. The petitioner is now gainfully employed and also has the ability to find employment, as she has done

⁴ SLUHCVP2015/0018 (Unreported)

during the marriage and afterwards, albeit in a less consistent manner than the respondent.

[46] The evidence shows that the main property of the parties is the former matrimonial home. The other asset is the vehicle, which the petitioner indicated at the commencement of the trial is not being pursued.

[47] The other financial resources of the parties are also evenly balanced. Both parties are skilled and trained to generate income through business ventures, as the evidence shows. In the foreseeable future, it is likely that both parties will be on a similar financial footing. This is because the respondent's financial position must factor in the cost of the loan and obtaining financing to purchase the petitioner's half share. When this is considered against his current better financial position, the petitioner's income and, more importantly, disposable income seem to put the parties on a similar financial footing in the foreseeable future.

[48] The financial needs, obligations, and responsibilities that each of the parties to the marriage has or is likely to have in the foreseeable future will no doubt be comparable, if not the same.

[49] I am also cognizant of the evidence that the respondent bears most of the financial responsibility for the child including her education and has frontally expressed his intention to continue this. This will also affect his foreseeable financial position having regard to her desire and by all indications progression to further tertiary education soon.

[50] I do not find in favour of the petitioner's claim that she should be permitted to return to the former matrimonial home. On the factual issue, I accept the respondent's version of the incident that led to her leaving the former matrimonial home. I also find as a fact that the respondent has greater and more substantial connections to the house on all fronts. He designed it, he built parts of it, he invested more money into it than the petitioner, and he continues to pay the loan. Furthermore, having granted care and control of the

child to the respondent, I am not inclined to permit the petitioner to return to the home and force the child of the family to live with her.

[51] For these reasons, I order that the respondent pay the petitioner one half of the market value of the former matrimonial home and its contents, less the outstanding balance on the loan, in full and final settlement of her half share within 180 days of the date of this order. Upon payment, the petitioner shall transfer all her share and interest in the former matrimonial home to the respondent. In default, the Registrar of the High Court is authorised to execute the necessary transfer in favour of the respondent.

[52] Should the respondent not be in a financial position to purchase the petitioner's half share after 180 days, subject to any extension granted by the court, then she is at liberty to purchase the respondent's half share at the market value, less the payoff value of the loan as of that date.

[53] In respect of the petitioner's application for maintenance pending suit and maintenance for herself, I am not minded to make any such order. The petitioner has paid the sum of \$1,500 for one year which was by agreement of the parties. I have also taken this into account. Additionally, there is no need for the petitioner to be financially assisted at present, given her current financial position and having regard to the factors set out in section 25 of the Act.

[54] In respect of the return of the Foamcore material which the petitioner seeks, the respondent does not contest the return even though his evidence is that he contributed to the business venture and even repaid the Stephensons, a third party who made an input into the business. The petitioner, however, did not take the material as she has no place to store them for free. In this regard, the petitioner shall remove the material stored at the former matrimonial home at her expense, within 180 days of this order. In default, the respondent is at liberty to dispose of the same and deduct any expenses incurred in selling the items as well as reasonable storage fees (to be agreed between the Attorneys) for storing the material after the Respondent is paid her half share.

[55] On the issue of insurance for the petitioner, the respondent has indicated that all that needs to be done for the petitioner to be covered by his insurance policy is for her to submit a claim form. In this regard, the petitioner can communicate with the respondent as to the submission of her insurance claim on his policy and shall complete and send to him as required.

[56] On the issue of costs, each party shall bear their own costs of this application.

[57] Finally, it would be remiss of me not to express my gratitude to Counsel for their sober and mature handling of this case while advocating for their respective clients. Their collaborative efforts, even on contested issues, their method of cross-examination, and their humane approach to this sensitive matter deserve high commendation.

ORDER:

[58] For the reasons above, it is hereby ordered that:

- 1) The parties are granted joint custody of the child of the family namely; EM born on December 18, 2006 with care and control to the Respondent/ Father.
- 2) Both parties will be jointly responsible for her financial welfare including all living, educational, medical, dental and other expenses until she attains the age of 18 or completes tertiary education, whichever is later.
- 3) The valuation report of Ms. Giselle M. Casimir dated February 2023, exhibited as "M5" to the affidavit of the respondent filed on 29 January 2024, is to be updated to (1) reflect the current market value of the immovable house standing on the land described as Block 1457B Parcel No. 254 and (2) provide the market value of the movable contents of the house (as of

the date the Petitioner left the house) within forty-five (45) days of the date of this order at the joint expense of both parties.

- 4) If Ms. Casimir is unable to value the contents of the house, the parties are to agree a valuer to value same and issue joint instructions to the agreed valuer to obtain a valuation report within fourteen (14) days of the date of this order. This cost of this report shall be borne equally.
- 5) Upon receipt of the updated valuation of Ms. Casimir and/or any other valuer instructed, the respondent shall pay the petitioner one half of the market value of the former matrimonial home and its contents, less the outstanding balance on the loan, in full and final settlement of her half share within 180 days.
- 6) Upon payment, the petitioner shall transfer all her share and interest in the former matrimonial home standing on the land described as Block 1457B Parcel No. 254 to the respondent. In default, the Registrar of the High Court is authorised to execute the necessary transfer in favour of the respondent.
- 7) Should the respondent not be in a financial position to purchase the petitioner's half share after 180 days from receipt of the updated valuation, subject to any extension granted by the court, then the petitioner is at liberty to purchase the respondent's half share at the market value, less the payoff value of the loan as of that date. Alternatively, the property shall be sold on the open market and the parties shall be at liberty to hire a real estate at their joint cost to secure a sale.
- 8) The petitioner's application for maintenance and further maintenance pending suit is refused.

- 9) The petitioner shall remove the Foamcore material stored at the former matrimonial home at her expense, within 180 days of this order. In default, the respondent is at liberty to dispose of the same and deduct any expenses incurred in selling the items as well as reasonable storage fees (to be agreed between the Attorneys) for storing the material after the Respondent is paid her half share.
- 10) Each party shall bear their own costs of this application.



**Alvin Pariagsingh
Judge**

By the Court,

Registrar