

BARBADOS.

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

Family Division

No. 158 of 2005

BETWEEN:

ANTHONY C. HOYOS

Applicant

AND

DORMA MARIE HOYOS

Respondent

Before the Honourable Mr. Justice William J. Chandler, Judge of the High Court.

2010: June 30; July 29

Mr. Wilfred Abrahams with Ms. Vanica Sobers for the Husband.

Mrs. Peta Gay Lee-Brace for the Wife.

DECISION

[1] On 22nd March 2010 the Applicant/Husband filed an application before the court seeking, inter alia an order for sale of the matrimonial home “Villa Benjamin”.

[2] The Respondent/Wife filed an application on the 29th day of March 2010 in opposition to the Husband's application wherein she sought orders that:

- (a) she be permitted to have peaceful occupation of the matrimonial home until determination of his application filed on the 11th December 2006.
- (b) that the Applicant/Husband be prohibited from selling, transferring or by any means disposing of the said property until determination of her said application.
- (c) that the Applicant/Husband be restrained from occupying the said matrimonial residence until determination of her application or until further order of court.
- (d) that Applicant/Husband bear the costs of the application.

Brief factual background

[3] The facts relevant to this application are that the matrimonial home was purchased by the Husband in 2001 out of moneys obtained by virtue of mortgages with Island Properties Ltd. at Barbados National Bank Inc. prior to the marriage. The Wife is a non national and is unemployed.

[4] There is one child of the marriage, whose care and control has been vested in the Husband.

[5] Prior to the month of February 2010, the matrimonial home was occupied solely by the Wife. On 16th February 2010 the Husband entered the home and thereafter effected repairs to it. He deposed that the physical

- condition of the house had deteriorated to such an extent as to require these repairs.
- [6] He has the sole responsibility for the maintenance of the infant child of the marriage and of the Wife.
- [7] The Wife suffers from a bipolar disorder. Her conduct towards the Husband has been the subject of several applications before the court and a non-molestation order was made against her.
- [8] She alleges that she is unable to work because her status in Barbados has not been regularized. The Husband alleges that the Wife has refused to obtain gainful employment.
- [9] The medical evidence is that the Wife requires ongoing psychological/psychiatric treatment to control her condition. This, the court is of the opinion, is also necessary for her to be able to find gainful employment.
- [10] No evidence has been led as to her qualifications and/or suitability for any particular type of employment.
- [11] The Husband alleges that he was informed that the home had been broken into and that he found such evidence on his entry into the premises. He decided to protect his investment and consequently assumed control of the property.

[12] He initially sought an order for sale of the property. He alleged that he had an offer which was an excellent one and that the opportunity to realize this investment ought not to be lost. That sale fell through. In addition, since the filing of the application by the Husband, the decision of the Court of Appeal in **Towner v Towner Civil Appeal No. 6 of 2008 (unreported)** was handed down, forbidding the sale of the matrimonial assets prior to the determination by the court of a substantive application for division and/or variation of interests in matrimonial assets. In consequence, the Husband abandoned his application for the sale of the home.

[13] The Husband seeks to be able to rent the property so as to generate income. He formerly sought to sell it to realize his investment.

[14] The Wife, on the 11 December 2006 filed an application under **s. 57** of the **Family Law Act** seeking a one-half share in the Husband's properties. This application remains pending.

The Issues

[15] The issues before the court are (1) whether the orders sought in the Wife's application filed 29th March 2010 ought to be granted and (2) whether the Husband ought to be able to rent out the property so as to generate income.

This involves the consequential discussion as to whether the Wife ought to be excluded from the home.

The Submissions

[16] The Husband's counsel submits:

- (1) That the Wife has no greater right of occupation of the matrimonial home than the Husband;
- (2) That to deny the Husband the opportunity to earn revenue and simultaneously bring the property back to acceptable standards while allowing the Wife, who has no demonstrable means of maintaining the property, to be reinstated is detrimental financially to the applicant/husband and threatens to diminish the investment to which each party asserts a claim;
- (3) That the wife, who is now a single woman does not require a four bedroom beach front property for the maintenance of which she is not making and cannot make a financial contribution;
- (4) That to allow the wife to be reinstated in the home would also be to waste a potentially income generating source which could be used by the husband towards the maintenance of the child and the Wife.

[17] He submits also that to reinstate the Wife would be to stall the property settlement which has already been delayed and that the Wife should not be allowed to benefit from her intentional delay and frustration of the Court process.

[18] Counsel further submits that the Wife was given adequate provision and opportunity to seek alternative accommodation following the Husband's efforts to secure the home.

[19] The Husband also posits that he is a man of substance who can comply with any order of court requiring him to pay the Wife for her share, if any, in the matrimonial assets. He further submits that the Wife cannot compensate him for the loss of or diminution in the value of this asset and she is financially unable to maintain the property.

Wife's Submissions

[20] The Wife submitted that the Husband's actions constituted an eviction of herself from the matrimonial home without an application to the court under **Section 91** of the **Family Law Act**. She submitted further that the Husband was seeking to have the court countenance his unlawful expulsion of herself from the home by seeking the orders now sought. If a **Section 91** application had been made, counsel submitted, it would have failed.

[21] Counsel further submitted that the court does not lightly turn a person out of their home and this ought not to be done in this matter by granting the orders sought by the Husband. Reference was made to the marriage of

O’dea and O’dea 1980 Family Law Cases 90-896 and in the marriage of **Davis 1976 Family Law Case 90-62**.

[22] She submitted that there is a vast disparity between the means of the parties. The Husband’s assets are in excess of \$14,000,000.00. He enjoys good health and is a businessman. Whereas, the Wife has serious medical challenges and because of her lack of status in Barbados is unable to work. He has at least two alternative places of residence and that he acquiesced in her continued occupation of the property the subject of this application.

Hardship to either party

[23] Counsel submitted that the Husband’s actions were designed to realize an asset whereas the Wife only sought to continue to reside in her home. To deny her the right to re-enter the home would cause hardship on herself.

Hardship to the child of the marriage

[24] Counsel made reference to the child’s love of the sea as alluded to by the Husband and his familiarity with the home in which he lived for sometime. The Husband stated that he bought the property with the child in mind; his love of the sea and his medical challenges since he suffers from Asperger’s Syndrome. Though the Husband presently has custody, care and control of the child and presently resides with him, “Villa

Benjamin” is the child’s home. Therefore, if mother and child are to be reunited, it ought to be as stress free as possible in the home in which both mother and child are accustomed to residing. Thus it would create a hardship on the child if the Wife were excluded from the home where reunification with the child ought to take place.

Conduct justifying action - party leaving the home

- [25] Counsel refers to the Husband’s affidavit evidence that he fled the home as a result of the Wife’s actions but did not apply for an injunction or order for the Wife to vacate the home and give the Husband sole occupancy.
- [26] She submits that the court ought to hold that the eviction was unlawful and that the keys ought to be handed over to the Wife. The property ought not to be sold or rented and the Wife should be allowed to enjoy peaceful enjoyment of the home.
- [27] Since the abandonment of the application for the sale of the property by the Husband, the remaining application on the Husband’s his part is for an order that he be allowed to rent out the property so as to derive an income therefrom.

[28] Counsel submits that the issue is whether the Husband ought to be allowed to rent the home or whether the Wife ought to be allowed to return there for purposes of occupying the home.

[29] She further submits that the Husband deposed that the matrimonial home was bought by him with the interest of the parties' son Benjamin in mind, but the logical assumption may be made that it was bought as the parties' home. They occupied it until he vacated it to live elsewhere. She ought therefore to be allowed to continue to live there until the Court orders otherwise.

The Law

Occupation of the matrimonial home

[30] It is clear law that both parties have a right to occupy the matrimonial home and that neither has a superior right where disputes arise concerning right of occupation. In these matters the guiding principle is what is just and equitable in the circumstances. The court must have regard, inter alia, to the conduct of the parties, their financial and other resources, age, and status of health as provided for in the **Family Law Act (the Act)**.

Discussion

- [31] In this case, the Husband, on his own admission, left the home. He alleges that it was because of the Wife's conduct. His re-entry into the home was to secure it, renovate and to sell it to realize his investment. At no point in time did he allege that he required the home for his residence and that of Benjamin whose custody, care and control was granted to him by the court.
- [32] On the 30th March 2005 this court ordered that each party was to have care and control of the infant child on alternate weekends, from Thursday morning at 7.30 a.m. until Monday at 6.00 p.m. commencing the 21st March 2005.
- [33] On the 27th July 2006 this order was varied by **Richards J.** to allow for supervised access during that month for a minimum period of six hours in any one day per week. That order continued until custody, care and control was vested in the Husband.
- [34] On previous occasions the Wife had left the matrimonial home to travel to the United States of America purportedly for medical treatment and at times where applications for contempt of orders of court were to be heard against her. During those absences, no applications were brought to exclude her from the home. So that during the time she had access to her

son and until 16th February 2010, no issue arose as to her continued occupation of the home save and except the threat to the property of being unattended. No attempts were made to renovate the property during this period of time.

[35] The Husband has never alleged that his present accommodation is inadequate for himself and Benjamin. No evidence has been led as to the disparity in living conditions between the apartment where the Wife resides and Villa Benjamin. However, it appears and seems reasonable to assume that Villa Benjamin because, it is a house, is more spacious and better appointed than the apartment the Wife occupies.

[36] It appears to the court that the real factor motivating the Husband's decision to re-enter the property was to realize the asset by way of sale. This having failed, the next decision was to earn income from it.

Maintenance Order of Court

[37] The orders for maintenance of the Wife and child were made against the background of the financial circumstances of the parties existing at the time and those factors required to be taken into account by Section **50** of the **Family Law Act Chapter 214**.

[38] The fact that the Wife then occupied the home would have been one such consideration. The Wife has not applied for a variation of these orders. No application has been made for a variation of the maintenance order by the Husband either. Maintenance for both the Wife and the child are still live issues in the case and so is future access to the infant child of the marriage.

[39] The Husband has gratuitously offered a sum of money to assist with the rental of her present accommodation. It was tendered on condition that the Husband be allowed to sell the house and is for a period of limited duration. The cheque has not been returned to him.

[40] This action seems to be a unilateral one, conditioned as it was on the then pending sale.

[41] Maintenance and property settlement issues, though not entirely coincident, share much in common, one impacts on the other (**per Windyer J. in Sanders v Sanders 1967 116 CLR 366**). See also **In the marriage of Mullane (1980) FLC 90-826**.

Section 91 proceedings

[42] **Section 91 of the Family Law Act provides:**

91(1) In proceedings referred to in paragraph (h) or (k) (iv) of the definition “matrimonial cause” in section 2(1), the court may make such order or grant such

injunction as it thinks proper in respect of the matter to which the proceedings relate, including an injunction for the personal protection of a party to the marriage or union other a marriage or of a child of the marriage or union or for the protection of the marital or other relationship or in relation to the property of a party to the marriage or union or relating to the use or occupancy of the family residence.

91(3) In proceedings other than proceedings to which subsection (1) applies, the court may grant an injunction, by interlocutory order or otherwise (including an injunction in aid of the enforcement of a decree), in any case in which it appears to the court to be just or convenient to do so, and either unconditionally or upon such terms and conditions as the court thinks fit.

[43] This section allows the court to grant an injunction mandatory or otherwise, where it is just and convenient so to do.

[44] The Husband's counsel, by letter dated 15th February 2010, Exhibit ACH '1' outlined to the Wife's attorney-at-law the circumstances in which his client re-took possession of the property. The reason included long periods of absenteeism from the home and an act of vandalism allegedly committed during her absence from the home. He set out that his client was prepared to advance moneys (\$10,500.00) to assist the Wife with finding alternative accommodation. He also set out that the home was a valuable asset which his client was intent on bringing "back to an acceptable standard for rental or to realise his investment by sale."

- [45] By letter dated 16th February 2010 to the Wife's attorney-at-law, Counsel for the Husband stated: "my client has no intention of allowing Mrs. Hoyos to resume occupation of Villa Benjamin unless in pursuance of an order of the court" and that his client "would strenuously resist any application by Mrs. Hoyos to occupy "Villa Benjamin". A cheque for \$10,500.00 was enclosed for 6 months' rent and an additional \$1,500.00 tendered in case a security deposit was required. The letter further stated that the Wife was expected to account for the moneys so advanced.
- [46] As was previously noted, the Husband left the home and the Wife continued in occupation of it. Counsel for the Husband must have been aware that, as he submitted, no party has a superior right to occupy the home. If the Wife was in occupation, it was the duty of the Husband to seek an order of court to have her removed from the home.
- [47] The tenor of Counsel's letter suggests that the Wife should apply to be reinstated. That is to place an onus on the person who was in actual possession to now show cause why she should be reinstated. That is not the law.
- [48] The Husband ought to have availed himself of **Section 91** proceedings. He ought not to have, by self-help remedies and/or the supposition of securing the home and also realizing his investment by sale or otherwise,

usurped the power of the court on an appropriate application to determine the issue of whether the Wife ought to be restrained from occupying the home. The dual reasons for his re-entry into the home would then have been tested by cross-examination. The Husband, in effect, usurped the function of the court by determining that he had the right to dispossess the Wife. In this regard, the court is also mindful that the net effect of the Husband's action is not only to protect the home but to dispossess the Wife on his terms. He cannot unilaterally do so. The right of occupation cannot be sacrificed on the altar of commercial convenience.

[49] In this case, the property dispute is still outstanding and so is the maintenance application. These applications will involve a number of issues including, inter alia, the Wife's mental health, her capacity to work and the child Benjamin's welfare as well as the Husband's expenditure on the acquisition, improvement and conservation of the matrimonial home. The court's jurisdiction to adjudicate these issues was effectively ousted by the Husband's actions in ousting the Wife from the home.

Repairs to the home

[50] The Husband deposed that he had to effect repairs to the home to bring it to an acceptable standard due to the Wife's actions. No evidence was

tendered as to the nature and extent of the want of repair which had to be remedied.

[51] No survey report was put into evidence. So that the court is unable to say what repairs may have been due to fair wear and tear or wilful neglect if either of these had been established.

Wife's absence from the home

[52] This has been a source of concern for the Husband and has been expressed in correspondence to the Wife's counsel. It is a legitimate concern. However, the Husband is aware that the Wife is a citizen of the United States of America. She travels there from time to time.

[53] In Counsel's letter of 15 February 2010 he concludes that her absences have frustrated the process of the court and that this has been the pattern and modus operandi of Mrs. Hoyos when it suits her.

[54] This allegation ought to have been made in accordance with a **Section 91** application to the court with supporting evidence in affidavit form or given viva voce. The Wife's attorney would have been entitled to cross-examine the Husband on his evidence.

[55] The assertion of counsel for the Husband, in his letter of 16 February 2010, that his client had no intention of allowing the Wife to resume occupation of "Villa Benjamin" unless in pursuance of an order of the

Court is not for the client or counsel to decide and take action without the Wife having the right to a hearing in court on the appropriate application.

Disposal

[56] In the circumstances, I hold that the Husband's unilateral action of entering the property effectively dispossessed the Wife of the home without the appropriate application to the court.

[57] I therefore order as follows:

1. The Wife is to be reinstated into the matrimonial home within seven days of this order.
2. The Wife must notify the Husband of the times during which she will be absent from Barbados and/or how long.
3. The Wife must take appropriate steps to secure the home before leaving.
4. The \$10,500.00 paid to her by the Husband must be accounted for within 7 days of this order, and any excess not used for payment of rent or security deposit refunded to the Husband within 7 days of the account being rendered.

5. The Wife is to have her costs of this application to be agreed or taxed.

William J. Chandler
Judge of the High Court