28.7.97

IN CHAMBERS

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. D. 5 of 1997

BETWEEN:	LORI KAY KING WATT RYAN	PETITIONER
AND:	LEONARD EDWARD KENDAL RYAN	RESPONDENT

For the petitioner: Ms. S. Brooks
For the respondent: Mrs. K. Thompson

BEFORE DOUGLAS, J.

RULING

This is an application by the petitioner seeking an order that the respondent vacate the matrimonial home situated in West Cayman Brac.

The powers of the court in dealing with matrimonial matters pendente lite are provided by Section 19 of the Matrimonial Causes Law (9 of 76). The relevant section is as follows:

"The court may make orders pending the outcome of

any suit in respect of which petition has been presented providing for the use of a matrimonial home."

The application was heard in Chambers on 13th May at the conclusion of which I reserved my ruling. On 12th June 1997 I dismissed the application and at the request of the applicant's attorney I now put my reasons in writing.

The circumstances leading up to this application were adduced from both the affidavits of the parties and the viva voce evidence of the respondent. The evidence reveals that until September 1996 when the marriage broke down the parties lived together in a two bedroom house. The petitioner then moved out of the connubial room and into the second bedroom which she has since shared with the two children. The elder a 13 year old boy, is the petitioner's child by a previous marriage, the other, a 4 year old girl, is the offspring of both parties. There is no doubt that this sleeping arrangement has resulted in a certain degree of inconvenience to the petitioner, and the children. She claims that she finds the situation very stressful. What seems to aggravate the matter somewhat is the occupancy by the respondent of the master bedroom with its ensuite bathroom and closet containing some of the petitioner's clothes. It is her contention that in view of the inconveniences and the resulting stress the respondent should be ousted from the matrimonial home. He could then go and reside with his mother who lives alone in a four bedroom house on that Island.

It does appear from the evidence that, although never happy with the arrangement, the petitioner was prepared to tolerate it pending the outcome of her uncontested divorce proceedings. However, now that the matter has become contested she is unwilling to continue the arrangement not knowing just how long the proceedings will take to resolve.

I fully appreciate the petitioner's plight. The respondent's presence in the house is clearly of great inconvenience to her. There is accommodation readily available to him on one of his mother's empty bedrooms. He presently goes there daily for his meals, and his only time spent at the matrimonial home is in the evenings when he goes to play with his young daughter and to sleep. His laundry is also being attended there by the maid. Furthermore he does admit that once the divorce is granted he will have to find someone to look after him.

One can see that from the petitioner's point of view the easiest and most logical solution to her problems would be for the court to grant the application and order the respondent to vacate the matrimonial home. As she has proposed, he could then move in with his mother, thereby alleviating situation, one in which the petitioner is obliged to share her bedroom with the children. Such an order would not prevent the respondent from visiting the matrimonial home and playing with his daughter as is his custom.

However an order to this effect would be contrary to a well established principle of law, one which was enunciated by Lord Denning

MR in **Hill v. Hill** (1971) ALL.E.R. 762. In this regard His Lordship said "An order excluding a spouse from a matrimonial home was a drastic order and ought not to be made unless it is proved to be impossible for the spouses to live together ....". In that case, as it is in this matter, there was no violence between the parties who got on well with the children, and as Lord Denning continue "unpleasantness and inconvenience, or tension pending a divorce was not a sufficient ground for ordering a spouse out of the matrimonial home".

This principle was followed in **Richards v. Richards** (1983) 2 ALL.E.R. 807 a case on which the wife moved out of the matrimonial home and into unsuitable accommodation while the divorce was pending. Unable to find suitable accommodation the wife applied to a judge for an order excluding the husband from the matrimonial home. Although the application was granted by the judge and upheld by the Court of Appeal, the House of Lords allowed the husband's appeal holding that the evidence did not justify the making of an order excluding the husband from the matrimonial home.

This application is based on two grounds, firstly the inconvenience being experienced by the petitioner. Secondly the stress which the respondent's presence in the home is causing.

Regarding the first, the evidence reveals that for months the applicant was quite contented with the domestic arrangements as they now exist. The fact that she may have to endure them until the

petition is heard is a insufficient ground on which to justify the order sought. Furthermore the respondent has offered to move out of the master bedroom, to allow the petitioner and children to occupy it, while he moves into the other bedroom.

I now come to the second limb of the application whereby the petitioner alleges that the respondent's presence in the matrimonial home is creating a stressful situation in the home. In paragraph 4 of her affidavit she states "we rarely speak to each other and the stress is now affecting the children." In paragraph 8 she states "I am absolutely convinced that having the respondent's continue to live in the same matrimonial home is not conducive to my own good nor is it in the best interest of the two children". Later in that paragraph she continues "at the said home I find it very emotionally stressful continuing to share the same house with the respondent living in the adjacent bedroom which is now becoming emotionally overwhelming for one as some of my clothes still remain in the master bedroom." Then in paragraph 10 she states "because of the stress in the household my friends and the children's friends no longer visit the former matrimonial home as they feel that they do not want to appear to take sides in the divorce proceedings and they feel uncomfortable. Previously my son's friend was allowed to spend a lot of time in our hose, and when they visited my son they were also allowed to spend nights or weekends with him. This does not happen any more and my son is adversely affected by it." Then in paragraph 10 she states "I have on number of occasions tried to impress the respondent that the marriage is now over and that it is time for us to accept the fact and

move ahead with settling down with routine. The emotional stress is especially hard on Kendra (the daughter) to take as most nights she is given a choice as to which parent she would like to sleep with and appears to be torn between us".

From this evidence I was asked to find that the situation was so intolerable that it was impossible for the parties to continue to share the matrimonial home. In this regard the case of **Phillips v. Phillips** (1973) 2 ALL.E.R. 672 is of particular assistance. In this matter the wife obtained a divorce having satisfied the court that the husband had behaved in such a manner that she could not reasonably be expected to live with him. After the divorce they both continued to live in the house in which they were both joint tenants. Subsequently the wife applied for an injunction requiring the husband to leave the matrimonial home She complained of the husband's hostile attitude to herself and the son. The family doctor deposed in an affidavit that the wife was "hardly able to bear the strain of living under the same roof with her ex-husband" and the son was "disturbed boy who actually ran away from home saying that he could not bear living there with his father". The doctor went on to state "I believe that, unless something is done to enable the wife and the son to live separately from the husband they will both become psychiatric invalids". There was no evidence that since the divorce, the husband had assaulted the wife or son.

In that matter an injunction was granted as there was clear evidence that the continued presence of the husband, and his behaviour, were

endangering the health of the wife and son, it was not necessary for the wife to prove physical assaults or a reasonable apprehension of them. In view of the principle enunciated in **Hall v. Hall** (supra) it could be said that the situation had become so intolerable that it was impossible for the parties to continue living together in the matrimonial home.

The circumstances as provided by the evidence before me are essentially different from those in **Phillips v. Phillips** (ibid). In that case the parties were already divorced and accordingly the provision of section 19 of our law (supra) would not apply. I daresay that in two of the cases into which I have already looked, that of **Hall and Hall** and **Richards and Richards,** had the situation between the parties become so intolerable that it would have been impossible for them to continue to live together in the matrimonial home, the outcome would have been quite different.

In **Phillips v. Phillips,,** there was sufficient proof that both the health of the applicant and that of the child would likely suffer some detriment by the continued presence of the husband in the home. The doctor's affidavit evidence verified this. In the present matter the evidence of the applicant in this regard is purely conjecture. The inconvenience caused by the respondent's presence seems to be overriding theme. She has not proved that the situation is in anyway close to being so intolerable that it is impossible for the parties to continue to share the matrimonial home. Against this we have the undisputed evidence that the respondent not only spends a lot of time

playing with the child of the marriage, but in the applicant's own words the child is "given a choice as to which parent she would like to sleep with and she appears torn between us". I do not in any way consider this to be an intolerable situation.

I find that in all the circumstances of the case there is insufficient evidence to induce me to make so drastic an order as would exclude the respondent from the matrimonial home.

Accordingly I dismissed the application.

Kipling Douglas

Judge

Dated 28th July 1997