

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

BVIHMT2008/0039

BETWEEN:

ERIC ST. CLAIR BOBB

Petitioner

AND

KAREN JASMINE BOBB (Nee PETERS)
Respondent

Appearances:

Ms. Asha Johnson for Applicant

Ms. Anthea Smith of Archibald & Co. for the Respondent

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2010: February 15th, 17th March 9th
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Judgment

Catch words- ancillary relief- maintenance of children and spouse-
Matrimonial Proceedings and Property Act)

- [1] Joseph- Olivetti J:_ This is an application by Mrs. Karen Bobb (“the Mother”) for the sole custody of the children of the marriage, an order for their maintenance and an order for maintenance for herself. Mr. Eric Bobb, (“the Father”) opposed the application. However, at the commencement of proceedings Ms Johnson, counsel for the Father, informed the court that he was no longer challenging the application for sole custody and that he was agreeable to paying half of the educational and medical expenses of the

children including half of their transportation costs to and from school. This was commendable. I heard the application on the 15th February and gave an oral ruling on the 17th February and undertook to give written reasons. I now do so.

[2] First, both parties were required to make full disclosure of their assets and liabilities. I am satisfied that the Mother has done so but it is glaring that the Father has failed to discharge this obligation to the court and what is more he has knowingly and deliberately attempted to give a very misleading picture of his financial circumstances.

[3] Counsel for the Mother has asked the court to make the necessary adverse inferences from this failure and the deliberate attempt to mislead and I am satisfied that the court is entitled to do so. See Foster J. in Findlay v. Findlay BVIHMT 70 of 2006.

[4] Financial provision for a spouse or children on the dissolution of a marriage is governed by legislation, namely, the Matrimonial Proceedings and Property Act, 1995 ("the MPPA"). Sections 23 and 24 give the court the power to make financial provision for a party to the marriage and a child of the family. The power is discretionary; the court must consider all the circumstances and pay particular attention to the factors set out in section 26.(1) in relation to financial provision for a spouse and 26 (2) in relation to financial provision for children.

[5] The specific matters in relation to financial provision for a spouse 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.

[6] The specific matters in relation to financial provision for a child are:- (a) the financial needs of the child; (b) the income, earning capacity (if any), property and other financial resources of the child.(c) any physical or mental disability of the child, (d)the standard of living enjoyed by the family before the breakdown of the marriage; (e) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained;

[7] The section mandates the court to “so exercise those powers as to place the child, so far as it is practicable and, having regard to the considerations mentioned in relation to the parties to the marriage in subsection (1) (a) and (b), just to do so, in the financial position in which the child would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards the child.”

[8] The ‘tail piece’ to section 26 likewise 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.

[9] The parties were married to each other about seven years and their relationship commenced three years prior to marriage so all told this relationship lasted for approximately ten years. A decree nisi was granted on the petition of the Father on 2nd October 2008. However, it is noted that the Mother had cross-petitioned but withdrew her petition subsequently, no doubt in an effort to contain costs and to prevent an unnecessary trial as she too was of the opinion that the marriage had irretrievably broken down. This is in keeping with the established norm in divorce matters and having done so I am of the view that she is not precluded from raising matters of conduct which might be pertinent to this application even though she had refrained from doing so at the hearing of the petition. Indeed, section 26 of the Act specifically enjoins the court to take into account the conduct of the parties where it would be inequitable not to do so.

[10] The Mother was aged 21 when the relationship began and the Father was significantly older being 38 years of age. The mother has no special skills therefore during the marriage the Mother stayed at home and looked after the home and the family and the husband was the sole breadwinner and took care of all the financial needs of the family. However, I accept that the Mother at some time later in the marriage sold drinks from a cooler outside the home, which she loosely referred to as the bar, and so assisted with the family's expenses. The parties have three children together who are now aged three, five and eight respectively. I accept the Mother's evidence that during the

early years of the marriage one of the children, a son, lived here with them and that the other two children , both girls, resided in St. Vincent in a comfortable home with the Mother's parents and that the Father contributed to their keep. Later, they brought the older girl to live with them and after the couple separated the younger girl was brought here in 2009 at the Mother's behest.

[11] I am constrained to say at this juncture that the Father's credibility was so severely damaged in cross-examination that wherever there is conflict which cannot be resolved by documentary evidence that I prefer the Mother's evidence to his. It is seldom that one sees such blatant dishonesty in a litigant. I refer in particular to his evidencing electricity and water bills which are not in his name and do not reflect his place of residence at Harrigan's Estate and to his claim that he is paying tuition fees for his eldest daughter, not a child of the family, to attend college, when he was very much aware that she had ceased to do so since September last and that he had paid no fees from that time.

[12] I have had regard to the present position of the parties and in particular to the living arrangements of the Mother. She occupies one bedroom of a two-bedroom apartment. She and the three children share the bedroom; the other bedroom is used by a roommate who shares all the household expenses. I accept the Mother's evidence that if she did not have a roommate she would not be able to afford even this meagre accommodation for herself and the children. The Father's teenage daughter also lives with the Mother and assists with the children. She is forced to sleep in the living room. This young person is not able to attend college to better her position in life because the

Father claims that he is unable to afford to pay her expenses. Unless the Father does something about this his daughter will be doomed to live in the shadows and continue to sleep in someone's living room, not a fate to be envied. I also have had no evidence that he contributes anything to her maintenance but this is not a matter which I am called upon to determine. In any event, for what it is worth, the Father explained that he is taking steps to obtain permission from the authorities to regularize her residence in the Territory and hopefully that should help.

[13] I find that during the subsistence of the marriage the couple always had a roommate but it is not clear what contributions, if any, the roommate made to the expenses and the Father has not been forthcoming on this. At one time the roommate was the Mother's stepfather and she testified that he assisted with the household expenses and that when he left she had to find another roommate to enable her to meet the rent. Her salary and expenses bear this out.

[14] With respect to conduct, various allegations have been made by each party against the other- infidelity as against the Mother and physical abuse as against the Father. However, conduct is only relevant if it would be inequitable not to consider it. I do not accept the Father's evidence surrounding the alleged infidelity and therefore I find no conduct so grave that would have the result of depriving her of obtaining financial assistance from him for herself.

[15] I have also considered the financial position of the parties. The Mother went out to work after the breakdown of the marriage and she is now a warehouse assistant and earns approximately \$900 per month which includes overtime

and work at the weekends and public holidays. That is her sole source of income. She has no property. Her expenses far outweigh her income. The Father is a forklift operator with the Ports Authority and his monthly salary from that position is \$1,760.00 net. I also note his alleged expenses which I find he padded. In addition, he owns and operates two businesses in his spare time- a barrel business in which he imports cardboard barrels from Puerto Rico and sells them here and a drinks business in which he imports sodas from St. Vincent and sells them here.

[16] I find that he has not made full disclosure of his earnings from those businesses and I do not accept that those businesses, which he has been carrying on from some considerable time, make little or no profit as he would have us believe. For example, he testified that he makes \$50.00 a month from the barrel business yet he pays rent of \$100 per month to store them. I am of the view that he is concealing his income and that those businesses are quite profitable despite the fact that the barrel business is mainly seasonal. His explanation that he has simply carried on those businesses for years as a hobby is ludicrous and patently dishonest.

[17] In all the circumstances, in my judgment, the Father is in a position to pay \$200.00 per month as maintenance for each child, a reasonable sum having regard to their needs, and I so order. And, in lieu of ordering maintenance for the Mother I consider that it is imperative that a home be secured for her and the children as far as possible and I will therefore order the Father to meet half the rent so that the Mother can obtain a two bedroom apartment for herself and the children. It cannot be said that if the marriage had continued that the parties would have intended that the children and indeed the Mother

would have been expected to continue in such cramped accommodation which is functional when children are mere infants but wholly inadequate and unsuitable as they grow older. These payments are to be made to the Mother monthly and shall commence immediately. The payments for maintenance shall continue until each child attains the age of 18 or completes tertiary education whichever is later and those for housing shall continue so long as any one child resides with the Mother.

[18] Custody

[19] The Father withdrew his opposition to the Mother's claim for sole custody. However, the final determination is that of the court's and in exercising its discretion the welfare of the child is the paramount consideration. On reflection, it is often all too easy for a party who has no custodial rights to simply walk away from his/her children and to treat them as yokes or burdens visited upon them by an unjust providence. This must not be supported in any way. The children have a right to the love and care of both parents. Accordingly, in my judgment it is in their best interests to award joint custody to the parents with primary care and control to the Mother. And for the avoidance of any doubt, the children are to reside with her. The Husband is to have reasonable access to the children including at weekends and half of the school's holidays. The parties have agreed on a schedule for those visits which is to be incorporated in the formal order of the court. In addition each party is entitled to take the children abroad once he or she gives reasonable advice notice to the order and makes proper arrangements for the other party to maintain communication with the children.

[20] **Costs**

[21] Costs lies in the court's discretion. Having regard to the financial position of the parties I am of the view that the Father should pay the Mother's costs as he is in a much better financial position to do so.

[22] **Conclusion**

The court orders as follows:-

(1) The parties are to have joint custody of the children with care and control to the Mother and reasonable access to the Father. The Father is to have the children every other week-end (Friday 6pm to Sunday 4-5p.m) and to have them for half of the school holidays.

(2) Either parent can take the children out of the jurisdiction once they give proper advance notice to the other and make proper arrangements to ensure that the other party can communicate with the children whilst abroad;

(3) The Father is to pay for half of the educational and medical expenses of the children including half of their transportation costs to and from school;

(4). The Father shall pay to the Mother \$200.00 per month as maintenance for each child. Payments are to commence from the end February 2010 and shall continue until each child attains the age of 18 or completes tertiary education whichever is later.

(5) In lieu of maintenance for the Mother the Father must pay to the Mother half the rent of a two bedroom apartment. The payments shall continue so long as any child resides with the Mother.

(6) The Father must pay half the Mother's legal costs summarily assessed at \$1250. He is to pay this sum by six monthly instalments of \$208.33

commencing at the end of February, 2010 and continuing at the end of each succeeding month until the amount is paid off in full.

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Rita Joseph-Olivetti

Resident Judge

Territory of the Virgin Islands