C90 (3)

ANTIGUA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 1 of 1986

BETWEEN:

CANDIA WILLIAMS - Appellant

and

RODNEY WILLIAMS - Respondent

Before: The Honourable Mr. Justice Robotham - Chief Justice
The Honourable Mr. Justice Bishop
The Honourable Mr. Justice Moe

Appearances: Sydney Christian and Cecile Hill for the Appellant
Bernice Lake, Q.C., and Joyce Kentish for the Respondent

1987: March 23, 24.
June 22.

JUDGMENT

BISHOP, J.A.

Candia Marguerite Williams and Rodney Errey Lawrence Williams, the parties in this appeal, were married in Montserrat on the 17th December, 1977. They lived in Antigua for most of the eight and a half years that their marriage lasted.

On the 19th January, 1980 their son Rodney Marcus Lawrence Emmanuel Williams (generally called Marcus) was born, in Antigua.

At the time of the marriage, the wife, a Montserratian by birth, had not long graduated with the degree of Bachelor of Science. The husband, an Antiguan by birth, had recently qualified in the field of Medicine.

While residing in Antigua, the wife worked for a period estimated by her at four years, as a school teacher. The husband practised his profession privately and in conjunction with his appointment as a district medical officer. In April, 1984 he ceased to work as district medical officer, but in that year he was elected to the House of Representatives.

Tension and unhappiness culminated in Rodney Williams leaving the matrimonial home and taking with him their son Marcus, on the 21st October, 1982. His wife remained in the matrimonial home.

On the 9th November, 1982, Candia Williams applied, by summons, to a Judge in Chambers, for an order for the custody of Marcus. That summons was heard on the 20th April, 1983 and an interim consent order was

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made. It will suffice to say that the issue of custody was adjourned but the parties agreed upon arrangements regarding access to Marcus. The hope was that there would be reconciliation and a return to a married life with no more than the acceptable wear and tear.

The interim order was obeyed until around 8th October, 1984, when, in the words of the mother, set out in an affidavit: "I have recently accepted employment in Montserrat and I am due to start work later this month. The defendant and myself have failed to come to an amicable agreement relative to custody of the said infant at this time, and in the circumstances it has become necessary for the Court to determine the issue of custody of the said infant." That affidavit was filed in support of an application for determination of the issue of custody filed on the same date. It was noted - and indeed Counsel for the mother referred to it in this Court - that the trial Judge commented "One is left to surmise that but for the fact that the plaintiff had to leave for Montserrat the matter would be left as it is presently." However in appreciating that he had to try to decide what was best for Marcus, the learned trial Judge stated: "I could not sanction any practice of sending young Marcus from one country to another every other week-end." With this statement I am in complete agreement and I would expect that the parties would not regard it as desirable.

Before the issue of custody was decided, two petitions for divorce were filed on behalf of Candia Williams. The first, based upon alleged cruelty by Rodney Williams was withdrawn. The second, in which she relied upon the ground of desertion was uncontested. Decree nisi was granted on the 30th September 1985 and decree absolute pronounced in July 1986.

On the 12th, 13th and 20th March, 1986, the application of 8th October, 1984 was heard, and on the 25th April, 1986, Matthew J. made an order:

> "(1) that the custody of the child Marcus be given to the defendant Rodney Lawrence Williams;
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> (2) that the defendant give access to the plaintiff Candia Williams on all school holidays by paying Marcus' passage to Montserrat and by contributing to his maintenance on these occasions the sum of $150.00 a week or any part thereof;
>
> (3) that each party bears his or her own costs."

/Candia.....

Candia Marguerite Williams was dissatisfied with that order, and she filed an appeal on the 27th May, 1986. She asked this Court for an order that custody of Marcus be given to her, that she allow access to the respondent-father on all school holidays except that the said child be permitted to remain with her for one week of the Christmas Season on alternate years. She also asked that the respondent-father be ordered to contribute to the maintenance of the child in the sum of $150.00 per week or part thereof while the child was in her custody, care and control, with liberty to apply for an increase in the quantum. Finally, she asked for an order for costs here and in the Court below.

Two grounds of appeal were argued: The learned Judge was wrong in exercising his discretion in favour of the respondent-father, and the learned Judge's decision was against the weight of the evidence and the facts as found by the Judge himself.

In his speech learned Counsel for the appellant-mother asked us to analyse the evidence and the findings of fact by the learned Judge, in the light of opinions and uncontradicted statements in his Judgment. The first statement was:

> "Let me say straight away that having seen the plaintiff and the way she gave her evidence I completely reject any suggestions to the effect that the plaintiff is of impeachable habits."

Now when the trial Judge so stated, he was dealing with specific allegatioins set out in an affidavit sworn in December, 1982 by the respondent, to the effect that the appellant was a person of slovenly habits and unclean housekeeping methods which would prevent her from being a suitable person to see after the child. The learned Judge also indicated that those particular allegations referred to a state of affairs prior to December, 1982 rather than at the time of the hearing of the application filed in 1984. Additionally and by way of comparison, the learned Judge mentioned the assertion of the respondent, to the effect that he had so organised his hours as "to ensure that he had sufficient parental time with the child"; and while he regarded this assertion as being more relevant to the issue before him than the "habits" attributed to the appellant, he stressed that the assertion was also made in December, 1982.

The second statement to which learned Counsel referred was made after the learned trial Judge had indicated that the case was not a contest between mother and father, but rather, it concerned the best interests and welfare of the child. Matthew J. stated:

/The plaintiff.....

> "The plaintiff has demonstrated she is a candid and truthful witness. The defendant I would not say has been deliberately untruthful but the hesitancy in answering questions does not make his evidence as reliable."

It would seem clear that the Judge was of the view that he ought to balance the quality of the factors, particularly those associated with the future welfare of the child, even if the father's testimony was not as reliable as that of the mother; as only by doing so would he succeed in deciding what was best for the child, as he perceived it. The learned Judge obviously adopted the view of Wooding C.J. in LEONG QUEN v BRAMBLE (1965) 8 W.I.R. 149 that "it is what is best for the child's welfare that matters not what may have been best at any time past", because he went on to state that in the instant case, little weight, if any, ought to be attached to the allegations of events and conduct set out in the affidavits of each parent "almost four years ago".

Mr. Christian also drew our attention to the opinions of the Judge on the evidence of the respondent's witnesses. About the testimony of Valerie Thomas, he said tersely: "I do not believe her evidence"; and as far as the value of the evidence of Tina Woods was concerned, he opined: "Tina Woods has got a trip out of Canada". I think this was a clear reference to the fact that Rodney Williams had provided Tina Woods with a plane ticket to travel from Canada to Antigua to testify on trivial matters related mainly to periods when the witness acted as a baby sitter between December 1981 and July 1982.

When learned Counsel dealt with the findings of fact by the trial Judge he cited the following passage with which he disagreed:

> "It has been established that Marcus has lived practically all his life with his father; he is happy there, he has his friends at school and at the Camp, and his religious education is provided for at school and by attendance at Church with other persons. Difficulties of adjustment would be bound to follow if he were to go to live in Montserrat where he would be living in an immediate area where there are no children."

Counsel submitted that it was inaccurate to find that Marcus had lived practically all his life with his father, and that the proper finding was that he had shared his life almost equally between his parents. Mr. Christian asked this Court to find as a fact that there would be, in all the circumstances, no difficulty of adjustment for Marcus if custody were given to the appellant and he had to live in Montserrat. In Counsel's view any adjustment would take no more than a matter of weeks. As for friends, Counsel submitted that although there

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were no children in the area where Marcus would be taken to live, nevertheless he would make friends at school whose friendship would extend beyond school hours. With respect to his religious education, Counsel pointed out that whereas Marcus, like his mother, was a Roman Catholic, the respondent-father was a Moravian. Consequently he stood to benefit more by being with his mother who could assist in guiding him in such education.

Mr. Christian also attacked the oral evidence of the respondent-father on the existing and future plans and arrangements that were made or would be made for Marcus' development. He submitted that there was an absence of flexibility and an altogether too regimented pattern for a young boy of six or seven years. However, according to Counsel, the appellant's committments showed flexibility which would permit her enough time to be with Marcus and guide his upbringing. Counsel asked the Court to find that the evidence showed beyond doubt that the respondent was extremely busy as a doctor and parliamentarian, with no settled hours for work, whereas the appellant's hours of work coincided closely with Marcus' thereby allowing her adequate time to give love, care and consideration to Marcus.

Learned Counsel for the appellant-mother submitted that (a) the trial Judge had failed to take into account the appellant's plans for the development of Marcus and (b) the trial Judge had placed emphasis on things not deserving of such emphasis while not putting correct emphasis upon what would have concerned and mattered to the child.

The third passage in the Judgment of Matthew J. that met with disagreement or criticism of learned Counsel, read as follows and appeared immediately before the order was set out:

> "Having regard to the arrangements presently made for his overall development by the defendant, the fact that he has been established in Antigua all his life and in a house under the control of one of his parents and the unlikelihood of similar facilities in Montserrat....."

I have already dealt with or referred to the criticisms of Counsel with respect to most of what was there stated. In addition, he submitted (i) that there was no basis in the evidence on which the trial Judge could have said that Montserrat might not have similar facilities to those available in Antigua (ii) that the learned Judge did not give due weight to the fact that he regarded the mother as unimpeachable and that he found that the father could not be expected "to have as much time to spend with the child as his mother could". Consequently this Court could and

/should.....

should hold that the learned Judge had wrongly exercised his judicial discretion.

Finally, learned Counsel for the appellant-mother referred to two cases that the learned trial Judge described as instructive; namely, In Re T (Infants) (1968) 3 All E.R. 411 and BHAROSE v PATRICIA (1978) 25 W.I.R. 260. Counsel submitted that neither case was instructive on the issues being considered and since the trial Judge so regarded them and used them he must have exercised his discretion wrongly.

In support of his submissions and arguments Counsel cited extracts from the Judgments in Re W (J.C.)(An Infant)(1963) 3 All E.R. 459, Re M (Infants) (1967) 3 All E.R. 1071, Re C (A) (An Infant) C.V.C., (1970) 1 All E.R. 309 and Re F (A Minor) (Wardship: appeal) (1976) 1 All E.R. 417.

Learned Counsel for the respondent-father began her speech by recalling and adopting the following words of Stamp L.J. from the case Re F (A Minor) (Wardship: appeal)(1976) 1 All E.R. 417, at page 427 letter b: "A Judge has not the tongue of an angel to convey his impression of the character of a parent or of that parent's suitability to care for and bring up a child, and however carefully his language may be chosen to describe that impression something will be lacking". Miss Lake submitted that this Court must be concerned with the totality of the Judge's findings and with the manner in which he exercised the discretion given by section 3 of the Guardianship of Infants Act Cap. 345; further, that with the above quotation in mind the question which arose for answer, in this appeal, was "whether or not, bearing in mind the Judge's need to balance all the factors relevant to the child's welfare and interest, which are paramount, he did so in any manner in which this Court could say that he was wrong from a judicial standpoint?"

In the course of her speech learned Counsel referred to and analysed the material which the learned Judge had before him. She conceded that the Judge made it clear that he felt that he ought to rely more upon the oral testimony than upon the affidavits sworn to some four years before. Miss Lake pointed out that the appellant-mother had stated on oath, in November 1982, that when she lived in Antigua she chose to teach in order to have more time to spend with the infant, daily and during school holidays; but the trial Judge had pointed out in his Judgment that he had found and taken into account that even when the parties were enjoying better days in Antigua there was a great deal of dependence on maids - a situation that was not shown by the appellant-mother to be likely to be any different if Marcus was taken to live in Montserrat where she was now

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teaching. In addition Counsel drew attention to the admission of the appellant under cross-examination in March 1986 that Marcus' need for a father figure was more in demand now than four or so years ago, and that if Marcus were taken to Montserrat he would have to spend some time settling in there. Counsel contended that there was no cogent evidence of a formulated programme for his settling in or for the overall advancement of his welfare in Montserrat, and so the learned Judge was confined to such evidence as the appellant had given before him on this aspect. Miss Lake asked this Court to conclude that if such a programme had been formulated then undoubtedly it would have been adduced in evidence.

Learned Counsel for the respondent-father submitted that (i) the learned trial Judge found that the overall programme for Marcus' future welfare was made out upon the basis of his residing in Antigua where he was born (2) having seen and heard each of the parents, the trial Judge properly concluded that the programmed which had been put in train in Antigua was to be preferred to that which was postulated by the mother for life in Montserrat, and (3) for the Judge to have decided otherwise would have led to removing Marcus from a settled and projected programme bearing the attributes for good development to an alien environment with no comparable programme set out, and with the undesirable consequences of a break in the continuity of life in his birthplace and the absence of children of his age in the vicinity of his intended home, with his mother and her father.

On the aspect of his religious education learned Counsel for the father submitted that no evidence was led by or on behalf of the mother to show that the practice of their faith ranked high in her plans for Marcus' welfare, and further, that the father had demonstrated by clear evidence that Marcus' religious education as a Roman Catholic would not be interrupted or denied him since he would get instruction at school and by attending a Roman Catholic Church with others of like persuasion.

As for schooling generally, Miss Lake reviewed the evidence of each parent carefully before submitting that whereas in Montserrat there was a Catholic School ranging from kindergarden to sixth grade, and one secondary school, the position in Antigua was, that Marcus was already attending a Roman Catholic school where he would continue his education to fifth form and thereafter he could move to another Roman Catholic school where preference of entry is given to boys of the Roman Catholic faith. Learned Counsel stressed that the appellant stated in evidence that Marcus was happy at the school he was now attending and he was comfortable among his peers; and she urged that the environment described

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by the evidence led on behalf of the father was and must be better than that described by the evidence led on behalf of the mother.

In the view of Counsel, the Judgment of Matthew J. showed that he did the balancing exercise that he was required to do. He weighed the evidence in order to see what he should do in the best interest of the chield. Miss Lake submitted that the change of residence from Antigua to Montserrat had to be weighed, it was weighed but it was not given any undue weight by the trial Judge. Further, according to Counsel's submission, this Court ought not to set aside the Judgment since there was nothing to which it could point and come to a clear conclusion that the trial Judge was plainly wrong.

In support of her submissions and arguments learned Counsel cited passages from judgments in a number of cases including B. v W. and Others (Wardship; appeal) (1979) 3 All E.R. 83, D. v M. (Minor: custody appeal) (1982) 3 All E.R. 897, G. v G. (1985) 2 All E.R. 225 and Appeal 1 of 1986 in the Privy Council Court of Appeal, Tonga dated 21st April, 1986, WOLFGANG MULLER v ESETA MULLER. Counsel also addressed this Court on the way, as she saw it, in which the learned trial Judge was instructed or instructed himself in the cases mentioned as being instructive.

I do not claim to have mentioned all of the evidence to which Counsel for the parties drew our attention. I do however assure all concerned that the Record in this appeal was studied with utmost care and that consideration was given to everything said on behalf of the respective parties in the appeal.

It may also be appropriate to say here that I appreciate greatly the assistance from Counsel for the parties in a matter which, like so many of these matters, offered no clear-cut and perfect solution. This case was perhaps even more difficult for the trial Judge than those relied upon in Counsel's submissions, if only for the reason that he did not have the assistance of a welfare officer or child psychologist or expert but was limited largely to the evidence of the two parents whose love for the child was probably surpassed only by their indifference to each other; and therefore there was really no cogent independent testimony.

Now sections 3 and 11, of the Guardianship of Infants Act, Cap 345, so far as this appeal is concerned, provide as follows:

> "(3) Where in any proceeding before any Court the custody or upbringing of an infant.....is in question, the Court in deciding that question shall regard the welfare of the infant as the first and paramount consideration whether from any other point of view the claim of the father.....

/in respect....

> in respect of such custody, upbringing..... is superior to that of the mother or the claim of the mother is superior to that of the father."
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> (11) The Court may, upon the application of the mother of any infant.....make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant and to the conduct of the parents, and to the wishes as well of the mother as of the father.....and.....may make such order respecting the costs of the mother and the liability of the father for the same or otherwise as to costs as it may think just."

It was clear that, as this appeal was conducted, Counsel for the parties accepted that the trial Judge heeded the above sections and regarded the welfare of Marcus as the first and paramount consideration. The learned Judge in his Judgment reviewed the material before him and expressed views based upon the demeanour of the parties and their witnesses, where relevant. He indicated unequivocally that he appreciated that he had to decide what was best for Marcus' future welfare. He believed that both parents loved and still love Marcus and that whoever was unsuccessful in the respective claims would be deeply disappointed. In my view, based on reading and re-reading the Judgment several times, Matthew J. analysed all the evidence and then he came down in favour of leaving Marcus to continue his life, his religious education, his schooling and overall development here in Antigua where he is settled and disciplined. Or, put another way, his feeling of security at home and at school would be maintained here in a household under his father's control. Matthew J. bore in mind that Marcus was over six years old and not 2½ years old as was the position when the parties first went to Court on the issue, that were the appellant to have custody it would necessitate a change of residence, not within the same Island but in another Island with a significantly smaller population and, in his view, one unlikely to have facilities like those available in Antigua.

In arriving at his decision the learned trial Judge undoubtedly exercised his discretion. The question that arose for answer therefore was: what principles ought to apply to this Court when exercising its jurisdiction to review the exercise of the Judge's discretion in this case, involving as it did the welfare of a child?

In CHARLES OSTENTON & CO. v JOHNSTON (1941) 2 All E.R. 245, Viscount Simon L.C. said:

> "The appellate tribunalis not at liberty merely to substitute its own exercise of discretion already exercised by the Judge. In other words, appellate authorities ought not to

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> reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. If however the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified."

About 24 years later, this case was considered in WARD v JAMES (1965) 1 All E.R. 563. In the Judgment of Lord Denning M.R., he posed the question: "In what circumstances will the Court of Appeal interfere with the discretion of the Judge?" He observed that the true proposition was stated by Lord Wright in Charles Ostenton & Co. v Johnston. Then both Ostenton's case and Ward's case were among a number of cases referred to in the judgments in Re F (A Minor) (Wardship: appeal) (1976) 1 All E.R. 417. By a majority, it was held that "the general principle applicable to appeals was applicable in cases concerning infants; the appellate court was entitled to set aside the decision of a trial Judge if it was satisfied that, although he had taken all relevant factors into consideration, his decision was wrong in that he had given insufficient weight or too much weight to certain of those factors. The appellate court would be reluctant to interfere where the judge had been influenced to a decisive, or even to a substantial, extent by his impressions based on seeing and hearing the witnesses, but it could not be said that in those circumstances it should never do so".

The above-mentioned cases were also among cases referred to in the opinions expressed in the House of Lords in G. v G. (1985) 2 All E.R. 225 a case in which Their Lordships took time for consideration. Lord Fraser of Tullybelton delivered the first opinion to which I shall refer in some detail. The main question was whether the Court of Appeal had stated correctly the principle on which an appellate court ought to act when reviewing the decision of a judge in the exercise of his discretion involving the welfare of children. Sir John Arnold P said in the judgment:

> ".....it is not decisive of an appeal in this court from the decision of the court below exercising the particular discretionary jurisdiction of deciding the custody of children..... that the result of the exercise of discretion would, or might have been different if the members of the Court of Appeal had themselves been exercising the discretion. There has to be more than that before the discretionary decision can be overturned. The question, if there be one, is: How much more?"

According to Lord Fraser, Sir John Arnold P stated this conclusion thus:

/I believe.....

> "I believe that if the court comes to the conclusion when examining the decision at first instance, that there is so blatant an error in the conclusion that it could only have been reached if the judge below had erred in his method of decision - sometimes called the balancing exercise - then the court is at liberty to interfere; but that, if the observation of the appellate court extends no further than that decision in terms of the result of the balancing exercise was one with which they might, or do, disagree as a matter of result, then that by itself is not enough, and that falls short of the conclusion, which is essential, that the judge has erred in his method. I cannot think of any case in which this particular issue has had to be faced in which that method of determination is not intellectually satisfactory, logically supportable or consistent with the result of any of the cases in the appellate courts; and I shall approach this case on the footing that what this court should seek to do is to answer the question whether the court discerns a wrongness in the result of so striking a character as to make it a legitimate conclusion that there must have been an error of method - apart of course, from a disclosed inclusion of irrelevant or exclusion of relevant matters."

Lord Fraser rejected the contention of Counsel who appeared for the mother (both in the Court of Appeal and before Their Lordships) that appeals in custody cases are subject to special rules of their own; and after explaining that the jurisdiction, in custody cases is one of great difficulty because nearly always there is no right answer, he said:

> "All practicable answers are to some extent unsatisfactory and therefore to some extent wrong, and the best that can be done is to find an answer that is reasonably satisfactory. It is comparatively seldom that the Court of Appeal, even if it would itself have preferred a different answer, can say that the judge's decision was wrong, and unless it can say so it will leave his decision undisturbed."

In explaining the limited role of the Court of Appeal in cases such as this now before us, Lord Fraser referred to part of the judgment of Cumming-Bruce L.J. in CLARKE-HUNT v NEWCOMBE (1982) 4 FLR 482. In my view the following words of Cumming-Bruce L.J. are very apt in our case:

> "There was not really a right solution; there were two alternate wrong solutions. The problem of the Judge was to appreciate the factors pointing in each direction and to decide which of the two bad solutions was the least dangerous, having regard to the long-term interests of the children, and so he decided the matter. Whether I would have decided it the same way if I had been in the position of the trial Judge I do not know. I might have taken

/the same.....

> the same course as the judge and I might not, but I was never in that situation. I am sitting in the Court of Appeal deciding a quite different question: has it been shown that the Judge to whom Parliament has confided the exercise of discretion, plainly got the wrong answer. I emphasise the word "plainly". In spite of the efforts of (counsel) the answer to that question clearly must be that the judge has not been shown plainly to have got it wrong."

It was held in G. v G. that "the Court of Appeal should only intervene when it considered that the judge at first instance had excluded the generous ambit within which judicial disagreement was reasonably possible, and was in fact plainly wrong, and not merely because the Court of Appeal preferred a solution which the judge had not chosen" (letter f page 225).

As I uinderstood the conduct of the appeal before us, learned Counsel were in agreement with the principles that ought to govern this Court. It was upon an application of those principles that learned Counsel differed, Mr. Christian contending that the grounds for intervention were revealed by a study of the judgment and the material on which it was based, and Miss Lake contending that there was nothing in the case to which this Court could point and say clearly and confidently that the trial Judge was plainly wrong.

Because of the conclusion at which I have arrived, it is not necessary for me to embark at this stage upon a lengthy and detailed analysis of the material which was before the Judge. Indeed I have referred to much of it when setting out the submissions and arguments advanced in favour of each party. From my analysis of the entire available facts and circumstances and from a careful study of the judgment, I am satisfied that the learned Judge carried out the necessary balancing exercise. Now whether I would have then decided the matter of custody as Matthew J. did - were I in his seat - is of no moment. As Cumming-Bruce L.J. said "I was never in that situation. I am.....deciding a different question". I am also satisfied that I cannot say, with justification, that there was so blatant an error in the conclusion of Matthew J. that it could have been arrived at because of an error in his balancing exercise. In my view the particulars relied upon to support the grounds of appeal that were argued, have not been established so as to lead to the conclusion that what the learned trial Judge decided was not reasonably satisfactory, at least for the time being and within the immediately forseeable future.

I would therefore dismiss this appeal.

On the question of costs I have come to the conclusion that taking all

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the factors into consideration the respondent ought to bear the costs incurred by the appellant both here and in the Court below, and I accordingly so order.

E.H.A. BISHOP
Justice of Appeal

I agree.

L.L. ROBOTHAM,
Chief Justice

I also agree.

G.C.R. MOE
Justice ofAppeal