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

2-06-04

CAUSE NO. D57 of 1996

**DIVORCE AND MATRIMONIAL CAUSES REGISTRY
(Legal Aid Certificate No. 110/96)**

BETWEEN:

CHARLES REDDINGTON GILMAN

Petitioner

- and -

CLAUDETTE LILLIAN GILMAN

Respondent

- and -

DONALD L. FRAZIER

Co-Respondent

Appearances:

**Ms. G.E. Nervik of Nervik & Company for the Petitioner
Mr. Eliot Simpson of Ogier & Boxalls for the Respondent**

Before: The Hon. Justice Livers

Heard: May 11, 2004

JUDGMENT

Livers, J.



1 This is an application by way of summons by the Respondent Claudette Lillian Gilman
2 for:

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4 (a) a social enquiry report to be prepared in relation to joint custody and access of
5 Amy and Sarah Gilman. (In particular that Amy and Sarah Gilman be
6 interviewed prior to their departure from the island on 9th August, 2003).

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8 (b) thereafter with the Petitioner and the Respondent being awarded joint custody of
9 Amy and Sarah;

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11 (c) That the Respondent be granted defined access in the following terms:

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13 For six weeks during each summer school holiday, for two weeks during each
14 Christmas school holiday, for one week during each Easter school holidays. At
15 such other times as may be mutually agreed between the parties or as this
16 Honourable Court deems fit and;

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18 (d) that Amy and Sarah be entitled to participate in the extra curricula activities of
19 gymnastics and singing.

20 The Interview in clause (a) above was ordered and undertaken.

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22 There is also a cross-summons filed by Charles Reddington Gilman, the Petitioner in
23 these proceedings for the following relief:

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- (1) That the summons filed by the Respondent be dismissed;
- (2) That the order made on the 28th of March be varied to state:
 - that the Respondent is to pay the airfares of the two children on the times agreed for the visitation of the children;
- (3) that the Respondent be ordered by the Court to contribute \$650 per month for the maintenance of the two children;
- (4) the Respondent be ordered to pay the costs of these proceedings until such further and other relief, as this Court deems fit and proper.

Before I go into the merits of these summonses and the affidavit evidence sworn in this matter, a brief history of the proceedings would be a beneficial exercise. The Respondent and the Petitioner were married for some twenty years and the union produced six children. Some time in 1996, the Respondent, Mrs. Gilman left the matrimonial home leaving the minor children, I believe at that time there were five, with the Petitioner and proceeded to co-habit with the Co-Respondent in these proceedings. She is now married to the Co-Respondent but separated from him. In April 2000, a consent order was entered into before his Lordship Mr. Justice Smellie Q.C., Chief Justice and that consent order set out many matters including that the Petitioner shall have custody, care and control of the relevant children of the marriage. At the time they were James Bryan Gilman, Amy Jane Gilman and Sarah Gilman. The Respondent was willing to give and gave custody of the children to the Petitioner. Some time later, the Petitioner decided to migrate and took the children with him to settle down in San Diego where he is remarried

1 and has lived for the last three years. The Respondent, as a result of the relocation, was
2 unable to see the children and petitioned the courts in San Diego for access. She was
3 allowed access on two days for four hours each. She exercised the first four hours of
4 access but for personal reasons to do with transportation did not exercise the second four
5 hours of access. No further applications for access were made until the year 2003.

6
7 The Respondent subsequently petitioned the courts in Cayman for further defined access
8 and was granted it. At the time of petitioning the court for defined access she made no
9 mention of the financial implications of access from San Diego to Cayman. On the 31st
10 of March, 2003, the Court was petitioned and the Honourable Mr. Justice Kellock
11 ordered the Petitioner to pay two thirds of the airfare to enable the Respondent to have
12 access. In making the order, the Honourable Justice Kellock made the following
13 remarks: -

14 “ the Petitioner has provided an affidavit in response to the summons which does not
15 address either prayer for relief for the summons in any meaningful way. In particular,
16 he provides no evidence whatsoever, upon which to base a finding that he cannot
17 afford to pay the children’s travel costs.”
18

19 Unfortunately, Mr. Justice Kellock may not have been aware that the Respondent’s
20 summons and affidavit was served on the Petitioner’s attorney the day before the hearing.
21 The Petitioner’s attorney was unable to get detailed responses as far as travel
22 arrangements and the cost of travel were concerned. I accept her explanation for this and
23 am therefore willing to look at the question of travel costs *de novo* in view of all the
24 evidence before me now.

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1

2 **THE CHILDREN**

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4 Both children, the subject matter of these applications are well settled in San Diego. All
5 social enquiry reports both in Cayman and the United States speak highly of the father's
6 stability and settled family life. The children are doing well at school and seem to have
7 settled down exceptionally well. On the other hand, the mother, the Respondent had not
8 exercised her access rights for one reason or another, mainly financial, but now wants to
9 play a role in the children's life. She submits that the reason she wants custody is to
10 ensure that she gets the school reports and that she now wishes to have a say in what the
11 children do with their lives. Her desires are not the end of the matter, when a consent
12 order is involved.

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14 The question is: Have the circumstances changed to such an extent since the making of
15 the Consent Order to merit interference with it? The question of custody was agreed by
16 the parties and the Consent Order endorsed accordingly. While it is entirely appropriate
17 in certain cases and in certain circumstances for the court to revisit the question of
18 custody despite a consent order, nothing has changed in this case to merit the Court
19 revisiting the question of custody. Indeed, if the Court were to revisit this question of
20 custody, the mother would not come out in the best light. She now wishes to divorce her
21 second husband (who gave evidence at the request of the court to say they were
22 reconciling while she denies the reconciliation). She is financially strapped, is unable to
23 make any payments towards the maintenance of the children or the travel fares, and it

1 would not be in the best interest of the welfare of the children which is paramount in
2 considering these matters that the Consent Order be varied at this stage. The
3 consequences of a variation would be severe. The mother may well start dictating to the
4 father, after all these years, on the manner and lifestyle of the children. The father will
5 have no guarantee that the children will be returned to him after the access period if joint
6 custody were granted. A variation may well result in the disruption of the children's
7 lives, in circumstances where the father has made a decision to start life and relocate
8 having the assurance that he had sole custody of the children.

9
10 When should the Court interfere after the making of a Consent Order? To my mind it is
11 under the following circumstances: -

- 12 (1) The basis or fundamental assumption underlying the order has been falsified by a
13 change of circumstances.
- 14 (2) An application because of such changes is made within a relatively short time.
- 15 (3) The variation would not unfairly prejudice either party who has relied on the
16 consent order to establish their lives.

17
18 The Court is required to weight up a large number of different considerations, and
19 importantly, the credibility of the applicant, and her ability to care for the children.

20
21 I find it disconcerting that the Respondent could not even answer appropriately the
22 questions raised by the court as to the children's religion and her own living
23 accommodation. Eventually, the Court got an affidavit from her eldest son, confirming

1 that the mother is now living with him. There has been no sound reason in my view put
2 forward by the mother, to vary the Consent Order. If in fact the reason for the request for
3 joint custody is the need for school reports, that can be addressed without granting joint
4 custody. The circumstance where a consent order was entered into and the father has
5 established his lifestyle and taken decisions as to his permanent residence based on the
6 fact that he has sole custody of the children, would make any court most hesitant to
7 reverse the consent order or vary it in any way unless the children were not being treated
8 well and their welfare was at risk. The mother is not settled; her married life is in a
9 shambles, her accommodation is unsettled as is her financial life.

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11 In *Belton v. Belton* [1987] 2 FLR 343 at page 349 the judge summarized the authorities
12 by saying:

13 “ the authorities in the law which dictate the hard and difficult decision which
14 must be made once it is established, that the custodial parent genuinely decides to
15 emigrate and in circumstances in which there is nothing adverse to be found in the
16 conditions to be expected those authorities are quite clear, in the course that the
17 court must take whatever the hardship and distress that may result.”
18

19

20 In the judgment in *Payne v. Payne* [2004] EWCA CIV 1666 FCR it was stated by

21 Thorpe L.J.:

22 “practicalities are all against this submission. International travel is
23 comparatively cheaper and more competitive than even before. So equally
24 communication is cheaper and the options more varied.”
25

26 I now turn to the application to vary the travel arrangements. This did not form part of
27 the consent order, and as stated previously, I am inclined to reconsider this application
28 *de novo*.

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2 During the course of these hearings the mother confirmed that she has an extended family
3 in the Islands and that they will help her pay the airfares if need be. However, I believe
4 that the variation should be equitable and in my view, the father should pay for the two
5 children to come for the summer holidays alone. The rest of the access as defined
6 previously should stand with the mother bearing the cost of the travel should she wish to
7 see the children. I take into account the mother's financial circumstances and will not
8 order any maintenance to be paid by her for the benefit of the children but she will be
9 responsible for them while in her care during the access period. Her request for the
10 children to do gymnastics and singing is so absurd that I invite counsel in the future to
11 consider carefully the appropriate relief to be included in summonses. Mr. Simpson did
12 not pursue this application with any vigour, as he was not counsel in the case initially, it
13 is not intended to mean any criticism of him. The mother is not maintaining the children,
14 and she has no knowledge as to the cost of gymnastics and singing but wishes the Court
15 to make these demands of the Petitioner. This relief cannot be entertained.

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17 I therefore make the following orders:

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19 (1) the application for custody by the Respondent is dismissed. The Petitioner is
20 to retain sole custody.

21 (2) the order as to the payment for the travel for the access to the children is
22 varied as follows:

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(a) the Petitioner to pay for return tickets in the summer. The rest of the

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times, the airfares to be borne by the Respondent;

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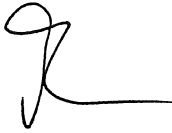
(b) the Petitioner to send the Respondent all the school reports.

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Dated this ^{2nd} day of June, 2004

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Levers, J.

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Judge of the Grand Court

