21/01/02
Signed

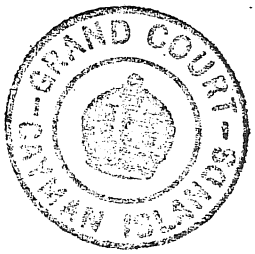
IN CHAMBERS

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO. D 101/97

BETWEEN:	SHERRY L. WATLER	Petitioner
AND:	KENNETH R. WATLER	Respondent

Appearances:

Karin M. Thompson for the Petitioner.
Kenneth R. Watler in person.



January 15, 2002

Kellock, J.

REASONS FOR JUDMENT

The parties were married at Gun Bay, East End on October 28, 1995. By August 1997 the marriage had broken down and a petition seeking dissolution of the marriage and ancillary relief was issued. The Respondent acknowledged service of the petition on September 16, 1997 indicating that

he did not intend to oppose the divorce but wished to be heard on the ancillary matters. There were at that time no children of the marriage.

The petition came on for hearing on December 12, 1997 and Douglas J. found the petition proved. There is a minute signed by Douglas J. to that effect (which also recites that the ancillary matters were 'deferred').

I have therefore assumed that Douglas J.'s minute reflects the provisions of the Matrimonial Causes Law (1997 Revision) and s. 19 of the Rules which contemplate that instead of a decree which, in addition to dissolving the marriage pursuant to section 10 of the Matrimonial Causes Law may contains orders disposing of the ancillary matters as required by section 22, the Court may, pursuant to section 19(2) of the Rules, defer pronouncement of a decree until the ancillary matters have been determined, whereupon the Court may pronounce the decree in open court.

After the decree has been pronounced in open court the Clerk is to issue a certificate in the prescribed form stating that the marriage has been dissolved.

It therefore appears that the Watler's marriage has not been dissolved. The material before me discloses that a child of the marriage Kenneth Wallace Watler was born on February 3, 1999, some seventeen months after these proceedings were commenced and over 11 months since Douglas J. found the petition proved. Neither side was in a position to address the significance of that development but neither side sought to make anything of it either.

At a time when the only ground for divorce was adultery, the law was that sexual intercourse occurring after the alleged adultery constituting the matrimonial offence upon which the petition was founded could be regarded as condonation by the innocent party which put an end to the cause of complaint and the right to divorce. *Williams v. Williams (1904) P. 145 Henderson v. Henderson (1944) A.C. 49 (HofL).*

Unfortunately condonation was a bar, not only to a petition based on adultery, but to relief based on statutory grounds eg. desertion. Although under the old practice a decree of divorce was pronounced in two stages, it was nevertheless regarded as a single decree and condonation occurring between the decree nisi and decree absolute was treated in the same way as

condonation occurring before the decree nisi. (Bromley's Family Law 8th Ed. 1992 page 225).

Now that the grounds for divorce are many and specified by statute it is arguable that the earlier law relating to the consequences of condonation no longer applies (the decision in *Williams v. Williams* notwithstanding). It seems to me reasonable to conclude that condonation will not be a bar to divorce unless the applicable statute so provides. Even if I am wrong in that conclusion I would hold in this case that the judgment of Viscount Simon L.C. in *Henderson* applies to this case.

Viscount Simon said (at p 53):

> *"It has been more than once pointed out that the conclusion of condonation by an innocent wife of her husband's previous misconduct is not in all cases so strictly drawn from the fact of subsequent intercourse..."*

In *Henderson* the House of Lords was of the view that taking all of the circumstances into account it was not necessary to deny the wife relief on that basis.

However it appears that there is more to the condonation issue than a single act of intercourse leading to the birth of the child. There is no evidence before me as to the circumstances in which the child was conceived, but it would appear that the parties had cohabited for some period of time after the appearance before Douglas J. in December 1997 until June 2001.

In paragraph 3 of the Petitioner's affidavit sworn January 14, 2002 the Petitioner states;

> *3. " Prior to our separation in June 2001 I offered to pay rent of CI$1200.00 in order for me to continue to reside in the apartment we were then occupying. Although the Respondent agreed to a separation he refused to leave thereby forcing me to find alternative housing for our child our helper and myself."*

However, as I have said, the Petitioner has not seen fit to raise this issue and it should be noted that the Respondent did not oppose the order made by Douglas J. It is clear that the parties are no longer living together and there are serious issues to be resolved. I therefore take the view that the cohabitation mentioned should not be regarded as a bar in this case.

Custody and Access

It was agreed before me that the Petitioner should have custody, care and control of the child subject to the Respondent's right to reasonable access. The formal order will so provide and will also provide both parties with liberty to apply to vary that order should either of them consider it appropriate to do so.

Maintenance for the Child

Unfortunately the child was recently diagnosed as suffering from pervasive development disorder and therefore requires further evaluation and perhaps special treatment which is likely to prove to be expensive.

Section 19 of the Matrimonial Causes Law requires the Court "to 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... of the parties".

On November 27, 2000 the Chief Justice made an interim order requiring the Respondent to pay CI$200.00 per month for the child's maintenance which he has not paid. The Respondent was also ordered to file an affidavit and

that he has done. In that affidavit he swears that his salary is $1908.00 per month. However it appears that in reality his salary is CI$954.00 paid every two weeks or CI$2067.00 per month.

I have examined the list of his expenses and have concluded that he can and should pay his wife CI$400.00 per month for the maintenance of the child.

Property and other issues

As indicated earlier the parties own jointly an apartment complex which has been recently appraised at CI$857,000.00. That property is subject firstly to a charge in favour of the CIBC (CIBC Bank and Trust Company (Cayman Limited)). The balance owing in respect of that charge is $555,195.41.

The parties agree that the property should also be regarded as being charged with the repayment of a loan from Excel Watler (the Respondent's father). The debt is CI$80,000.00 and bears interest at 7% per annum. It was agreed that this property should be sold as soon as possible and the net proceeds divided between the parties. The Petitioner suggests that she should receive 70% of net proceeds so that she will be in a better position to meet the

financial burden expected by reason of the child's medical needs. It was agreed that the net proceeds, after deducting the expenses to be incurred in the sale (eg., real estate commission), should further be reduced by the sum of $2500.00 which is now owing to A.L. Thompson's.

In addition, the Petitioner urged me to direct that any arrears of maintenance payments (which are now $400.00) should be deducted from the proceeds and paid to her.

It appears that the Respondent is still in occupation of one of the apartments and owes rent in the amount of CI$950.00 per month from September 2001 to date. He is entitled to a 50% share in the profits of the apartment business but I gather that all of the rental income has been and is being devoted to the payment of expenses including mortgage payments.

There can be no doubt that the space now occupied by the Respondent should be occupied by a tenant who pays rent regularly and on time when the property is placed on the market for sale which should be soon.

I therefore direct the Respondent to vacate the apartment he is now occupying as soon as possible and under no circumstances is he to remain in occupation after February 15, 2002.

In her affidavit sworn October 30, 2001 the Petitioner identifies a number of debts which, very late in the argument, Mrs. Thompson urged me to order the Respondent to pay or alternatively to direct that the money should be paid to the Petitioner out of the proceeds of the sale. These include a number of credit card obligations. The Respondent refers to these in his affidavit and takes the position that some of them should be regarded as the Petitioner's obligations. I cannot tell from the Respondent's affidavit exactly what amounts he believes are the Petitioner's obligation and what amounts may be properly regarded as joint obligations or otherwise dealt with.

The Car

The Respondent is driving a car which he acknowledges belongs to the Petitioner. It was agreed to be worth CI$1,000.00. It was agreed that that

amount should be paid to the Petitioner out of the proceeds of the sale of the apartments.

The Florida Time Share

I was told that there is little if any equity in this property and the Respondent has agreed to transfer his interest in it to his wife. The order will so provide.

Conclusion

Bearing in mind the provisions of Section 19 of the Matrimonial Causes Law, I have concluded that it is not possible to finally determine how the net proceeds of the apartment property should be divided and how those proceeds might be used to provide for the child. Mrs. Thompson has given me copies of an order in which the Court constituted the wife a trustee of a portion of the proceeds of the sale of matrimonial property for the benefit of the children of the marriage and that seems to me to be an option worthy of serious consideration in this case.

However until it is known whether or not there will be any "net" proceeds from the sale of the apartments and when those proceeds will be available it

is impossible to make any sensible order or indeed to know whether or not a sensible order can be made.

I have therefore decided that the following order should be made as a first step and that liberty to apply should be granted so that the Court can make further working out orders and in due course a final order (I am of course aware that custody and maintenance orders are never 'final' in the popular sense).

(1) It is therefore ordered that:

(a) The Petitioner shall have the care, custody and control of the child of the marriage.

(b) The Respondent is entitled to reasonable access to the child with liberty to apply if the parties should disagree as to what reasonable access means in the circumstances then prevailing.

(c) Liberty to apply is also granted should either party seek to vary the provisions of this order concerning custody and access.

(d) The Respondent shall pay to the Petitioner for the maintenance of the child commencing February 1, 2002, CI$400 per month.

(e) The property being block and parcel No. 4E G13 Registration Section. West Bay NorthWest be placed on the market for sale by private contract through a broker. The broker shall be selected by the Petitioner and the sale shall be under her control.

Both parties shall execute any offer to purchase recommended for acceptance by the broker but such offer must contain a condition providing that it is subject to the approval of this Court unless the Petitioner and Respondent agree in writing to waive this requirement. The Respondent is to vacate the apartment he occupies no later than February 15, 2002.

(f) The monies received on closing after obtaining the discharge of the CIBC mortgage and payment of legal and real estate fees and the usual necessary disbursements shall be paid by the parties;

(i) To retire the debt to Excel Watler.

(ii) To retire the debt to A.L. Thompson's.

(iii) To pay any arrears of maintenance payments to the petitioner.

(iv) To pay the Petitioner CI$1,000.00 in respect of the car.

(v) To pay the balance to the Accountant General of the Grand Court, to be paid out as the Grand Court may then direct.

(2) It is further ordered that the Respondent transfer his interest in the Florida time share to the petitioner forthwith.

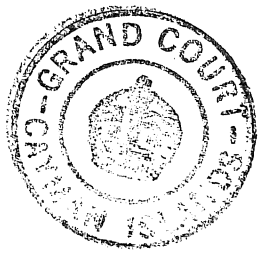
(3) That the parties have liberty to apply to address the question as to how the funds in Court are to be paid out and any other matters required to be addressed prior to the making of a final order and decree and in particular whether these funds should be used to make provision for the child.

(4) The costs of the petition and this application to be reserved to be disposed of on the making of a final decree.

I should say here that it would be wise if both parties either resolved their disagreement over the credit card and other debts etc. or provide the Court with a clear statement of their cases in respect of any unresolved issues related thereto. They should also provide guidance as to how the question

concerning the rent not paid in respect of the apartment occupied by the Respondent should be resolved.

I may be spoken to about the form of the order.



Kellock, J (Actg)

Judge of the Grand Court

Dated the 21st day of January, 2002