

BRITISH VIRGIN ISLANDS

**IN THE HIGH COURT OF JUSTICE
(Divorce)**

BVIHMT2008/0039

Between

AVERY PERCIVAL

Petitioner

And

CASSANDRA PERCIVAL

Respondent

Appearances:

Marie-lou Creque of S.A Creque for the Petitioner

Ruth A. Wigley and Tina Bannister of Dancia Penn &Co. for the Respondent

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2010: May 25, 28 31; June 3
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JUDGMENT

(CATCHWORDS:- ancillary relief- property division - Matrimonial Proceedings and Property Act 1995) – Whether wife entitled to a 50% share of the matrimonial home – wife made little financial contribution to acquisition of the property but significant contributions financial and otherwise to the welfare of the family.)

- [1] **Joseph-Olivetti J:-** The only issue which arises for determination in this matter is the not unusual one of the division of the former matrimonial home on the breakdown of a marriage. In this case the application is made by Mrs. Cassandra Percival (“the Wife”). She seeks a half share. Both parties were cross-examined on their affidavits filed in support of and in opposition to the application and both counsel made written submissions which were very helpful to the court.

The Law

- [2] Unlike some other islands this issue of financial provision for a party to the marriage and division of property on the breakdown of a marriage is governed by legislation, namely, the Matrimonial Proceedings and Property Act, 1995 (No. 6 Of 1995) ("the Act") The relevant provisions are contained in sections 23 and 25. These give the court the power to make financial provision for a spouse on the dissolution of a marriage and in particular property adjustment orders. The power is discretionary; the court must consider all the circumstances and pay particular attention to the factors set out in section 26. (1).
- [3] The section 26(1) factors are :- (a) the income, earning capacity, property and other financial resources which of each of the parties have or is likely to have in the foreseeable future, (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) any physical or mental disability of either party, (f) contributions made by each to the welfare of the family, including any contribution made by looking after the home under section 49, (g) any order made under section 49¹, 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.
- [4] The 'tail piece' to section 26 (1) 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.

¹ S.49 deals with situations where the court grants to one of the parties the personal right to occupy the matrimonial home for a period of time

Findings of Facts and Discussion

- [5] The parties were married to each other on 15 May 1999 and their marriage was dissolved on the petition of the Husband on 17 February, 2010. Thus their nuptial relationship subsisted for just over 11 years². Ms. Wigley, counsel for the Mother, erroneously stated the marriage as lasting for almost 20 years, but no doubt she was misled by the fact that the wrong date was cited on the Petition. However, in any event the parties cohabited prior to the marriage for a period of about 8 years.
- [6] At the time of their marriage the Wife was aged 31, she is now 42 and the Husband was 26. He is now 37. The parties have two children, Andre and Adriel, who are now aged 17 and 8 respectively. The Wife also has a son by a previous marriage who was considered a child of the family. He is now over 18 years old and suffers from autism. The Husband also has a daughter born during the course of the marriage who is now 10 years old.
- [7] The Wife testified that it is her intention to relocate to England in June with the parties' younger child and her son to obtain medical assistance for her son as he requires urgent medical attention. However, she produced no documentary evidence to support this need for urgent medical attention but I believe the court can take cognizance of the fact that better medical facilities are doubtless available in England to treat her son's condition than could be had here. And, doubtless, the decision to re-locate was a considered decision by the Wife having weighed all the attendant disadvantages or advantages of such a move. I note however that she is not seeking any help, in this regard, from the Husband.
- [8] Currently the entire family continues to occupy the former matrimonial home. This is sited on parcel 85 East End Registration Block 3240A at Greenland (14,026sq.ft.) and comprises 2 floors, with a two bedroom apartment on the ground floor which is rented out, and a four bedroom apartment on the first floor in which the family currently reside. The property is registered in the names of the parties as joint proprietors and is mortgaged to First Bank. The entire property was valued at \$436,000.00, by BVI Development Consultants Ltd. as of 18 July 2007 at the request of First Bank.

² See the Certified Copy of Original Register of Marriage, No. 005453 on file.

- [9] I now turn to consider the circumstances in which first the land and then the matrimonial home was acquired as the bulk of the dispute centered around that. First, there is no dispute that the Husband bought the land on 20 February 1990 and registered it in his own name. At that time the parties were not married. In fact, the Husband was living with another person. He testified that he paid for the land with his own monies. The Wife however claimed that she contributed \$650.00 to the down payment and that the Husband repaid her \$600.00 a year later. The Husband accepted that he received that money from the Wife but claimed that it was a personal loan which he later repaid and was not related to the purchase of the property. I find the Husband's version to be more credible, as if he was living with another person it is unlikely that he would have asked the Wife to help him with the down payment on the land. I therefore find that any monies she provided to him were by way of a loan and not for the purpose of buying the land and that he repaid it. Thus the Wife made no monetary contribution to the acquisition of the land such as would give rise to her a beneficial interest in it as she was repaid.
- [10] In addition, I find that the Husband began to construct a cistern and the foundation and footing of the house shortly after purchase and again that he used his own funds. However, by that time he was living with the Wife and the Wife paid the rent of the premises in which they lived for some months prior to moving into the ground floor apartment albeit the rent was not very costly, being \$60.00 per month. However, in doing so she contributed indirectly to the Husband being able to continue with the construction of the house.
- [11] On 1st September 1992 the Wife signed a joint loan for \$64,500 from the Development Bank, now the National Bank of the Virgin Islands, to enable them to continue with the construction. And, in 2000 the Husband applied for another loan to enable him to complete the house, and doubtless at the request of the bank, he transferred the property into the joint names of himself and his Wife and on 22nd November 2000 a loan of \$193,000 was granted to them. Subsequently, additional financing totaling \$210,000 was obtained from Chase Manhattan (now First bank) some of the proceeds of which was used to satisfy National Bank.

- [12] Despite the fact that the loans were in their joint names there is no dispute that the Husband made all the mortgage payments assisted by the rental income from the ground floor apartment³. However, I find that the arrangement between the parties was such that the Wife used her earnings to take care of the home which included purchasing food, clothes, paying for cable and telephone services and the bulk of the children's educational expenses. The Husband also paid the electricity bills and contributed to the household generally from time to time as called upon by the Wife to assist when she needed to help and she also had the use of the rents for about one year. In addition, the Husband admitted that the Wife assisted during the construction by cooking for the workers.
- [13] I have considered the financial position of the parties. The Wife earns approximately \$2,530.00 per month. That is her sole source of income. She has no other assets. The Husband alleged that she has property in St. Kitts but he produced no cogent details or any documentary evidence to support this allegation and I accept the Wife's explanation that the property is her mother's and that she did send money to assist the mother from time to time because I find her to be a more credible witness, the Husband having contradicted himself several times in cross examination. The Wife's expenses far outweigh her income. I note that she is an administrative officer with the Social Security Board and it is very likely that with that experience she will be able to find a suitable position in England.
- [14] The Husband is a transmission and distribution foreman with BVI Electricity Corporation and earns approximately \$ 3465.00 per month. In addition he earns about \$900.00 per month operating a taxi service.
- [15] I must say at this juncture that the parties gave disclosure of their earnings. Ms. Wigley, however suggested to the Husband that he had deliberately failed to disclose his earnings from his taxi operation to the court in his affidavits. This suggestion was ill-founded as on closer perusal of his affidavit of 23rd February at para. 15 the court notes that he deposed that his earnings from his taxi operations was \$900.00 per month which ties in with his oral

³ The rent collected from the ground floor apartment assists with the payment of the mortgage - \$650.00 per month. Presently that apartment is unoccupied. The Wife testified that the Husband is refurbishing this apartment and is hoping to rent it for \$1500.00 per month.

evidence on cross-examination in which he explained and I accept that this was not a regular income and that the figure was an approximation.

Decision

- [16] Having heard the evidence and in particular considering the Wife's contributions to the marriage and to the welfare of the family as a whole I have no doubt that her contributions were significant. The parties during their marriage conducted their affairs on a partnership basis each bringing what he /she could to the marriage. The fact that one party, here the Husband, enjoyed a larger earning power does not by itself entitle him/her to a larger share of the matrimonial assets. The court is called upon to look at all the circumstances of the case including the contributions to the welfare of the family made by a spouse be it monetary or otherwise. And in **Timothy Stonich v. Tamara Stonich Civil Appeal No.17 /2002** the Court of Appeal (Saunders J.A) made it clear that a wife should not be discriminated against merely because she has less earning power than her husband. And similarly, to my mind, a husband's contributions to the welfare of the family cannot be diminished because he has to work long hours to meet the family's financial commitments and is thus unable to have the time to form the same emotional bonds with the children as the Wife. The family cannot have its cake and eat it also.
- [17] In all the circumstances I deem it fair and just that the Wife be granted a forty percent interest in the matrimonial home. This departure from a half share is to make allowance for the fact that the land was purchased by the Husband without any assistance from the Wife prior to the parties' marriage and before they began co-habiting.
- [18] The Husband will be given an opportunity to purchase the wife's share of the property at the current market value. The valuation of the home presented to the Court is as at 2007, and therefore an updated valuation report should be obtained, with both parties bearing the cost. If not, the property is to be sold at the current market value or such other price the parties may agree on in writing and 40% of the proceeds of sale is to be paid to the Wife after payment of the mortgage and all necessary expenses consequent upon sale. This must be done within 3 months or such longer time as the parties may agree on in writing.

Costs

- [19] Costs lies in the court's discretion. Having regard to the financial circumstances of each party I am of the view that it is just that each be required to pay his or her own costs.

Conclusion

- [20] The Court declares and orders as follows:-
- (1) The Wife has a beneficial interest in the matrimonial home of forty per cent.
 - (2) The Husband is given the opportunity to purchase the Wife's share at an updated valuation to be obtained by both parties. If not the property is to be sold at the current market value or such other price the parties may agree on in writing and 40% of the proceeds of sale paid to the Wife after payment of the mortgage and all necessary expenses consequent upon sale. This must be done within 3 months or such longer time as the parties may agree on in writing.
 - (3) Each party is to bear his/her own costs.

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Rita Joseph-Olivetti
Resident Judge
Territory of the Virgin Islands