

IN THE GRAND COURT OF THE CAYMAN ISLANDS
DIVORCE AND MATRIMONIAL CAUSES REGISTRY

Handwritten:
Wadsworth
7/6

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CAUSE NO: D6/2002

BETWEEN:

WADSWORTH COOLIDGE CONNOLLY

Petitioner

AND:

DAWN MARIE CONNOLLY

Respondent

BEFORE: THE HON. JUSTICE LEVERS

APPEARANCES:

Counsel for the Petitioner: Mrs. E. Nervik of Nervik & Co.

Counsel for the Respondent: Mr. I Connel of Hunter & Hunter

Heard: 7th, 8th, 9th, 14th, 15th, 16th, 19th, 21st, 23rd, 26th May, 2003



JUDGMENT

Lever J.

The Petitioner, Wadsworth Coolidge Connolly comes before this Court by way of summons asking for the formal determination of the ancillary matters. He seeks the following relief:

1. An order as to custody, care and control of the child of the marriage namely Lewis Wisman Connolly born on the 20th March 1996;
2. An order as to the maintenance of the said child of the marriage;
3. An order as to the disposition of the matrimonial property;
4. Such further and other relief as this Honourable Court deems fit and proper;

5. Costs.

The Respondent, Dawn Marie Connolly opposes the application and asks for sole custody, care and control of the child of the marriage or in the alternative, joint custody, but sole care and control. She also asks for maintenance for herself and maintenance for the child of the family, and a fair distribution of the matrimonial property/assets. For purposes of this application this judgment will be divided into two categories.

1. The question of custody, care and control
2. The distribution of family assets.

BACKGROUND

The Petitioner and the Respondent were married on the 26th April 1996 at George Town, Grand Cayman, Cayman Islands. The Respondent, Dawn Marie Connolly was already married when she met the Petitioner, whom she met while on vacation with her husband in the Cayman Islands. A relationship developed and the Petitioner visited the Respondent in the United States of America where she was residing with her then husband. After her divorce from her second husband, the relationship with the Petitioner culminated in this marriage. In 1995, prior to the marriage, the Respondent informed the Petitioner that she was pregnant. He sent her a ticket to enable her to be with the Petitioner in Cayman and to have the child in the Cayman Islands. The child was born on the 20th

March 1996 and the parties, as stated previously, got married on the 26th April 1996.

Some five years later in or about October 2001, both parties agree that the marriage broke down irretrievably. The Petitioner, Wadworth Coolidge Connolly filed for divorce on the 11th January 2002. The Respondent filed her Cross-Petition and Answer on the 22nd February 2002. The Petitioner filed his Reply and Answer to the Cross-Petition on the 5th March 2002. The Respondent filed a Reply on the 26th March 2002. Leave was granted to proceed by way of mutual petitions. The mutual petitions were proved on the 25th July 2002.

THE PETITIONER

The Petitioner is 65 years of age. He is a retired seaman having retired in 1983. He sailed for 28 years and eventually was a master mariner when he retired. He now does farming on his properties and derives an income from his farming and also from rental of properties that he either purchased or inherited. He is a Caymanian and the marriage to the Respondent was his first. He does however have an adult child, Cheryl Miller and a grandchild. The child of this union therefore is his only son and second child. The Petitioner has a close relationship with his mother who lived with him until a few months after his marriage. He also had a close relationship with the two of his aunts from whom he inherited substantial properties.

THE RESPONDENT

The Respondent is an American who now resides in the Cayman Islands. She was married twice before and this is her third marriage. She does not have any living children except the child of the marriage with the Petitioner. However, she has had two abortions, the first of which was in unfortunate circumstances and the second of which she depones was as a result of the insistence of her second husband. The Respondent worked for two years from 1993 to 1995 as a sales girl at Dillard's in Las Vegas. She has not worked since she came to the Cayman Islands but is about to commence work in sales. Her work experience and her qualifications would permit her to work either as a receptionist and/or a sales assistant.

At the hearing of this matter which lasted over a number of days, several affidavits were filed in support of both the Petitioner and the Respondent and *viva voce* evidence was given and tested in cross-examination. Several witnesses were tested in cross-examination by the Respondent's attorney.

At the outset, it is perhaps important to note that the exercise in choosing to give *viva voce* evidence and/or cross-examining parties and their witnesses is not only to put forward the case more vigorously but also to enable the presiding trial judge to assess the credibility and the veracity of the statements given by the

parties and their witnesses. It also assists the Court which has to exercise a discretion in these matters, by permitting the judge to assess the demeanor of the parties. Allowances can be made for ill health or nervousness but this form of evidence can help in the process of adjudication of the material issues.

CUSTODY

In the Commonwealth Caribbean the issue of custody has been extensively dealt with by the Courts and local case law on the subject abounds. However, whilst the principles that have been reiterated by these Courts over and over again must be applied, each case depends entirely on the facts presented in support of it. For children born in wedlock the parent or guardian formally appointed are/is legally entitled to custody unless there is a Court Order depriving a party of this right. Whatever order is made by this Court the paramount consideration must be the welfare of the child. I am entirely in agreement with the dicta of Georges J, in Milne v Milne (unreported), 10th July 1974, High Court, Trinidad & Tobago (No. 2162/1973), where it was stated that:

“It is clear from the recent cases that the emphasis is not on the ‘rights’ of the parents to custody but on the ‘right’ of the child to be placed in the environment which will be most conducive to its welfare. It is the duty of the Court to assess all relevant circumstances and arrive on the balance at the decision which serves that end.”

All the circumstances must however, be taken into account and each case is a different circumstance. In this case the relevant factors are the age of the child, the upbringing of the child, the moral welfare, the education, accommodation and material advantage for the child, satisfaction of the child's basic needs, the happiness of the child, the future prospects of the child and the question of access to the unsuccessful party and to a lesser extent the new partners of either party and whether they will be amenable to looking after the child, or assist in so doing.

In considering the child's welfare I must do so on the widest possible basis. I must take into account a wide range of subjects already referred to and my approach to the matter will be to consider the respective merits of each party with regard to each of them and decide the contest on what I think is the best thing to do in the interest of the child. When it comes to the question of custody, the father claims that he is better suited to care for the child for the following reasons:

1. That he is in a better position financially than the mother;
 2. He has a great bond and affection for the child;
 3. The child has a bond and affection for him;
 4. That he is prepared to do the best he can for Luis;
 5. That the Respondent is unstable and occasionally abusive to the child;
- and

6. That the child has lived in North Side all his life where the father is well known and has many friends and family.

The Respondent on the other hand believes that she is better suited to have the child on the basis that:

1. She is a loving mother;
2. She intends to reside in the Cayman Islands on a permanent basis if she can;
3. That with adequate support from the Respondent, his financial consideration would not be a factor to be taken into account by this Honorable Court;
4. That she has a greater input into the child's educational and academic progress;
5. That the child is attached to her; and
6. That the Petitioner occasionally use corporal punishment on the child.

There is an abundance of judicial opinion to the effect that the Court will not grant custody of a child to one parent solely on the basis of that parent's financial circumstances. To my mind the fact that a father or a mother is financially in a better position to give the child a start in life does not give the party a superior claim. It is the happiness of the children and not only the material prospects with which this Court should be concerned. The quality of home life is not to be measured in purely material terms and for that reason the father's claim would not necessarily succeed over the mother's. However, the other factors to be taken into account must now be considered.

The moral welfare of the child is also of importance to the Courts in the determination of a custody case. The Court has heard evidence that the mother who has been married before (this being her third marriage) had an affair with a Mr. Roger Ebanks during the marriage. Two independent witnesses corroborated this allegation and actually went as far as to say they saw the mother in a compromising situation in her home. I believe them. The cross-examination of these witnesses merely strengthened their statements. This Court has heard evidence that the mother is now in a liason with a Mr. Roland and that she visits Mr. Roland and sleeps overnight at his home with her son. It is to be noted that the child is said to sleep with the mother while Mr. Roland sleeps in the spare room in his own home, Mr. Roland gave evidence that he is still married and has no intention of remarrying. I need to take into account that the mother appears from all the evidence and her demeanor in Court to have an element of instability in her personality and her own behaviour is not beyond reproach. When it comes to the question of the moral welfare of the child, the father would appear to be a better parent. However, that is just another factor that I have to consider in the equation. An unimpeachable parent does not have an automatic right to custody. The child is taken to church by the father. His educational needs appear to be settled for now, and is helped more by the mother than the father. I bear in mind that the child is a very young child of seven years old. I also bear in mind that the social enquiry report requested by the Court makes certain recommendations. The conduct of the Respondent as

a parent during the period when the child was in the care and control of the Respondent does not appear to show disregard for the child's welfare or being unmindful as to her parental obligations to the child. I find therefore that when it comes to the question of custody, the factors are evenly balanced between the parents and custody of the child should be awarded to the Petitioner and the Respondent jointly.

It leaves the question of care and control to be decided. I am uneasy in giving joint care and control to the Petitioner and the Respondent. I believe if that is done, the acrimony between the parties will be such that the child will be the one to suffer. The parties do not communicate with each other, they do not consult with each other and the day-to-day care and control of the child will be problematic if given to both parties. I find the Respondent is unstable in her relationships but I do not find that the child has been exposed to a degree of instability as to deprive the mother of the right to care for the child or the child to have his mother care for him. I have taken the opportunity during the course of the hearing to meet with the child in the presence of the parties' attorneys and it was clear that the child was trained by the mother to say what he did but I believe that the mother has to date shown concern for the child's welfare and has been a significant factor in the child's academic development. I do not believe that the Respondent's conduct and/or any evidence before me makes her an unsuitable person to have the daily care and control of this child. The alternative would mean that the child would be cared for by a helper assisting the father. In

making the order granting the Respondent care and control of the child, I wish to give effect to the principle that the child must have as much contact with the father and in this particular case I believe it is important that the father has greater contact than I would normally order. I take into consideration the unwillingness of the Respondent to facilitate such contact and intend to make the order so specific that it is hoped that present hostility would be decreased, by the making of this access order.

The order is that the Petitioner is to have access to the child. (1) Fortnightly from Thursday evening to Monday mornings. (2) Half Easter, half summer and half Christmas holidays. (3) Every other public holiday, every other Christmas day and on Father's day and (4) that during the weeks when there is no access, the Respondent is to see the child on a Tuesday and a Wednesday afternoon between the hours of 2 o'clock to 6 o'clock.

I wish to make it clear that this order for care and control is given to the Respondent only on the basis that she resides in the Cayman Islands. If the Respondent wishes to leave the Island or has to leave the Island, the question of care and control must be revisited. It is imperative that this child is not removed from this jurisdiction without the written consent of the Petitioner or without the permission of the Court. The Respondent is to consult the Petitioner as to educational, religious, medical decisions to be made on behalf of the child. I only

make this care and control order on the clear understanding that the Respondent can monitor the situation by frequent contact.

The Petitioner is to pay all educational, medical and extra curricular expenses for the child of the family and the sum of \$400 per month as maintenance for the said child of the family. The sum of \$400 is to be placed in an account designated by the Respondent. All other payments are to be made directly to the relevant institution.

FAMILY ASSETS

I now turn to the question of the distribution of assets and financial provisions for the Respondent. The law is governed by section 19 of the Matrimonial Causes Law (1997 Revision). Section 19 reads:

“In dealing with all ancillary matters arising under this Law, the Court shall have regard first of all to the best interests of any children of a marriage and thereafter to the responsibilities, needs, financial and other resources, actual and potential earning power and the deserts of the parties.”

Section 22 is also relevant for purposes of this application. It reads:

“At the time of pronouncing a decree under this Law, the Court shall, as appropriate, make orders for –

- (a) the custody, care and control of the children of the marriage;
- (b) the disposition of matrimonial property, including the matrimonial home;

- (c) varying any settlement of the property of the spouses made in consideration of the marriage, whether such settlement was made before or upon the treaty of the said marriage;
- (d) varying any other settlement of matrimonial property;
- (e) making financial provision from the property of either spouse for the children of the marriage and for the other spouse;
- (f) providing for periodic payments to be made by either spouse for the benefit of the children of the marriage and for the other spouse; and
- (g) costs.”

In my view, the Matrimonial Causes Law (1997 Revision) in the Cayman Islands gives the Court a greater discretion than its equivalent English jurisdiction (section 25 of the Matrimonial Causes Act). However, the fundamental plank of any decision made by the Courts in this regard must be that the distribution is fair considering all the circumstances of the case. The duty of the Court in deciding whether to exercise its powers and, if so, in what manner, is to have regard to ‘all the circumstances of the case’. The first consideration being given to the welfare of a minor child of the family who is in the care and control of the party seeking a settlement or maintenance. The Court is not to discriminate between the sexes and whilst it is clear that the Caymanian legislation gives the Court a wider discretion than the English legislation that legislation is a useful guideline in the

factors to be taken into consideration when the Court has to determine the financial provisions for the parties. The factors to be considered are:

1. The welfare of the children;
2. The income earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which in the opinion of the Court be reasonable to expect a party to the marriage to take steps to acquire;
3. The financial needs, obligations and responsibilities which each of the parties of the marriage has or is likely the have in the foreseeable future, including child care responsibilities;
4. The age of each party to the marriage and the duration of the marriage;
5. Any physical or mental disability of either of the parties to the marriage;
6. The conduct of each of the parties if that conduct is such that it would in the opinion of the Court be inequitable to disregard it; and
7. The value to each of the party to the marriage of any benefits which by reason of the dissolution or annulment of the marriage that the party will lose the chance of acquiring.

In this jurisdiction the Court must, also, when deciding on the proper disposition of the matrimonial property, consider the intention of the parties as to their respective interests in the property and any contributions the parties may have made towards the acquisition of that property.

It is perhaps best that I start in this particular case with the age of each party to the marriage and the duration of the marriage. The Petitioner is 65 years

of age; the Respondent is 44 years of age. Both the Petitioner and the Respondent have health problems. The Respondent has greater health problems than the Petitioner. She has Hepatitis-C. Counsel for the Respondent, Mr. Connel submits that the evidence as to when the Hepatitis-C was contracted is not definitive and therefore this Court should take into account her health and what her medical bills would be when assessing the division of the property and/or maintenance payments to be awarded to the Respondent. Counsel for the Petitioner says that the evidence is clear that the Respondent came into the marriage with Hepatitis-C and therefore the Petitioner should not be penalized by having to pay her ongoing medical bills which could be substantial.

The marriage lasted some 5 years and the Petitioner alleges that sexual contact ceased sometime in 1997. The Respondent alleges on the other hand that sexual contact continued until December 2001. Whichever way you look at it the marriage effectively came to an end in October 2001 and therefore by any standard it was a short marriage. The duration of the marriage is more often relevant than age. In the instant case the marriage was not a long one and certainly was not a happy one. The Petitioner alleges that he was deceived into marriage because the Respondent hid certain aspects of her background from him. In this regard Counsel for the Respondent cites the case of C v C (Financial Relief: Short Marriage) [1997] 2 FLR in support. He argues that when it comes to an award to be made that

there is no inflexible rule that only a low rehabilitative award would be considered appropriate in short marriage cases. However, having reads C v C (supra) carefully, it is quite accurately described as a very unusual case. In that case the marriage produced a child who needed to be cared for by the wife who had the benefit of a generous award. The adverse impact on her health, as a result, of the breakup of the marriage was also taken into account in making the award. The award was described as a highly unusual one and the features of the case made it unlike this one. It is easily distinguishable from the case at hand.

There is no doubt that the husband is financially more secure than the wife whose earning capacity is limited to income she can earn as a sales person/receptionist. She also has no property of her own. This would be of some importance, if in fact the Petitioner were not taking care of all the child's needs. As it is however, in view of the length of the marriage and the other factors, I do not believe, that the wife will have a greater claim for the reason that she has care and control of the child.

The financial needs, obligations and responsibilities for the wife needs to be examined. The wife's basic needs and/or requirements I find are:

- (a) Accommodation;
- (b) Medical costs;
- (c) Child care responsibilities.

I therefore have to arrive at an equitable division of the matrimonial property, taking into account all the factors previously examined. The law speaks of the “deserts of the parties” when it comes to the many considerations that the Court should take into account. There is no magic formula to be applied to these words. To my mind, it simply means that the parties must be given “their just deserts.” It gives the adjudicating tribunal a wide discretion to do what is equitable by taking into account general factors including the conduct of the parties towards each other prior to, during and after the marriage (most importantly during the marriage).

In this case, perhaps, a most important consideration is the conduct of the Respondent, which I find would be inequitable to disregard. The following aspects of her conduct I believe should have an impact on any decision I make:

- (a) Her affair during the marriage with Roger Ebanks;
- (b) Her failure to tell the Petitioner that she was married twice before;
- (c) Her constant demands on the Petitioner for money (evidence of Petitioner’s sister and brother-in-law);
- (d) Her attitude pertaining to monies at the Bank of Nova Scotia (see letter from bank);
- (e) Use of Credit Cards behind Petitioner’s back;
- (f) Her admitted perjury during the course of giving evidence at the hearing.
- (g) Conflicts in her viva voce evidence with that of her statements to two independent witnesses as to how she contracted Hepatitis-C.

The other consideration before exercising my discretion must be the contribution which each of the parties has made or is likely to make in the foreseeable future to the welfare of the family including of course, any contribution made by the Respondent in looking after the home or caring for the family. The evidence is not disputed that the Respondent brought little or no capital into the marriage. The Respondent's contribution was entirely in caring for the child of the family, in cooking for the Respondent and in performing her wifely duties. I accept the Petitioner's evidence that she did not help with the farm in anyway whatsoever. I further accept the Petitioner's evidence that she did not want to work and I also accept the Petitioner's evidence that she was easily tired and unwell for at least four years of the brief five and a half year marriage having been diagnosed with Hepatitis-C in 1997. What therefore is an equitable division of the assets to which the Respondent has not contributed a cent? The matrimonial home was built 20 years before the marriage. All the property that was owned was prior to the marriage. There is no assertion that she contributed in anyway to the acquisition of that property. Monies in the several bank account in the names of the Petitioner and his mother or his aunts were not contributed to by the Respondent. Therefore, there is no question of the intentions of the parties as to their respective interests in the properties and/or chattel to be considered and there is no question of a financial contribution to the matrimonial assets to be considered by this Court. It would be in my view highly inequitable to disregard the fact that the wife has made no contribution to the acquisition of these matrimonial assets. It cannot even be said that she gave up her place in the

world of work to concentrate upon her husband, her home and her family. I am left therefore to deal with the question of her financial needs, obligations and responsibilities which she has or is likely to have in the foreseeable future. Need is only one factor. I think it would only be right to assess her needs without giving any weight to any contributions made and then subsequently to place the contributions she has made into the balance together with any other relevant factors. I am alert to the fact that the child of the family will be spending a substantial part of his life under the care and control of the Respondent. In the circumstances, one of the basic needs must be housing. The Petitioner has offered the Respondent a home where she presently resides rent-free as long as she does not get married or until the child is seventeen years of age. The home is in North Side and the child of the family has grown up in that area and has friends in that area. Furthermore, the Petitioner has easy access to the child of the family by virtue of living in the North Side area. The Respondent argues that the area is the Petitioner's "stomping ground" and that she would feel uncomfortable living there. She wishes the Petitioner to be ordered by the Court to provide her with money to buy a two-bedroom condominium in the George Town area. The Cayman Islands is a very small place and as long as one has transportation nothing can be said to be far in these Islands. The question of need and not preference must be considered and the test must be provision of accommodation which is satisfactory and must be an objective test and not a subjective test. The wife is presently living in a newly refurbished renovated residence in an area where the child has always lived. As housing has been

offered at no cost to the Respondent by the Petitioner, the Court needs to address the other needs of the Respondent. I do not agree that the Respondent is entitled to any part of the matrimonial home, having been acquired 20 years before the marriage. I do however believe that in a short marriage (a young wife of 44 who is capable of working), the husband's obligation would be to provide for the wife over a period of adjustment to overcome her financial hardships. In this case equality is not the appropriate starting point. I am of the view that the wife needs a monthly allowance for a period to overcome her financial hardships that may be occasioned by the divorce. The Respondent deponed that she will earn approximately \$600 per month to start with. The Petitioner income from Rental income and farmlands can be estimated at over \$2000 per month. He has his own health problems, the child's school fees and farm related expenses to pay in addition to maintaining his own home, his mother and that of the Respondent's residence. Taking all these matters into consideration the order of the Court is:

1. The wife be permitted to reside at 983 North Side Drive until the child reaches 17 years or she remarries. The Petitioner to pay the taxes and insure the premises;
2. The Petitioner pay the sum of \$400.00 per month for maintenance to the Respondent for 2 years from the date hereof;
3. The Petitioner pay half the Respondent's medical bills incurred in treatment associated with Hepatitis-C only for a period of one year;
4. The Petitioner to permit the Respondent use of the motor vehicle presently being used by the Petitioner. The Respondent to insure and license same;
5. The distribution of chattels to be as follows:

To the Respondent

- Gold Seiko watch, if found
- Disney books
- Toys from grandmother

To the Petitioner

- All other chattels including silk rug
- 4 Chinese rugs
- 4 Chinese lamps and
- 2 silver coins

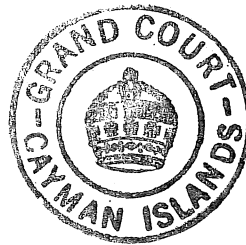
6. No order as to costs;

7. Liberty to apply.

Dated this 20th day of June 2003



P. Levers
Judge



1. Joint custody of the child Luis Conolly to Petitioner and Respondent;
2. Care and control to Respondent as long as she lives in the Cayman Islands;
3. Access to Petitioner as follows –
 1. Fortnightly Thursday evening to Monday morning
 2. Non-access weeks ever Tuesday and Wednesday afternoons between 2 to 6
 3. Half Easter; half Summer and half Christmas holidays
 4. Every other public holiday
 5. Every other Christmas day
 6. Every Father's Day
4. Maintenance – Petitioner to pay the sum of \$400 per month as maintenance for the child;
5. Petitioner to pay all medical, educational and extra curricular expenses for the child;
6. Respondent to consult the Petitioner as to educational, religious, and medical decisions for the child; and
7. Respondent not to take the child out of the jurisdiction without the Petitioner's consent or the leave of the Court.