

**BRITISH VIRGIN ISLANDS
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

**BVIHMT 2011/0069
Between**

NEVILLE CLAIRMONTE BRATHWAITE JR.

Petitioner

and

ANGELINE SHEREZAR BRATHWAITE (nee PAUL)

Respondent

Appearances:

Tamara Cameron of Farara Kerrins for the Petitioner Father

Asha Johnson of Samuels Richardson & Co. for the Respondent Mother

2012: May 23

2012: July 18

JUDGMENT

1. **Joseph-Olivetti J:-** We are here concerned in the main with the invariably vexed issue of custody of children on the breakdown of a marriage. Mrs. Braithwaite ("the Mother") filed an application on 29 March 2012 seeking in the main joint custody of the two minor children of the marriage with primary care and control to her and reasonable access to Mr. Braithwaite ("the Father") for certain relief. The Father in turn filed his own application for ancillary relief on 13 April 2012. He too seeks in summary joint custody with primary care and control to him and reasonable access to the Mother. Both applications were heard together.

The Law on custody and maintenance

2. S.44 (1) of the Matrimonial Proceedings and Property Act 1997 ('the MPPA') clothes the court with authority to make an order for the custody and education of any child of the family who is under 18 years in any divorce proceedings. And s. 26 enjoins the court to take into account certain matters in making financial provisions for children of the family and in determining custody the court must bear in mind that the welfare of the child is the first and paramount consideration. See ss. 3 and 4 of the Guardianship of Infants Act, Cap

270¹. Cap 270 also makes it abundantly clear that one parent's claim to custody is not to be regarded as superior to the other's. The welfare checklist as set out in section 3 of the Children Act, 1989 (UK) is also useful as too the words of d'Auvergne J. in **Alvin Hodge v Marguerite Denise Hodge 33/2002**, where the learned judge made reference to the UK Children Act section 3 noting – “much weight is now given to the child's sex, age, his 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.” Thus, it is apparent from these provisions and the authorities cited by both counsel that each case must in the end turn on its own particular circumstances.

3. Facts as found.

4. As a preface I feel compelled to make some general observations. Having seen and heard the parties I have no doubt that they both love their children and each wishes to obtain primary care and control of them. However, having regard to some of the allegations made it is clear that there is still a lot of hurt and anger present and that this has formed the parties behavior towards each other especially that of the Father's. For example, his attempts to blacken the Mother's name to her employers in the USA. This was silly and wholly unjustified and could have resulted in much harm to her with secondary effects on the children. I am sure that on reflection the Father will readily accept that this was so.
5. The parties were married on 25th September 1999 and that once happy marriage was dissolved on 26 January 2012. There are two minor children of the marriage, a daughter born 15 July 1999 and a son born 24 April 2005. They presently reside with the Mother in North Carolina in the USA. Prior to the hearing the Father filed an application for an injunction on 18 April 2012 alleging that the Mother had removed the children from the jurisdiction without his knowledge or consent on 16 April 2012. This application was heard and dismissed on 20 April 2012 by Justice Kelvin John (Ag). The children presently reside with the Mother in the United States of America (“the USA”).
6. I find, accepting the Mother's evidence as it was more credible on this issue that the Father and Mother had agreed to relocate to the USA after the Mother received her permanent US residency, even though the Father did so with some reluctance. Accordingly, in 2009 the Mother gave up her employment and she and the children moved to South Carolina in the USA but due primarily to her inability to find work they returned to the Territory in May

¹3. where in any proceeding before any 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.

4. The mother of an infant shall have the like powers to apply to the court in respect of any matter affecting the infant as are possessed by the father.

2010. Whilst the Mother and children were in South Carolina the Father visited monthly. When the Mother returned home they sold their matrimonial home because the Father as the only breadwinner then could not meet the mortgage payments. The proceeds were divided equally between them. With his share the Father bought a small house which he claims the Mother wanted no part of and I accept this as I find that she was intent on migrating to the USA. The Mother used her share to return to South Carolina in February 2011 with the children. They agreed that the children would visit the Father from June to August 2011 and relevant arrangements for their return flights were made and a confirmed itinerary obtained.
7. During the children's visit to the Father that summer the Mother was transferred to her employer's office in North Carolina (she is employed as a science teacher). She said and I accept that this news excited her because the Father had indicated that he would move to North Carolina if he found a job although the Father disputed this saying that he was against the move because he felt that moving the children from "place to place" would hinder their development as this constant moving had caused them to repeat a grade in school in 2010. But that as it may he admitted to applying unsuccessfully for jobs in the aviation industry in NC and elsewhere in an attempt to keep his family together.
 8. After the Mother moved to North Carolina she enrolled the children in new schools there. A day prior to the children's agreed return date the Father emailed the Mother to say that he would not in fact be returning them and that they would be staying with him in the Territory. He enrolled the children in school in the Territory for the Fall term in September 2011. The Mother said when she asked for the children to visit her for the Christmas vacation she was told that the only way she would be able to visit the children was if she came to the Territory to see them.
 9. It appears that the Mother had difficulties in maintaining proper contact with the children during that period and alleged that the girl was not doing well in school at that time. This was not borne out by the relevant school report.
 10. The Mother alleges that since that time she was hardly in contact with her children. She also alleged that because of the Father's hectic work schedule which he admitted in his evidence she understood that the children often spent their waking hours with their paternal grandmother and aunts and slept over at times when the Father came home late from work. The Father denies this but having regard to the fact that the Father is engaged in a family business and the nature of the business (small aircraft operations) I do not find that scenario unusual or unacceptable. The children also have a right to know their respective extended families. The Mother also complained that the Father did not allow the children to spend an equal amount of time with her family. I accept this and put that down to the inevitable competition that results in such situations. The Mother responded to that by removing the children from the Territory in April of this year and taking them back to live with her in NC.
 11. I have considered the present accommodation available for the children at the current homes of each parent. It is clear that the Father has inadequate accommodation for both children as he has a one-bedroom house but that the Mother has better living

arrangements in NC, a two-bedroom apartment. I note however the Father's stated intent to seek more spacious accommodation and Ms. Johnsons observation that it was questionable as he did not do that when the children were with him. Be that as it may I see no reason why a parent who undoubtedly loves his children as the Father obviously does, would not make proper arrangements if he is called upon to do so.

12. The court is hampered somewhat in this important exercise as both children are of an age and understanding whereby their opinions and wishes can properly be considered and certainly some independent report on the children would have been helpful as well.
13. I have also considered the possible effect of constant changes on the children. The Father says that the Mother has throughout demonstrated a pattern of instability as between **2004 and 2010** the Mother moved their daughter to different schools 6 times and the pattern continued. The Mother explained that some of the changes were due to the child's difficulties in school here as she was subjected to bullying. I pause here to note that there was nothing in his affidavits or **viva voce** evidence saying neither that he objected to the moves locally nor that he was not consulted.
14. Both parties allege that on occasion the children were left unsupervised. The Father further says that while the Mother lived in the US she often called from different numbers and the numbers she gave him to call were often out of service. They both complain of the other only allowing the children to make very brief 1 or 2 minute phone calls to either parent. It seems that both parents accuse each other of the very same misdeeds and in doing so share a common motive. Both parents say that the US could provide the children with what amounts to better opportunities, they differ on when they should start to partake in the opportunities. Both parents love and care for their children and both hurt when they are kept apart from them. Both have done what they thought was best for the children in the tug of war of their custody.

15. Conclusion

16. On consideration of all the evidence I find that both parents love their children and are very capable of taking care of them. Their daughter is now of an age where it can be said that she will benefit fully from the educational and other advantages available to her if she continues to reside with the Mother in NC. However, I also feel sure that their son will also benefit from living with the Father here in the Territory and that when he is older he may very well choose to take up residence in the USA with his Mother. Therefore I am satisfied that it is in the best interests of the children that joint custody be awarded to both parents with primary care and control of their daughter to the Mother and primary care and control of their son to the Father. Each party is to have reasonable access to both children during the school holidays and the parties are to ensure that each child gets a proper opportunity to maintain ties with his or her siblings and parents. To this end each party shall bear the costs of the each child's travel expenses to the other parent and shall put proper telephone or other communication facilities in place to ensure good communication

is maintained at all times with both parents and both children. Further the Father shall ensure that he has proper accommodation to house both children.

17. With respect to their maintenance there is little in issue here as both parties recognise their obligations to maintain their children. Accordingly, having regard to the current needs of the children and to the sums claimed by each parent I will order that the Father pay to the Mother the sum of \$200.00 per month in respect of their daughter and that the Mother pay to the Father the sum of \$100.00 per month as maintenance for their son and that they shall each pay half of the children's medical and educational expenses on presentation of invoices or receipts. Maintenance is to continue until such time as each child attains the age of 18 or completes tertiary education. Each party is to bear his/her own costs.

18. Summary of orders

19. In summary the orders made herein are follows:-

- i. Joint custody of both children is awarded to the parties;
- ii. the Mother shall have primary care and control of their daughter with reasonable access to the Father,
- iii. the Father shall pay to the Mother the monthly sum of \$200 as maintenance for their daughter and half of all her educational and medical expenses, upon production of invoices or receipts;
- iv. the Father shall have primary care and control of their son with reasonable access to the Mother;
- v. the Mother shall pay to the Father the monthly sum of \$100 as maintenance for their son and half of all his educational and medical expenses, upon production of invoices or receipts;
- vi. Maintenance is to continue until such time as each child attains the age of 18 or completes tertiary education,
- vii. the parties are to ensure that each child remain in contact with his/her sibling and parents and to do what is in their power to facilitate this including installing telephone or other communication facilities and paying each child's travel expenses to visit the other parent,
- viii. Further the Father shall ensure that he has proper accommodation to house both children,
- ix. each party is to bear his/her own costs,

x To give effect to this order the Mother shall forthwith return both children to the Territory, the son to commence living with the Father and the daughter to spend part of this summer's holidays with the Father and,

,xi. Liberty to apply.

20. I must express my thanks to both counsel for their extremely valuable written and well presented submissions. The fact that all your authorities were not mentioned does not mean that they were not taken into consideration.

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Rita Joseph-Olivetti
Resident Judge
Territory of the Virgin Islands