

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

*Noted*

CAUSE # D 2 OF 1995  
C.I.C.A. # 3/95

Before:

The Rt. Hon. Mr. Justice Edward Zacca P.C., O.J. President  
The Rt. Hon. Mr. Justice Telford Georges, P.C., J.A.  
The Hon. Mr. Justice Gerald Collett J.A.

BETWEEN DONALD WHEELER PETITIONER/APPELLANT  
AND MYO SOOK WHEELER RESPONDENT/RESPONDENT

9th April, 1996 and 9th August 1996

Mr. Ramon Alberga Q.C. instructed by Mr. S. McCann of  
Bruce Campbell & Co for the Appellant  
Mr. W. J. Helfrecht of Ian Boxall & Co for the Respondent

GEORGES, J.A.

JUDGMENT

Section 5 of the Matrimonial Causes Law 9 of 1976 (the Law) vests in  
the Grand Court the jurisdiction to entertain a suit arising out of  
the Law -

"Where at the time of filing suit or at a  
material time with reference to the suit and  
within one year of the presentation of the  
petition, either of the parties to the suit  
was domiciled in the Islands; or the party  
filing suit, being a female, has been  
ordinarily resident in the Islands for at  
least two years immediately preceding the  
presentation of the petition."

The respondent in this appeal, Myo Sook Wheeler (Mrs. Wheeler) filed a petition for divorce and related ancillary remedies against her husband the appellant, Donald James Wheeler, (Mr. Wheeler) on January 12, 1995. On being served with the petition Mr. Wheeler filed a summons seeking leave to enter conditional appearance and asking that the petition be struck out. The basis of the application was that neither party was domiciled in the Caymans and that Mrs. Wheeler had not been resident in the Caymans for a period of at least two years immediately preceding the presentation of the petition. Smellie J. held that Mrs. Wheeler had met the requirements of being "ordinarily resident" for the period prescribed in the Law and that the Court did have jurisdiction to entertain the petition. From that decision Mr. Wheeler has appealed.

Mr. Wheeler is an American businessman now in semi-retirement. His business commitments required frequent travel. He has, since 1987, to use his own words "enjoyed the privilege of holding permanent residency in the Cayman Islands". A company, the beneficial owners of which are himself and a family member, are the registered proprietors of a house in Grand Cayman, Casa del Mar, which he can use whenever he is here. Photographs indicate that it is a well appointed house, suitable for use as a residence, though also convenient for conducting business.

Mrs. Wheeler is a Korean by birth. She moved to the United States of America when she married an American serviceman and became an American citizen. They divorced in 1980. Mr. Wheeler met her in

1989 while she worked at a Japanese restaurant. They became friends and later lovers. They lived together for a year and got married on September 10, 1990.

Before their marriage they lived at first in a town house - 1715 East las Olas Street in Fort Lauderdale. She moved there with all her belongings. In August 1991 they moved to a bungalow at 1230 Cordova, Fort Lauderdale, which was more convenient for the use of Mr. Wheeler's yacht. Generally Mr. and Mrs. Wheeler divided their time between Casa del Mar and the town house at 1715 East las Olas Street and later the bungalow at 1230 Cordova, Fort Lauderdale. An agreed summary from stamps in Mrs. Wheeler's passport shows that in 1989, starting from September, she spent 59 days in Grand Cayman, in 1990 she spent 193 days, in 1992 151 days and in 1993 139 days.

Her evidence was that she considered the house Casa del Mar as their home. During their absences the house was empty and locked. A housekeeper kept it clean and ready awaiting their return.

In 1992, Mr. Wheeler decided to build a house in North Carolina to be called "The Hideaway". Mrs. Wheeler was involved in selecting the plot and in discussions as to its design and structure. She was actively involved in the interior decorating and the landscaping of the grounds. The property was owned by a Cayman Corporation, the shares of which were beneficially owned by Mr. Wheeler. Mrs. Wheeler describes The Hideaway as a summer get-away which would also be a good investment. Mr. Wheeler describes it as

their home in his semi-retirement with Casa del Mar being merely a business and vacation base in the Caymans.

The judge found that, since November 1993, The Hideaway had been occupied by them "for periods longer than and with greater regularity than they spent at Casa del Mar". He also found, that despite this, the entire circumstances remained consistent with petitioner's evidence which he accepted that Casa del Mar was an established home for the parties in the Cayman Islands from the time of their marriage and before the Hideaway was built, and that it was used by them, though at the convenience of Mr. Wheeler at frequent and regular periods as part of the regular and ordinary pattern of their lives. This pattern continued even after The Hideaway was built. These conclusions are supported by the evidence and there can be no ground for interfering with them.

"Ordinary residence" is defined in section 2 (1) of the Law as having "the meaning ascribed to it from time to time in English law". The definition hardly assists having regard to Lord Scarman's statement in Reg v Barnet London Borough Council ex parte Nilish Shah [1983] 2 A.C. 309 at p. 340 that "ordinary residence is not a term of art in English law".

Lord Scarman, in that case, with whom all the other sitting Lords concurred, adopted the definition formulated by Lord Denning M.R. at the hearing of the matter at the Court of Appeal reported at [1982] Q.B. 688 at p. 720.

"Traditionally we ought simply to apply the natural and ordinary meaning of the two words "ordinary resident" in the context of [The Education Act]. If we were to do that here I feel I would apply the test submitted by Mr. Lester. The words "ordinary resident" mean that the person must be habitually and normally resident here, apart from temporary and occasional absences."

The words "temporary and occasional absences" did not raise problems in the case of Reg v Barnet London Borough Council ex parte Nilish Shah (supra). The persons whose status as being "ordinarily resident" were being discussed were students living in England for the purpose of their studies.

They do cause difficulties in cases where the person involved can be said to live in two places in such circumstances that each of them can be described as his or her ordinary residence. The possibility of being ordinarily resident in two places has been recognized. Thus in Levene v Inland Revenue Commissioners [1928] A.C. 217, Viscount Cave L.C. stated at p 223 -

"But a man may reside in more than one place. Just as a man may have two homes - one in London and the other in the country - so he may have a home abroad and in the United Kingdom, and in that case he is held to reside in both places and to be chargeable with tax in this country. Thus in Cooper v Cadwalader an American resident in New York who had taken a house in Scotland which was at any time available for his occupation, was held to be so resident there, although in fact he had only occupied the house for two months during the year."

The facts under discussion there related to tax legislation but the principles enunciated were not being limited to the use of the

word in a tax context. This was made clear by Lord Scarman in Reg v Barnett London Borough Council ex parte Nilish Shah (supra) at p. 341.

"It was urged upon your Lordships ... that these two decisions of the House were authority only for a special meaning limited to the Income Tax Acts. The converse is the case. The true reading of the speeches delivered is that the House decided to construe the words in their tax context as bearing the natural and ordinary meaning as words of common usage in the English language."

It may also be noted that although in the passage quoted from the judgment of Viscount Cave in Levene v Inland Revenue Commissioners (supra) he discussed the word "reside" rather than the phrase "ordinarily resident" there are dicta supporting the view that ordinary residence means no more than that the person held to reside does so in the ordinary course of his life - see per Lord Buckmaster in Inland Revenue Commissioners v Lysaght [1928] AC 234 at p. 248. Thus it may be possible to find that a person is resident in Miami where that person has settled for 4 months for the purpose of receiving medical treatment though not ordinarily resident there since it was not part of the ordinary course of his life.

In this case the trial judge has found that Mrs. Wheeler was ordinarily resident in Casa del Mar in Grand Cayman and there is evidence that in the ordinary course of their lives Mr. and Mrs. Wheeler, during their marriage, repeatedly spent significant periods at Casa del Mar which<sup>v</sup>as kept at all times ready and available for their use. That finding cannot, therefore, be disturbed.