5·12·2003

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. D 73/95

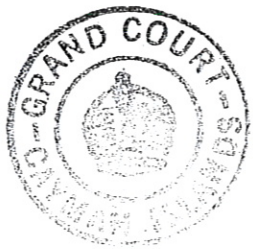
IN CHAMBERS

BETWEEN **LAVERNE MONTIETH GOODING** **PETITONER**

AND **WALTON TENNYSON GOODING** **RESPONDENT**

Mrs. Nervick of Nervick & Co. for the Petitioner/Respondent.

Miss Brooks of Brooks and Brooks for the Respondent/Applicant.



Heard: November 25, 2003

REASONS FOR RULING

HARRISON J (Ag.)

The Applicant /Respondent has filed a summons seeking variation of an order made on the 8th day of October 1996 whereby the petitioner was granted custody, care and control of the child of the marriage with reasonable and defined access being afforded to the Respondent. Access was defined as follows:

a) The Respondent shall have the child of the marriage in his care and control on alternate weekends from Friday 6:00 p:m to Sunday 6:00 p:m;

b) That the Petitioner and Respondent shall share equally the school holidays of the child of the marriage and that the child of the marriage shall spend alternate Christmas' with the Respondent; Christmas of 1996 being with the Petitioner.

Both the petitioner and child are now living in the United States of America so the respondent seeks an order that the Court re-defines access to the child if he is to remain living in the United States. In lieu of the order to access above, he is asking that he be granted access for this year Christmas and for all other school holidays with the dates of such holidays to be provided by the petitioner.

The Respondent was also ordered to pay by way of maintenance for the child the sum of CI$100.00 per week but he now asks the court to vary that amount and for it to be reduced from CI$100.00 per week if the child is to remain living in the United States and he is to pay for his visits and his maintenance during the period that he visits with him. Counsel had submitted on his behalf that this sum should be reduced to CI $25 per week until such time as the court is provided with an affidavit of means from the petitioner or alternatively until further order of the court.

Having heard the application to vary on the 25th November I dismissed it with costs to the Petitioner and promised to put my reasons in writing. I now seek to fulfill this promise.

Let me deal firstly with the maintenance application. Under section 7(3) of the Guardianship and Custody of Children Law (1996 Revision) (Cayman) the court has power to order the father of a child to pay for his/her maintenance having regards to the means of the father. Subsection 5 provides however, that either parent of the child may apply to the court to have the order for maintenance varied or discharged.

Now, it has long been established that it is the primary responsibility of a father to maintain his child. In this respect the primary factor that a court considers is his means and if he is of insufficient means then the court may order him to make a contribution. The authorities have also established that it is not inequitable for a father to support his child entirely albeit the child's mother might be earning a greater income than him.

What factors ought a court to take into consideration in deciding whether to vary an order for maintenance? In **Howard v Howard** [1945] 1 All ER 91 where there was an application by the husband for a reduction of the amount payable under a maintenance order, Lord Greene MR said (at p 95):

> 'What has to be looked at is the means of the husband and "means" means what he is in fact getting or can fairly be assumed to be likely to get.'

In this particular case, it was argued on behalf of the applicant that since he would have to pay all expenses associated with his access to the child in the U.S.A the maintenance ought to be reduced. Counsel had submitted that the weekly maintenance should be reduced to CI $25 but to my mind, this was not a reasonable proposition. Furthermore, it is my considered view that the respondent would have had to show that there was a change of circumstances as to his means in order to warrant a variation of the court's order. He has deposed that his monthly earning as an electrician amounts to CI $4000.00. His monthly expenses amount to $4,195.70 and they are set out hereunder:

a) Mortgage	$1,100.00
b) Electricity	250.00
c) Telephone	250.00
d) Water	54.00
e) Insurance	675.00
f) Food	500.00
g) Transport	300.00
h) Church contribution	100.00
i) Payment on Miami property	766.70
j) Pension	200.00

He has exhibited documentary evidence of his salary but there is none in support of his payments in respect of mortgage, utilities or insurance. His mere say so is therefore insufficient. He cannot just throw up figures to the Court and expect that it will accept them. It is a fundamental principle of law that he who asserts must prove.

It was my considered view that when all the evidence is considered there was no justification in the arguments that the weekly payment for maintenance should be reduced to $25. It would seem to me that the respondent ought to manage his affairs much better. If the expenditure listed above is correct then he ought to reduce or discontinue some in order to allow him to be in a better position to pay this small weekly maintenance.

I turn now to the defined access facility. It was argued on behalf of the respondent that due to the petitioner's unilateral action in removing the child from the jurisdiction the respondent can no longer exercise his right of access to the child which was anticipated by the court when it made the 1996 order.

The evidence has revealed that both the petitioner and child have been residing in the United States of America for approximately three years now but this is the first occasion that the respondent has chosen to apply for a variation of access. Counsel for the petitioner submitted that the reason why this step has now been taken is because there is a pending application before the court to have the respondent's salary attached. He has admitted in his affidavit before the Court that he is in arrears with his maintenance payments and that payments are only up to January of 2003. It would seem to me therefore, that there is some merit in the argument put forward by Mrs. Nervick.

To my mind there is evidence that the respondent has condoned in the child's removal. He was aware from very early that his wife's work permit had expired in 2000 and there were discussions between them about him keeping the child until she had a settled place of abode. He took no steps restrain her by a Court order and he has deposed that he did not complain about this removal previously since he was trying to co-operate with the Petitioner. He had discussed the matter with the Social Services Department in Cayman but according to him he was told that if he complained and there were any problems it was the child who would be hurt. He also stated that he thought the Petitioner would be more lenient since it was he who was responsible for the additional travel expenditure to Atlanta. As a matter of fact when the petitioner asked him to keep the child in Cayman until she had decided on a place of abode he told her then that he would send the child to one of his sisters in Barbados. She concluded in the circumstances that he did not want the responsibility of caring for the child.

The evidence also revealed that the petitioner's whereabouts in the United of States of America were made known to the respondent and during the three years she lived there he has visited the child twice. He has had access to the child two Christmases and the child has traveled with him to Miami, Florida where he has a residence.

It was therefore submitted by Miss Brooks that the respondent would be prepared for his access to be confined to vacation time but this did not appear feasible to me at this time since the petitioner has deposed that the child is not in possession of a current visa hence there would be problems if he were to travel outside of the United States. There was no evidence that the respondent was stopped or inhibited in any way from having access to the child and it was my view that that there were no pressing circumstances warranting a variation of the Court's order in relation to access.

It was for the above reasons why the Court made the order dismissing the respondent's application.

KARL S. HARRISON
Acting Judge of the Grand Court
Cayman Islands.
December 5, 2003