BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

(CIVIL)

BVIHMT 2009/0022

Between

TRACIA SMITH Applicant/Petitioner

And

WILL SMITH Respondent

Appearances:

Tamara Cameron for the Applicant/Petitioner

Michael Maduro for the Respondent

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2010: 12, 18 May, 3 June

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JUDGMENT

(CATCHWORDS: - Family law - Ancillary relief - Division of beneficial interest in the matrimonial home - Custody and Maintenance of children of the marriage - Whether the wife should pay by lump sum for the husband's share in the matrimonial home – whether the husband should vacate the matrimonial home now – whether both parties are equally responsible for all outstanding debts incurred during the marriage - Matrimonial Proceedings and Property Act, 1995)

INTRODUCTION

[1] The purpose of this judgment is to address an application for ancillary relief made by the Applicant/ Petitioner, Tracia Smith against the Respondent, Will Smith, arising out of the breakdown of their marriage and the subsequent divorce. Ms Smith, in her amended application, filed on 2nd February 2010, sought the following relief:-

i. that Mr. Smith pay the sum of $900 per month to maintain the children of the marriage;

ii. that Mr. Smith pay half of the medical expenses and educational expenses of the children including the school transportation costs;

iii. that Mr. Smith pay half of monthly utility bills for the matrimonial home, including the electricity bill, water and sewerage bill, cooking gas bill until such time as he shall have vacated the matrimonial home;

iv. that she has sole custody of the children of the marriage with visitation to Mr. Smith. (This prayer was withdrawn at the hearing.);

v. that she pay to Mr. Smith a sum equivalent to no more than 40% of the value in the matrimonial home. (This prayer was withdrawn at the hearing.);

vi. that she and the children be allowed to occupy the matrimonial home to the exclusion of Mr. Smith until she pays Mr. Smith for his interest in the matrimonial home;

vii. that Mr. Smith pay half of the outstanding debt incurred by the parties during the course of the marriage of $12,441.18 and to continue to pay half of the joint loan at National Bank of the Virgin Islands;

viii. that Mr. Smith pay to Ms Smith the sum of $1200.00 which she has to pay from March 2009 in relation to the joint consolidated loan at National Bank of the Virgin Islands and the sum of $100 per month so long as Mr Smith fails to pay for his half of the said loan.

THE FACTS

[2] Approximately 19 years ago, on 23 June 1991, the Petitioner, Tracia Smith and the Respondent, Will Smith got married. They had three children, namely Shenece Smith, born on 29 September 1992; Devon Smith, born on 6 January 1995; and Oundre-a Smith born on 9 August 1997. Shanece currently attends the H Lavity Stoutt Community College and Devon and Oundre-a both attend the Elmore Stoutt High School.

[3] On 8 May 2009 Ms Smith filed a Petition for the dissolution of their marriage and on 27 January 2010 the Court granted the decree nisi according to the Petition, on the basis that the marriage between the parties has broken down irretrievably by reason of the fact that the Respondent has

behaved in such a way that the Petitioner cannot reasonably be expected to continue to live with the Respondent.

[4] During the marriage both parties and their children resided at Parcel 6 of Block 2235 B Mount Sage Registration Section, Little Apple Bay, Tortola. Situated on this land, is the home of Ms Smith's parents, a building of two floors. Ms Smith's father is the legal owner of both the land and the building. From 1991 to 1995, Mr. and Ms Smith lived with her mother in that building. However in 1995, the couple began construction of their matrimonial home by creating a third floor on that building. It was completed in 1997. Mr. and Ms Smith and the three children of the marriage still reside there today.

[5] Also during the marriage, the parties obtained two loans which are in question in this case. The first is a joint consolidated loan from National Bank of the Virgin Islands, which was used to purchase vehicles for the family and other items. The second loan, in the sum of $10000, is from Banco Popular and was made on 30th December 2008, under Mr. Smith's sole name.

[6] Both parties are employed in the medical field. Mr. Smith is a paramedic and is employed with the BVI Health Services Authority and earns a net salary of $2964 per month. He has been steadily employed for twenty one years and it is unlikely that his occupation will change in the foreseeable future. Mr. Smith also admitted to receiving an increment in his salary in March 2010, which is received by him yearly.

[7] Ms. Smith, is a nurse employed by the Government of the Territory (Ministry of Health) and earns a net income of $2572. She obtained a Bachelors Degree in Nursing in May 1994.

[8] Before the decree nisi was granted, Ms Smith filed an Application for interim relief on 22 January 2010, for:- (i) maintenance of the children and for payment of the household expenses; and (ii) occupation of the matrimonial home.

[9] On 19 February 2010, upon the Court hearing Ms. Smith's Application for interim orders, the Court ordered, *inter alia*, that (i) Mr. Smith pay half the medical and educational expenses, including the transportation costs of the children; and (ii) Mr. Smith pay to Ms Smith the sum of $450 per month as maintenance of the children, from the 1 March 2010, such payment to continue on the 1st day of every month thereafter.

[10] On 16 February 2010, Mr Smith filed an Application for Ancillary Relief, however, he obtained leave to withdraw this application at the hearing of the matter. Therefore, I will address the issues which arise in Ms. Smith's Application for Ancillary Relief and also any other outstanding issue between the parties in this matter.

ISSUES ARISING

[11] The issues which arise in this matter are as follows:

i. What order is to be made with respect to the custody of the children,

ii. What sum should Mr. Smith pay for the maintenance of the children of the marriage,

iii. How should the beneficial interest in the matrimonial home be divided;

iv. Whether Mr. Smith should be ordered to vacate the matrimonial home now;

v. Whether both Mr. and Ms Smith are to have equal responsibility for all outstanding debts incurred during the marriage.

THE LAW

[12] The applicable legislation is the Matrimonial Proceedings and Property Act, 1995 ("the MPPA"). Section 24 gives the court the power to make financial provision for a child of the family, and section 25 gives the power to make a property adjustment order for the benefit of a party to a marriage or a child of the family.

[13] In deciding whether to exercise the power given by section 24 in favour of a child the court must have regard to the financial needs of the child, the income, earning capacity (if any) property and other financial resources of the child, the standard of living enjoyed by the family before the breakdown of the marriage and the manner in which he was being educated and in which the parties to the marriage expected him to be educated or trained. The court is called upon to exercise these powers so far as is practicable and just so as to place the child in the same position as he/she would have been in, had the marriage not broken down and had the parties fulfilled their obligations of the child. See also s.26 (2).

[14] In deciding whether to exercise the power given by section 25 the Court must have regard to all the circumstances of the case including the following matters stipulated in Section 26 which are:- (a) the present or foreseeable future income, earning capacity, property and other financial resources of each party, (b) the present and foreseeable future financial needs, obligations and responsibilities of each party, (c) the standard of living enjoyed by the family before the breakdown of the marriage, (d) the age of each party and the duration of the marriage, (e) the physical or mental disability of either party, (f) contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home, (g) any order made under section 49 (not applicable), and (h) the value to either party of any benefit (for example, a pension) which, that party will lose as a result of the dissolution of the marriage.

[15] The ‘tail piece’ to section 26 requires the court to exercise its powers so as to place the parties, so far as is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each party had properly discharged his or her financial obligations and responsibilities towards the other.

[16] It is clear from these provisions that the court has a wide power to make property adjustment orders and other financial relief orders and that those powers can be exercised at any time either before or after the grant of a decree absolute of divorce. The power is to be carried out having regard to all the circumstances of the case with the aim of achieving a just and practicable result.

[17] Lord Nicholls of Birkenhead in the English case of White v White[1] which considered similar legislation said:- "as a general guide, equality should not be departed from, only if, and to the extent that there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination." [Emphasis added]

[18] Lord Nicholls further used the concept of fairness and stated that:-"divorce creates many problems. One question always arises. It concerns how the property of the husband and wife should be divided…the outcome ought to be fair in all the circumstances…"

[19] This view was reflected in the leading case from the Court of Appeal, Stonich v Stonich[2] , where Justice of Appeal Saunders (as he then was) stated as follows:-

i. "...the overriding objective that the Court must strive at is fairness. In apportioning the assets, the Court must consider the various factors the legislature has asked it to take into account and then arrive at a solution that is, in all the circumstances, fair to the parties." [Emphasis added]

[20] This dicta speaks directly to the construction and interpretation of the MPPA, as this case arose from the territory.

Custody of the children

[21] At the hearing, Ms Tamara Cameron, counsel for Ms Smith, obtained leave to withdraw Ms. Smith's application for sole custody of the children and instead proposed that both parties should have joint custody, with primary care and control to Ms Smith, and with alternate weekends to Mr. Smith. Mr. Smith did not refuse or accept such proposal.

[22] Taking everything into consideration, including the particular circumstances of the children and their parents, such an arrangement will be in the best interest of the children, and therefore I will make an order for joint custody in terms of Ms. Smith's proposal.

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1 [2001] 1 All ER 1

2 BVI Civ App. No. 17 of 2002 (unreported)

Maintenance Award for the children

[23] According to the said Interim Order, as mentioned earlier, Mr. Smith was ordered to pay to Ms Smith the sum of $450 per month for the maintenance of the children and half medical and educational expenses of the children, including the transportation costs.

[24] Mr. Michael Maduro, counsel for Mr. Smith, argues that Mr. Smith should continue to pay the sum as ordered on 19 February 2010. He explained that though Mr. Smith's net salary is $2964 per month, his average monthly expenses are in excess of $2400, as seen in his Affidavit of Means paras 2, 4, 6 and 7, filed on 26 February 2010, which includes his transportation costs; the transportation costs for the children to commute to school; utility and other bills of the matrimonial home; loan payments for National Bank and Banco Popular; maintenance for the children; and financial support for his ailing mother.

[25] However, Ms Cameron has contended that the monthly maintenance award should be increased to the sum of $300 per child, since the sum of $450 per month is not sufficient to maintain the three children. Ms Smith submits that even though her net salary is $2572.18, her monthly expenses amount to approximately $2811, as detailed in her Second Affidavit filed on 12 February 2010, which includes utility and other bills of the matrimonial home; fuel expenses; vehicle maintenance expenses; school bus expenses; medical expenses; educational expenses and entertainment expenses. In addition to this, Ms Smith states that she has a personal loan on which she pays $289.00 per month and other joint debts incurred during the marriage.

[26] Upon examining Ms Smith’s monthly expenses, I agree with Mr. Maduro's contention, in that I find it hard to believe that her monthly expenses are as high as she submits, and that some of these items may have inflated sums attached to them, including the cooking gas at $50 per month; water $50 per month; jeep tires at $65 per month; and clothing at $300 per month. Further I am of the view that the expense of the “school bus” fee of $300 per month, should not be included in the list of expenses, since, in her evidence, Ms Smith admitted that Mr. Smith pays half of the transportation for those children attending at the High School. However, Ms Smith explained to the

Court, and Mr. Smith admits, that he does not pay for the transportation of the eldest child, who attends the H. Lavity Stoutt College.

[27] I also take into consideration the evidence of Mr. Smith that aside from his job as a paramedic, he earns additional money by doing videography; and that he also has the skill of being a disc jockey and he is able to do mechanic work, which supplement his income, although on an irregular basis. Mr. Smith earns a good salary from a steady job, which offers yearly increments, and his other skills make him a desirable candidate in the working world. I also take into consideration his age, being fairly young at 43 years old. Further, I take into consideration that both parties have comparable salaries.

[28] On full consideration, of all the circumstances and in particular the financial position of the parties and the children's obvious requirements, I accept the argument of Ms Cameron that the sum of $450 per month for the three children is not sufficient and therefore should be increased[3].

[29] Therefore, I will increase the monthly maintenance sum of $450 to $600 per month for the three children of the marriage. Mr. Smith is also to continue paying half of the medical, educational and transportation expenses of the children.

The Matrimonial Home

[30] The matrimonial home, as mentioned earlier, consists of the third floor of a building situated on land owned by Ms. Smith's father. Mr. Maduro argued that Mr. Smith contributed approximately 75% of his lifetime earnings to the construction of the home and the continued development of it, and therefore the Court should make an award to reflect this, since he bore the entire financial and physical burden of the construction and development of the home.

[31] Ms. Cameron, however, contends that both parties contributed equally to the construction of the home.

[3] For example, the eldest child, Sheniece, needs money for transportation to the college, and several times she requires money to purchase both lunch and dinner while she is attending late classes.

[32] I accept Ms Smith's version of the events when she said that the construction of the matrimonial home began in 1995, which is about 4 years after the marriage. Therefore, it is clear to me that the purpose of this building was, from its inception, to provide a home for the parties and their children, and each party contributed according to their means to its construction.

[33] Further, I do not accept that Mr. Smith contributed 75% of the monies towards building the home. I prefer Ms Smith's evidence that the construction of the home was financed by both of them. In her Affidavit filed on 26 February 2010, Ms Smith states that she graduated with a Bachelor's Degree in Nursing in May 1994 and began working in August 1994 at the Peebles Hospital. Her salary was more than that of Mr. Smith, who was employed as an orderly at that time. Both salaries went into a joint account at Scotiabank and expenses for the construction of the home were paid from this. Both parties went to Puerto Rico together to purchase items including toilets, doors and windows for finishing the home, and had taken out a joint loan at Banco Popular, which was already paid off (and is not an issue in this case), to buy the furnishings of the home.

[34] I accept though, that Mr. Smith, has contributed more to the physical work on the construction of the home than Ms Smith. I accept his evidence that at that time, in the mornings, he would assist the hired labourer on the construction, and when he returned at 11:00pm at nights, he would work on the home alone, including put up beams. However, I cannot leave unrecognized the work done by Ms Smith for her contribution in taking care of the children of the marriage during the time of the construction of the home. I also accept her evidence that during the construction of the home, she helped to pour cement; helped to tie steel; hold things in place; and helped with the preparations and serving of food for the workers.

[35] Taking all those factors into consideration, I am of the view that both parties have an equal share in the matrimonial home. Further I am of the view that since Ms. Smith is interested in retaining the home that she should be allowed to do so, and so she shall pay to Mr. Smith fifty percent of the value of the home. This fifty percent value of the home should be paid by Ms. Smith to Mr. Smith as a lump sum to achieve a clean break.

[36] That being said, the Court is mindful of the fact that there is no appraised value of the home, upon which the fifty percent value can be calculated. Therefore, I will order that both parties agree on a

value, or in lieu of agreement, obtain a valuation for the home from an agreed valuer, and that both parties must equally bear its cost.

Whether Mr. Smith should remain in the matrimonial home until Ms. Smith buys his share of the matrimonial home.

[37] In her Application, Ms Smith asks that the Court order Mr. Smith to vacate the home now. Ms Smith testified that this is desirable as Mr. Smith has displayed "very disturbing and irrational behaviour", as set out in her Affidavit filed on 22 January 2010, and so she is fearful to continue to live with him, as she does not want him to try to hurt her. She made specific mention of one incident where Mr. Smith jumped off a wharf and threatened to kill himself because she had told him that she wanted a divorce; and another time when he faked a heart attack. I do not believe these versions of events as described by Ms. Smith. Mr. Smith denies that such ever happened. I do not accept his either. The truth lies somewhere in between the two versions, however, I do not think that it amounts to an issue for further discussion, save to say that, I do not accept that Mr. Smith poses any danger to Ms. Smith.

[38] Ms. Smith further testified that she is also fearful that Mr. Smith will destroy the home or the property therein, since on 28 December 2009, Mr. Smith destroyed one of the walls in the band room of the home, which was made of drywall material, by ripping it apart and leaving the wood and nails exposed. Mr. Smith admitted to removing the drywall from the room, however he explained that he did not do so in anger but to retrieve the electrical wires he had put inside the wall when Ms Smith asked him to remove his belongings from the room. I do not accept this explanation as being a reasonable one as it strikes me that a handyman with the admitted skills of Mr. Smith would have been able to retrieve the wires with minor damage. He was obviously annoyed with Ms. Smith's request and so deliberately failed to remove the wires in a proper manner thus causing damage to the home. I harbour no doubt that Mr. Smith will cause any further damage to his home, as if he does so this will diminish the value of the home in part and impact on the payment to him.

[39] Accordingly, I am of the view that the Mr. Smith should be allowed to continue to reside in the home until such time as Ms. Smith pays him for his half share in it.

Outstanding debts of the parties

[40] There are three disputed debts which are alleged to be joint debts, which are (i) miscellaneous expenses; (ii) loan payments at National Bank; (iii) loan payments at Banco Popular.

[41] (i)Miscellaneous Expenses

[42] Ms. Smith applies for an order that Mr. Smith pays half of all the outstanding debts and liabilities which were incurred during the course of the marriage, which, she states, totals $12,441, as set out in her Affidavit filed on 26 February 2010, para. 8. The list of debts includes debts to First Bank (credit card) of $732.75; Radioshack of $1593.65; LIME telephone of $632.90; CCT telephone of $1090.59; Office Max of $3406.98; Tola Mitsubishi of $1051.31; Water and Sewerage of $3533.00; and Premier Dental of $400.

[43] Ms. Smith produced receipts for all the expenses except the one at Premier Dental. I accept these documents, and the expense incurred at Premier Dental has not been refuted by Mr. Smith. In cross examination, Ms. Smith stated that she had already paid the LIME and CCT telephone bills, and explained that they were no longer outstanding bills with the companies, however, she maintained that the bills were still outstanding as debts owed to her by Mr. Smith, as he was responsible for paying half. I accept this explanation.

[44] I will however, take into consideration Mr. Smith's contention with the Water and Sewerage bill in that this bill was not solely a bill of the parties, but included Ms Smith's mother's use of the utilities. In cross examination, Ms. Smith admitted to this. However, she tried to explain that though her mother shared in the water and sewerage utilities, as reflected in the bill, both parties were still responsible for this bill since her mother would help look after the children and the children spent a lot of their time in her mother's home. I do not accept this submission. In light of this finding, I hold that Mr. Smith is not responsible for half of the Water and Sewerage bill. Rather, he responsible for one quarter of the said.

[45] Therefore, I will order that Mr. Smith must pay one-quarter of the water and sewerage bill.

[46] In respect of the other bills claimed at para 42, namely, the bills of First Bank (credit card), Radioshack, LIME telephone, CCT telephone, Office Max, Tola Mitsubishi and Premier Dental, I find that those related to the family and therefore Mr. Smith is responsible for paying half.

[47] (ii) National Bank Loan

[48] In addition to the aforementioned expenses, Ms. Smith, in her evidence states that Mr. Smith has failed and/or refused to make an equal monthly contribution to the parties' joint loan at National Bank, in that, instead of paying $700 per month, he has only been paying $600 per month since March 2009. Therefore, because of this, Ms Smith has had to bear the monthly shortfall of $100 together with her portion of $700, towards paying off the loan. Ms Smith applies for an order that Mr. Smith, repays to her the sum of $1200 which she paid on the loan at National Bank to cover the shortfall made by Mr. Smith, and that he continues to meet half of the outstanding loan at the said bank.

[49] This was not denied by Mr. Smith, who stated in cross examination, that the loan at National Bank was in fact a joint loan for which they are equally responsible. He stated that he removed his monthly salary from the joint account of the parties, leaving only $600 per month towards the payment of the loan at National Bank.

[50] This issue is not a difficult one to determine as both parties accept that they are responsible for paying off this loan. Therefore, I will order that Mr. Smith pay the sum of $1200 to Ms Smith being monies he failed to pay towards his equal payment of the loan, and he must continue to make his half share of the loan, which is $700 per month, until the debt is satisfied.

[51] (iii) Banco Popular Loan

[52] Mr. Smith claims that he is entitled to $1729, being the sum he had to pay from April 2009 in relation to the loan at Banco Popular, and the sum of $133 per month in relation to the said loan. Mr. Smith asks that the Court order Ms. Smith to pay these sums since the loan was taken out during the marriage and was used to benefit the family. The primary use of this loan was to begin a party planning business of the parties, called “Special Occasions”

[53] Firstly, I will highlight, as was done by Ms Cameron, that there is no written application before this Court to determine this issue, however, at the hearing, Mr. Maduro indicated that this was an outstanding issue of the parties, raised by Mr. Smith. I will allow submissions on this issue since this debt is alleged to be an outstanding debt of both parties, and it is in the interest of the parties that this issue be clarified.

[54] Ms. Smith's position is that she is not responsible for paying any part of this loan because it was a personal loan to Mr. Smith. She states that the idea of the business was that of Mr. Smith and it was him and a third party, who approached her in November 2008 to get involved in the business. Ms. Smith explained that she was initially involved in the business, however, she is no longer a part of it, as she left a few months later, in March 2009, because she found it difficult to work with Mr. Smith, as he allegedly verbally abused her. Mr. Smith, in his evidence, confirmed this, stating that Ms Smith informed him that she no longer wanted to have anything to do with the business.

[55] Mr. Smith, however, says that even though Ms Smith is no longer involved in the business, she still benefits from it and therefore should be jointly responsible for the loan. Under cross examination, Mr. Maduro highlighted, in his questions to Ms. Smith, the fact that the business operates under a trade license which is in the name of her mother. However, I do not see how this fact will have any bearing on the issue of whether Ms Smith benefits from the business. I accept her evidence that the trade license remained under her mother's name as it was too expensive and cumbersome to replace such with new names.

[56] It seems clear from the evidence of both parties that Ms Smith has indeed left the business in the hands of Mr. Smith and I do not believe that she still benefits from such and have not done so since leaving in March 2009. She may have only done so when, as she stated, Mr. Smith gave her supplies of the business at a family get-together for her graduation from school. However, I accept that Mr. Smith had given such supplies as gifts. I do not accept his contention that Ms Smith took away with her supplies of the business when she left.

[57] The loan was obtained by the parties to start up the business and the parties expected that the monies derived from the business would meet the loan obligations. However, it seems to me that

this is impossible now as, according Mr. Smith's evidence, which I accept, the business no longer operates, and therefore, there is no revenue being generated by the business that can be used to pay back the debt. Since the business was a joint venture of and was intended to benefit both parties, it is my view that both parties are equally responsible for repaying the loan. And so, Ms. Smith is ordered to pay the sum of $1729, being half of the sum Mr. Smith had to pay towards the loan from April 2009, and the sum of $133 per month, being her equal share in the monthly payments, until the loan is satisfied.

COSTS

[58] Taking everything into consideration, I will order that both parties will bear their own costs.

CONCLUSION

[59] The Court declares and orders as follows:-

(1) The parties are granted joint custody of the children, with primary care and control to Ms. Smith, and reasonable access to Mr. Smith, he is to have the children on alternative weekends and half of every school holiday;

(2) Mr Smith is to pay to Ms Smith the sum $600 per month for maintenance of the three children, that is, $200 for each child per month. Mr. Smith shall continue to pay half of the medical, educational and transportation expenses of the children until each child attains the age of 18 years or completes full-time tertiary education;

(3) Ms Smith is to pay to Mr Smith a lump sum of fifty percent of the value of the matrimonial home, being his share in the home;

(4) Both parties are to agree on a value of the matrimonial home, or in lieu of agreement, obtain a valuation for the home from an agreed valuer. Both parties must bear the cost of the valuation. This must be done within three months or such longer time as the parties may agree on in writing;

(5) Mr. Smith is allowed to remain in the matrimonial home until such time as Ms Smith pays him for his half share in it.

(6) Mr. Smith is to pay to Ms Smith half of the outstanding bills of First Bank (credit card); Radioshack; LIME telephone; CCT telephone; Office Max; Tola Mitsubishi, and Premier Dental. Mr Smith is to pay one quarter of the Water and Sewerage bill.

(7) Mr. Smith is to pay to Ms Smith the sum of $1200 in relation to the National Bank loan, and he must continue to make monthly payments of $700 until the debt is satisfied;

(8) Ms Smith is to pay to Mr. Smith the sum of $1729 in relation to the Banco Popular loan, and she must continue to make monthly payments of $133 per month until the debt is satisfied;

(9) Each party is to bear his/her own costs.

(10) Liberty is given to the parties to make any further application to the Court.

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Rita Joseph-Olivetti

Resident Judge

Territory of the Virgin Islands