

IN THE GRAND COURT OF THE CAYMAN ISLANDS  
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

Libom 13/7/2007

CAUSE NO. D16 OF 2006

BETWEEN:

**B-H**



Petitioner

AND:

H

Respondent

Appearances:

Ms. Eileen Nervik of Nervik & Company for the Petitioner  
Mr. Shaun McCann of Campbells for the Respondent

Before:

Hon. Justice Henderson

Heard:

September 10, 2007



RULING

I have conducted a hearing on affidavit evidence to determine the question of custody.

There are two children of the marriage. Mrs. B-H has the day to day care and control of those children. She seeks sole permanent custody. Mr. H has asked for joint custody.

It has to be said that there is a very considerable level of acrimony between the parties exceeding what might be considered the norm in matrimonial causes. I will not detail any of the reasons for my having come to that obvious conclusion. However, there is no disagreement between the parties on any major issue touching upon the best interests of the children. Questions of education, religion, health and medical treatment, and place of residence are all agreed upon.

What then is the significance of an award of joint custody as opposed to one of sole permanent custody? It seems, from the modern authorities, that the difference is largely symbolic.

*In Re Carlson*, 2000 CILR 138, Mr. Justice Douglas of this court cited a leading English authority on the subject and adopted it as the law of the Cayman Islands. Commencing at p.142 line 41 he said:

"In any event, we must look to the law of this jurisdiction in order to determine the legal rights and duties of the parties regarding the custody, care and control of the child. In this regard the principles of our law are basically no different from those which guided the judge in the Miami Circuit Court when making his order. We also hold that neither parent has any pre-emptive right. In the case of *Dipper v. Dipper*, Ormrod, L.J. said (1 FLR at 296):

'It used to be considered that the parent having custody had the right to control the children's education - - and in the past their religion. This is a misunderstanding. Neither parent has any pre-emptive right over the other. If there is no agreement as to the education of the children, or their religious upbringing or any other major matter in their lives, that disagreement has to be decided by the court. In day to day matters the parent with custody is naturally in control. To suggest that a parent with custody dominates the situation so far as education or any other serious matter is concerned is quite wrong.'

Cumming-Bruce, L.J. said (*ibid.*, at page 298-299):

'What is not practicable ... is to try to resolve the problem by giving the other parent an apparent right to interfere with the day to day matters or in the general way in which the parent with care and control intends to lead his or her life.'

What is abundantly clear is that giving one party sole custody does not pre-empt the other's rights."

That passage was cited and adopted again by this court in the leading decision of *Barrett v. Barrett* 2001 CILR 56. Some further commentary is contained in *Hurst v. Hurst* (1984) FLR 867, in which the Court of Appeal said this (quoting from *Caffell v. Caffell* (1984) FLR 169):

"The third point is that the judge -- as many judges, I think, are -- was influenced by the case of *Jussa v. Jussa* [1972] 1 WLR 181 which is cited in *Rayden* for the proposition that joint orders for custody ought not to be made unless there is a reasonable prospect that the parties will co-operate together.

...

No doubt in many cases that is a perfectly sensible proposition; but there are cases in which the party who has not got the day-to-day control of the children is anxious to preserve as much of his or her contact with them as is possible in the new circumstances where the parties have separated, and there is a good deal to be said for recognizing the responsibility and the concern of the father in this case by making some order which shows that the court recognizes that he is anxious to take an active part in their upbringing. Therefore, a joint custody order meets his problems as far as it can be met in the physical circumstances and should at least help him to get over the bitterness which he is bound to feel."

On the basis of those authorities it must be recognized that custody is largely a symbolic concept devoid of any real practical meaning. The crucial issue, from the point of view of the best interests of the children, is which parent is given day to day care and control. A second issue of great importance is the nature and degree of access awarded to the non-custodial parent.

In making my decision, I must be guided solely by the best interests of the children. I am to have no regard to supposed rights to custody which some might think parents enjoy. The only test is what is in the best interests of the children.

Mr. H argues that joint custody would tend to make him more involved in the day to day lives of his children and would therefore tend to promote their welfare. Mrs. B-H argues that joint custody is likely to have a different effect - it will likely be seen as a reason or excuse to interfere in the day to day management and care of these two children.

At present, in light of the acrimony between the parties, I am of the view that joint custody is more likely to exacerbate the tension than to reduce it. For that reason, I award sole permanent custody to Mrs. B-H.

I am also of the view that the tension between the parties is very likely to dissipate over time. When it has declined to a certain level, it would be useful to award joint custody to both parents for the reasons advanced by Mr. H. I therefore grant to him liberty to apply again for joint custody after two years have passed. It is my hope that, by that time, Mrs. B-H will see the wisdom in agreeing to joint custody without the need of a hearing.

I award day to day care and control of the two children to Mrs. B-H. I award to Mr. H access in accordance with the current regime.

Dated this 13<sup>th</sup> day of September, 2007

Henderson, J.

Henderson, J.  
Judge of the Grand Court

