

1 IN CHAMBERS  
2 IN THE GRAND COURT OF THE CAYMAN ISLANDS  
3 HOLDEN AT GEORGE TOWN, GRAND CAYMAN

*Unreported*

*JLH*

15-10-04

6 CAUSE NO. D129 OF 2003

8 BETWEEN:

9 ANDREW CROWE

Petitioner

12 AND: SHERENE CROWE

Respondent

15 Appearances:

16 Counsel for the Petitioner: David McGrath of Quin & Hampson

17 Counsel for the Respondent: Alan Turner of Turner & Roulstone

19 Before: The Hon. Justice Levers

21 Heard: 1<sup>st</sup> & 2<sup>nd</sup> September, 2004

23 JUDGMENT

25 Levers, J.

27 Before this Court are three applications.



29 1. The Respondent's application dated 14<sup>th</sup> July, 2004 for access

30 to her children both in person and over the telephone.

31 2. The Petitioner's application dated 14<sup>th</sup> July, 2004 to vary the

32 terms of the Consent Order which constituted a clean break

1        order between the parties in order to revisit the question of the  
2        disposition of the matrimonial property and other ancillary  
3        orders; and

4  
5        3. The Respondent's application dated 16<sup>th</sup> July, 2004 for leave to  
6        appeal out of time against the above mentioned Consent Order  
7        dated 4<sup>th</sup> February, 2004.

8  
9        It would I think be convenient to deal with the question of custody and  
10       access, initially.

11  
12       Custody and Access

13  
14       At the commencement of this matter counsel for the Respondent, Mr.  
15       Turner conceded that the Petitioner Andrew Crowe should have  
16       custody of the children. The question of access therefore remained  
17       outstanding. All the parties involved readily conceded that the  
18       children at some time must have access to the mother. In view of the  
19       facts outlined below, bearing it was felt that the children at this stage  
20       should only have telephone access and not have access in person.

1

2 The Facts

3

4 The parties Andrew Crowe and Sherene Crowe had been married for  
5 ten years and two months when the Petitioner moved out of the  
6 former matrimonial home and petitioned for divorce. The divorce was  
7 made absolute and the parties agreed the arrangements relating to  
8 the children of the marriage and matrimonial assets. This agreement  
9 was embodied in a Consent Order before Justice Henderson on 4<sup>th</sup>  
10 February 2004.

11

12 On 8<sup>th</sup> February 2004, the Respondent attacked the Petitioner with a  
13 knife at the former matrimonial home. She was charged and  
14 subsequently pleaded guilty to attempted murder.

15

16 On the 28<sup>th</sup> July 2004, she was sentenced to 12 years imprisonment,  
17 in respect of this offence. Shortly, after the attack the Petitioner  
18 applied to vary the arrangements in relation to the children.

19

1 On 11<sup>th</sup> February, 2004, Mr. Justice Henderson ruled that the  
2 Petitioner should have interim sole custody, care and control of the  
3 children.

4

5 The Respondent has been in custody since the incident in February  
6 2004. In the seven months since that time, she had not seen her  
7 children. She has only been able to speak to them by telephone.

8

9 The Respondent has been diagnosed as having Bi-polar disorder. At  
10 the time of the attack on her ex-husband on 8th February, 2004, she  
11 had been on medication and reports to the Court opine that it was her  
12 lack of compliance in taking her medication that may have led her to  
13 this attack. The allegations against the Respondent all pertain to acts  
14 of violence against the Petitioner and do not impact on her  
15 relationship with her children. In view of the opinion expressed by the  
16 expert Cathy Alberga, this Court decided to speak to both parties and  
17 to see the children. As stated previously both parties agreed that the  
18 children must at sometime have access to their mother. The question  
19 therefore, to be decided was how and when was the best time, as it  
20 were to break the ice and permit the Respondent to see the children

1 in prison. Both children were brought to the court and in the  
2 presence of counsel for the Petitioner and the Respondent, the Court  
3 interviewed the children. It was agreed prior to the children visiting  
4 the court that should they then wish to see their mother in the Court's  
5 presence, it would be permitted (as the mother was present in Court)  
6 in order for the Court to assess the interaction between mother and  
7 the children. The children were duly brought before the Court in an  
8 informal atmosphere and it was abundantly clear that the children still  
9 loved their mother and wished to have some form of communication  
10 with her. Accordingly, the Court requested the mother to be brought  
11 in and the interaction between mother and children was to say the  
12 least "revealing". The children clung to their mother, the children had  
13 no fear or gave no indication of fear of seeing their mother. The  
14 children indicated to the Court that they would wish to see their  
15 mother albeit in prison.

16

17 In all cases, the paramount consideration is the welfare of the  
18 children and the court must look at the background and all the  
19 circumstances of the case when deciding on these matters. This is a  
20 particularly unique case. The Court is not faced frequently with

1 having to make decisions such as this. It is difficult to decide when  
2 and in what circumstances access should be commenced. However,  
3 considering that the welfare of the children is of paramount  
4 importance and the fact that the children are of tender years and  
5 need the continuation of that special relationship and bond with their  
6 mother, I believe that permitting regular telephone access to the  
7 mother on a weekly basis and subsequently commencing prison visits  
8 in or about the first week in November 2004, would be in the best  
9 interest of the children. These visits should be conducted with either  
10 the Respondent's brother Rex Ebanks or her sister Sharon or the  
11 Respondent's mother or father being in attendance during the visits to  
12 the prison. The frequency of these visits would have to be  
13 determined after the children's first visit and their reaction thereto.  
14 Subject to any unforeseen adverse reactions, the Court would order  
15 that the visits are conducted on a monthly basis.

16

17 The Petitioner's summons in asking for the terms of the Consent  
18 Order to be varied does not specify the relief that subsequently was  
19 asked for by counsel Mr. McGrath. However, it is perhaps convenient

1 as the court heard submissions thereon to deal with all the aspects of  
2 variation pertaining to the children at this stage.

3  
4 Leave to take the children out of this jurisdiction.

5  
6 Mr. McGrath submitted that the Court should grant leave to the  
7 Petitioner Andrew Crowe to take the children out of the jurisdiction as  
8 he intends to live abroad permanently. He submits that in view of the  
9 stabbing incident and in view of the safety concerns that Mr. Crowe  
10 has for his children and himself, the Court should grant him  
11 permission to live out of the jurisdiction. It is conceded that in these  
12 circumstances where the mother is in prison for a considerable  
13 number of years it would be unreasonable to deny the Petitioner  
14 permission to relocate. He has custody of the children. There is no  
15 indication that he is not the most appropriate person to have custody  
16 and in circumstances where the mother could not care for the  
17 children, the Court would find it difficult to deny Mr. Crowe permission  
18 to relocate. However, counsel for the Respondent has quite rightly  
19 indicated that the court is not fully apprised of the details of such  
20 relocation. I agree with him. It is therefore difficult to make an order

1 at this stage but in order to assist Mr. Crowe in the decision making  
2 process of his relocation, this Court is willing to make an order that  
3 consent is granted to relocate with the children to Connecticut subject  
4 to Mr. Crowe applying to the Court when he is ready to do so and  
5 providing the court with the details of such relocation. The Court has  
6 readily agreed to this relocation for another reason and that is that  
7 Mr. Crowe has agreed that he would organize access to the  
8 Respondent in Cayman at least three times a year. Bearing in mind  
9 that the Respondent will have a conviction and therefore will be  
10 unable to travel to visit the children in Connecticut should they  
11 permanently relocate there, the question of access to the Respondent  
12 must be addressed in specific terms at the time when a final order is  
13 made granting Mr. Crowe permission to relocate. Mr. Crowe in  
14 addressing the court indicated that he was concerned for the safety of  
15 the children at certain times when the Respondent was going through  
16 an attack of bi-polar disorder and/or personality disorder. His  
17 proposals to bring the children himself would be the most appropriate  
18 in the circumstance. However at the time of the formal order, the  
19 details proposed by the Petitioner should be submitted to the Court  
20 for its approval.

1

2 The main question at the hearing was whether the Court had power  
3 to vary or set aside the Consent Order of the 4<sup>th</sup> February, 2004 *vis a*  
4 *vi* the matrimonial property settlement. It was conceded by all parties  
5 that the Court could revisit the question of custody and access, but it  
6 was disputed by Mr. Turner that the court had jurisdiction to vary the  
7 terms of the matrimonial settlement as far as the property issue was  
8 concerned. I held that the Matrimonial Causes Law, Section 24 gives  
9 me the power to vary any order made under section 22. I therefore,  
10 held that I had jurisdiction. The Summons for leave to appeal out of  
11 time was therefore made redundant. Mr. McGrath submitted that if I  
12 held that I did not have the jurisdiction to revisit the matter then he  
13 would require leave to appeal out of time. Having held that I had  
14 jurisdiction, the next step that the Court considered was whether it  
15 wished to exercise its discretion in varying the order.

16

17 The law is remarkable not only for the extent of the powers which it  
18 gives the court over the income and assets of divorcing spouses but  
19 for the fact that the discretion is almost unfettered. It is now being  
20 said that the judicial objective is to do that which "is fair just and

1 reasonable between the parties". See White v White [1998] 2 FLR  
2 310, CA. Thorpe L. J.

3

4 When should the court therefore intervene in this way. Leave to  
5 intervene should be given or considered if four conditions are  
6 satisfied:

7 (1) the basis or fundamental assumption underlying the order  
8 had been falsified by a change of circumstances;

9 (2) such change had occurred within a relatively short time  
10 (usually no more than one year) from the making of the  
11 original order;

12 (3) the application for leave had been made reasonably  
13 promptly; and

14 (4) the granting of the leave would not prejudice unfairly third  
15 parties who had acquired interests for value in the property  
16 effected.

17

18 It seems to me that the principles to be applied are not dissimilar  
19 to those in deciding whether a contract is to be set aside by

1 reason of mutual mistake or frustration. The English authorities  
2 are governed by statute, for example in *Barder v Caluori* [1988]  
3 A.C. 20, House of Lords, the court by consent made a “clean  
4 break” order under which H was to transfer the matrimonial home  
5 to the W within 28 days. Four weeks later, W killed her children  
6 and committed suicide. All her property would go under her will to  
7 her mother. The House of Lords held that the husband should be  
8 given leave to appeal out of time; and, on the appeal, that the  
9 order should be set aside. In that case, there was a question of a  
10 third party inheriting because of a fundamental change of  
11 circumstances. Mr. McGrath argues that when the Petitioner  
12 agreed to the order he did so on a number of fundamental factual  
13 premises and they were:

- 14 1. That the Respondent and he would share  
15 custody of the children;
- 16 2. That the children’s time would be divided  
17 60:40 between himself and the  
18 Respondent;
- 19 3. That the children would require a suitable  
20 home in which to live when with their  
21 mother consistent with the division of their  
22 time;

1           4. That the Respondent would be able to pay  
2           for the mortgage of the former matrimonial  
3           home;

4           5. That the Respondent and he would  
5           respectively share cost and expenses of  
6           bringing up the children and that he would  
7           continue to live and work in the Cayman  
8           Islands for the foreseeable future.  
9

10   Having agreed to the consent on that basis, he now submits that  
11   because of the change of circumstances and as a result of the  
12   stabbing incident, the Petitioner will be forced to live elsewhere and  
13   that the circumstances have changed so fundamentally since the  
14   making of the consent order, that the court should exercise its  
15   discretion and revisit the order. Mr. McGrath submits that if the court  
16   was to take the factors that the court should consider in making a  
17   court order then and bearing in mind that the welfare of the children is  
18   of paramount importance, the court would vary this order. He seeks  
19   an order for the sale of the former matrimonial home and the division  
20   of net proceeds of sale taking into account all section 19 factors. He  
21   submits that the Petitioner had intended to remain living in Cayman in  
22   his present employment and share the children's time and associated  
23   child care responsibilities and financial obligations with the  
24   Respondent. That in view of the stabbing this is now no longer the

1 case and he submits that a sale and division of the net proceeds of  
2 sale is the appropriate means by which to do justice to the facts of  
3 this case because as he submits:

4

5 "The Respondent proposes that she will rent  
6 the house whilst she is in prison. Because  
7 the liability against the house is relatively  
8 small and it is a significant and attractive  
9 family home in a family community in Red  
10 Bay, the house will now attract a good rent.  
11 This will result in the Petitioner collecting and  
12 amassing an ongoing rental profit from the  
13 former family home while she is in prison for  
14 attempting to kill her husband. Meanwhile the  
15 Petitioner and the 2 children are the parties to  
16 whose detriment this financial arrangement  
17 will act because they are living in a smallish 2  
18 bedroom rented apartment. The grotesque  
19 injustice and iniquity of this situation is self-  
20 evident. If the Court is not minded to exercise  
21 its discretion and vary the order then the factual  
22 scenario outlined above is the status quo.  
23 The Court is, therefore, respectfully urged to  
24 undo the injustice."

25

26 I now turn to Mr. Turner's submissions to see if in fact the court order  
27 should be varied and whether there is a fundamental change of  
28 circumstances. Mr. Turner submits on behalf of the Respondent that  
29 there is no fundamental change of circumstances. He submits that a  
30 consent order especially giving a clean break should not readily be

1 revisited by a Grand Court judge. A re-visitation, he say flies in the  
2 face of public policy. I disagreed with Mr. Turner on the question of  
3 jurisdiction, and held that I could revisit the order. Does that mean  
4 that in this particular case there has been such a fundamental change  
5 that when one considers all the relevant factors the present court  
6 order is not a fair one? To decide this, the Court has to look at the  
7 consent order and go through the exercise of analyzing the clauses  
8 that deal with the matrimonial property.

9  
10 **The Consent Order**

11  
12 **Clause 1:**

13  
14 (1)The Petitioner do transfer his interest in the former  
15 matrimonial home situated at 5 Lord's Way to the  
16 Respondent simultaneous with the Petitioner's removal  
17 from the mortgage at 2 below.

1        Clause 2:

2  
3            The Respondent do assume sole liability for  
4            the mortgage against the above property,  
5            presently held with the First Caribbean Bank  
6            and the parties do forthwith execute the  
7            necessary documentation for the removal of  
8            the Petitioner from such liability.  
9

10    Mr. McGrath argues that the stabbing has fundamentally changed the  
11    circumstances because the welfare of the children would now require  
12    the matrimonial home to be sold. He submits, the fact that the  
13    Petitioner is the unimpeachable parent gives him the right to custody  
14    and gives him the obligations and responsibilities of looking after the  
15    children. He urges that when the Consent Order was made, the  
16    Petitioner was to have at least 20% more time with the children and  
17    was to share the obligations of the children with the Respondent. It  
18    appears to me the only thing that has changed is not the  
19    Respondent's condition, nor the Respondent's health, but the fact  
20    that she is now in prison and will not be able to undertake the sharing  
21    of the responsibility because she is prison. This is all that has  
22    changed. However, the Respondent's premises will be rented and  
23    from the rental she will be able to undertake some of the obligations

1 for the children. Further, Mr. McGrath says that the Respondent  
2 wishes to go abroad and therefore if the house is sold, he will have  
3 some capital with which to start life. He does not touch on the  
4 question of the Clause 3 of the Order which is:

5

6 "That the Respondent do transfer her interest  
7 in Block 68A Parcel 63 to the Petitioner  
8 simultaneous with her removal from the  
9 mortgage at 4 below."  
10

11 The Petitioner has property which he can sell and convert into capital  
12 towards the purchase of a home abroad, if he should so desire.  
13 Section 24 of the Matrimonial Causes Law gives me the power to  
14 undertake such a variation, however, section 19 gives me the right to  
15 exercise my discretion having regard to the best interest of any  
16 children of a marriage and thereafter that the responsibilities, needs,  
17 financial and other resources, actual and potential earning power and  
18 the deserts of the party. As I am of the view that the interest of the  
19 children are not affected by either the Petitioner selling the  
20 matrimonial home or the Respondent retaining it, then I have to look  
21 at the responsibilities, needs, financial and other resources, actual  
22 and potential earning power and the deserts of the parties. If, I were

1 to accede to Mr. McGrath's request to sell the property, I would then  
2 have to visit the question of the piece of land that was given to the  
3 Petitioner by the Respondent which is free and clear of a mortgage  
4 and valued at approximately \$150,000. I would then also have to  
5 look at the responsibilities, the needs, the financial and other  
6 resources and the actual and potential earning power and the deserts  
7 of the parties and undertake "a division exercise". Mr. McGrath  
8 submits that the division should be 75:25 split. I disagree. Whatever  
9 the proportion, I need to consider first whether I need to now revisit  
10 this consent order because of a fundamental change of  
11 circumstances. It can be assumed that the parties must have  
12 addressed all questions before coming to an agreement on "consent  
13 order with a clean break". The only factor since then is the stabbing  
14 incident. How has that stabbing incident fundamentally changed the  
15 matters so that the court will be concerned for the welfare of the  
16 children and wish to (considering all other factors) intervene and set it  
17 aside.

18

19 The evidence before me is that the fundamental change is that the  
20 Petitioner wishes to live abroad and no longer live here and that

1 because of the incarceration of the Respondent, it is submitted that  
2 she will be unable to share the expenses for the children. It is said  
3 that she should not be permitted to benefit from the matrimonial  
4 home. The Respondent has been punished under the due process of  
5 the law for the incident and I must be careful and mindful that I do not  
6 punish the Respondent twice. The welfare of the children does not  
7 require the property to be sold. The fact that the Petitioner is living in  
8 a small home was a decision he made when he left the matrimonial  
9 home long before the incident. This, therefore, is not a fundamental  
10 change due to the stabbing. Therefore, the only question is why  
11 should the matrimonial home be sold now and what are the  
12 fundamental changes that have taken place to make the sale a fair  
13 one. I do not see any, save and except for the fact that the Petitioner  
14 wishes to live abroad and needs capital to relocate. But as indicated  
15 previously he has the piece of land that he can sell. Therefore, I do  
16 not think that considering the matters that I have to take into account,  
17 the responsibilities remain the same, the needs remain the same,  
18 save and except for the relocation expenses, the financial and other  
19 resources remain the same because any rental that the Petitioner  
20 collects can help to defray some expenses. The actual and potential

1 earning power does not remain the same. The Respondent's actual  
2 earning power when she gets released from prison will be far less  
3 and I have to bear that in mind when I consider all the circumstances  
4 of this case. The Petitioner is the unimpeachable parent and  
5 therefore gets custody of the children. The Respondent is the  
6 impeachable parent, her conduct has contributed to the detriment of  
7 the family, but I believe that she has been punished and whilst the  
8 conduct of the parties is a factor that must be considered, it is not the  
9 sole factor. I do not believe that I should exercise my discretion and  
10 vary this Order.

11

12 I cannot complete this judgment without commenting on the value of  
13 seeing the children in circumstances such as this. Had I just had the  
14 benefit of the professionals report alone, I would have received no  
15 guidance or benefit as to the question of commencing personal  
16 access. Seeing the children assisted me greatly. Not only the  
17 children, but hearing from both parents was beneficial/ As I indicated  
18 to counsel during the hearing, it is hoped that the Respondent will  
19 avail herself of the Anger Management Counseling that is provided  
20 for in the prisons. The Order therefore is:

1

2

1. Sole custody to the Petitioner;

3

2. Weekly telephone access and monthly supervised personal

4

access to the Respondent; such monthly access to commence

5

on 1<sup>st</sup> November, 2004; and

6

3. The Petitioner will be permitted to remove the children from the

7

jurisdiction on condition that the Court is apprised of the

8

conditions of relocation and is satisfied with the proposed

9

access arrangements.

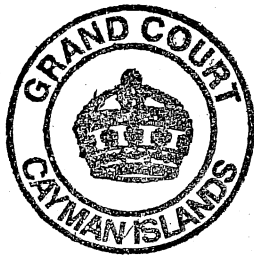
10

11 Dated this 15<sup>th</sup> day of October, 2004

12



13



14

15 Judge of the Grand Court