

Between:

KAREN GRACE KENNEDY

Petitioner

and

ROBERT' ANDERSON KENNEDY

Respondent

Sir John N. Falvey Q.C. with Mr. P. Knight  
for the Petitioner

Mr. B.A. Sweetman for the Respondent

JUDGMENT

The parties were married on 14th January 1967. Both of them are now seeking dissolution of that marriage - the wife, Karen Grace Kennedy, as petitioner for divorce, on the ground of her husband's cruelty and the husband, Robert Anderson Kennedy, as cross-petitioner for divorce, on the ground of his wife's adultery with one Ian John Hoskinson.

The parties are also seeking custody of the children of the marriage, namely, Robert Henry Kennedy who was born on 18th March 1970 and Andrew John Kennedy who was born on 29th November 1971.

The wife also seeks an order of maintenance for the children and an order for settlement of property.

Damages are being claimed by the husband against Ian Hoskinson for his adultery with the petitioner.

The facts so far as these are not disputed can be briefly set out. The parties are domiciled in Fiji. After their marriage in 1967 they lived and cohabited at Carnavon Flats, Carnavon Street in Suva from January 1967 to August 1969 and then

at 109 Princes Road, Tamavua, Suva from August 1969 to December 1976 and then at Sandy Point Beach Cottages, Korotogo from December 1976 to September 1977 when all cohabitation between them ceased. This occurred on 17th September 1977 when the wife left Korotogo with the children to live separately.

There have been no previous proceedings in Court between the parties since their marriage.

The children have been with their mother since they left Korotogo with her. This was at a time when the respondent was away overseas. Ian Hoskinson assisted the family to move out of Korotogo to Suva where a flat was rented for them and before they took up residence with him at Pacific Harbour. The petitioner is living with and is wholly maintained by Ian Hoskinson. The respondent has been providing and still provides \$60 per month in respect of the maintenance of each of the two children of the marriage. In addition he has been paying and still pays towards the children's school fees, clothes and books. The children are attending the International Primary School in Pacific Harbour. It is a good school in which they have settled down well.

In respect of her petition on the ground of her husband's cruelty the petitioner has listed eighteen items upon which she asks the Court to make a finding of cruelty against her husband.

These items are:

- (1) That in or about May 1971 when the petitioner was pregnant with her first child the respondent struck the petitioner whilst she was lying in bed in the matrimonial home at Princes Road, Tamavua.
- (2) In or about August 1974 in Suva the respondent abused the petitioner in public causing her humiliation and distress and afterwards struck the petitioner across the face whilst driving in his car.

- (3) In or about October 1975 the respondent struck the petitioner in the bathroom of the matrimonial home at Princes Road, Tamavua, as a result of which the petitioner left the matrimonial home. The petitioner returned to the matrimonial home the next day, having been begged to do so by the respondent.
- (4) In or about October 1976 at Stirling Place, Lami the respondent used foul and obscene language to the petitioner in front of her friends thereby humiliating and distressing her and afterwards assaulted the petitioner by pulling her hair, ripping her dress and throwing her about causing her injury.
- (5) On or about the 21st day of February 1977 at Sandy Point, Korotogo, the respondent assaulted the petitioner by throwing her to the floor, twisting her arm and ripping her nightdress as a result of which the petitioner left the matrimonial home. The petitioner returned to the matrimonial home after three days having been begged to do so by the respondent.
- (6) On numerous other occasions between 1967 and 1977 the respondent has assaulted the petitioner by striking her.
- (7) That in or about 1967 whilst the petitioner was pregnant the respondent refused to allow the petitioner to leave her employment despite the protestations of the petitioner and her mother thereby causing the petitioner distress. Furthermore the respondent persisted in driving his motor car at a fast speed despite the petitioner's protestations that he drive more slowly and thereby caused the petitioner distress. And in October 1967 the petitioner suffered a miscarriage.

- (8) That throughout the marriage the respondent has been possessive, jealous and stubborn and has thereby caused the petitioner distress and humiliation.
- (9) That despite the travel concessions that the respondent enjoyed as an employee of Air Pacific he would very rarely allow the petitioner to take advantage of those concessions on her own. In particular, on or about October 1969 the respondent refused to assist in the petitioner travelling to New Zealand to attend her brother's wedding, in or about November 1973 the respondent refused to assist the petitioner travelling to New Zealand to visit her mother who was seriously ill, and in or about April 1977 the respondent refused to assist in the petitioner travelling to Sydney, Australia to seek medical attention for a skin complaint from which she was suffering. On all these occasions the attitude and conduct of the respondent caused the petitioner considerable distress.
- (10) That from 1971 the respondent, despite the request of the petitioner refused to try to lose weight, he then being approximately sixteen stones in weight, although he was aware that his weight distressed and was physically repulsive to the petitioner.
- (11) That the respondent, aware of the distress and revulsion referred to in clause (10) above, continued to demand his matrimonial rights thereby aggravating the petitioner's distress.
- (12) That in or about July 1975 and on a number of occasions thereafter the respondent suggested to the petitioner that she have a lesbian relationship with a family friend thereby causing the petitioner great distress.

- (13) That during the course of the marriage the respondent insisted on the petitioner engaging in sexual practices which he knew the petitioner regarded as being perverted and which repulsed her and caused her great distress.
- (14) That during the course of the marriage the respondent did commit sodomy upon the person of the petitioner and suggested sodomy on other occasions causing the petitioner distress.
- (15) That from February 1977 until the petitioner's date of departure from the matrimonial home the respondent has continually verbally harassed the petitioner concerning their matrimonial relationship, causing her distress.
- (16) That in or about August 1977 the respondent demanded that the petitioner depart the matrimonial home within twenty four hours and without support or her children, thereby causing her distress.
- (17) That during the course of the marriage the respondent has treated the children in a vindictive and unduly severe manner and as regards the child, Robert Henry, has on many occasions belittled the child thereby causing the petitioner distress and humiliation.
- (18) That by reason of the respondent's said cruelty the petitioner has suffered in health in that she has suffered from nervous stress that has caused and/or aggravated a skin rash.

Item (1) relates to a bedroom argument between the couple at Princes Road Tamavua. It is not clear at this point in time what the argument was about but it is not disputed that

the petitioner was struck by the respondent, either across the back or on the buttock. It does not seem to matter very much as to which part of her body she was struck and the reason for it. What matters however is that the incident may have signalled the beginning of the rot in the personal relationship of the couple. In any event the petitioner was very much affected by it. This was no doubt due largely to her delicate temperament.

Item (2) relates to an incident in August 1974 when the couple dined and wined with other friends at New Peking Restaurant. During the dinner it was suggested that the party should go on to the Golden Dragon to cap off the night with some dancing. The petitioner was all for it being then in a convivial mood but the respondent was in no such mood and felt that they should go straight home after dinner. The respondent felt very embarrassed and humiliated when after bringing the car round from where it was parked he saw his wife walking with the others towards the nightclub. After some argument he managed to persuade her to get into the car. It was inside the car that he slapped her in the face for causing him so much embarrassment in public. This incident is a further symptom of the growing difficulties the couple had been experiencing in their marital relationship. These difficulties were caused and aggravated on the one hand by the respondent's suspicions concerning his wife's marital integrity and on the other by the wife's protracted liaison with a Nek Mohammed whom the couple had befriended. When a marriage is shrouded in secrecy on one side as this one was there was bound to be friction between the parties. Items (3), (4) and (5) can also be seen as further symptoms of the forces of distrust at work in their marital relationship. It is not disputed and I accept that the broad incidents recited in these three items did occur although the details vary a great deal in the evidence adduced. However, this is of little consequence because of the view I have formed on these and other similar incidents complained of. In my view they were essentially incidents which one would expect in a marriage which has become increasingly unstable and unhappy for the reasons I have indicated.

Item (6) is too vague and general to be of any assistance to this Court and in any event the evidence before me has not borne out this allegation.

The evidence on Item (7) is also such that it is not possible to make any useful finding of fact thereon. It is such an old incident in this marriage that it necessarily puts an unreasonable strain on the power of recollection particularly in regard to the sequence of events and the accompanying details.

As regards Item (8) I would on the evidence before me accept that the respondent had been possessive and jealous of his wife. These are not legally though they may be morally discreditable qualities in a man and it is a little hard to understand why their display should be a source of so much distress and humiliation to the petitioner. If anything they stand as proof of her husband's concern and affection for her. Respondent has also been described to be a stubborn man. I would prefer respondent's own description of himself on this namely, that he was a firm man, firm in his attitude to life and people with whom he comes in contact. In any case that is my impression of him so far as one is able to gather from his evidence and demeanour in the witness box.

Item (9) complains of respondent's unreasonableness and meanness in regard to overseas travel expenses and arrangements. This is a question of degree and on the evidence before me it is difficult to know one way or another whether or not the respondent was not merely motivated in his decisions by a desire for expediency and economy in the matrimonial home.

As regards Item (10) I do not accept that on the evidence the respondent had purposely allowed himself to become overweight because he wanted to cause distress to his wife. It was unfortunate that because of his additional weight he had appeared repulsive to his wife. However, the evidence does not show that as a consequence of it his wife had suffered ill-health.

As regards Item (11) I accept respondent's evidence that their sexual relationship was a reasonable one. His wife was never asked to do anything more than was normal in a sexual relationship. It is difficult to reconcile this allegation of repulsiveness against respondent which is said to date back to 1971 with the fact that the couple continued their sexual relationship until she left the home though admittedly this was, towards the end, becoming somewhat strained for reasons for which certainly the respondent could not be blamed.

As regards Item (12) I accept the respondent's evidence on this that he did say to his wife that if circumstances dictate he would rather see her in a lesbian arrangement than for her to enter into relationship with other men. The context in which the matter was raised is quite understandable if I may say so. In the year 1975 the respondent's suspicions against his wife and Nek Mohammed had become rather strong that he was prepared to opt for an arrangement which would not undermine his marriage.

As regards Items (13) and (14) this has been vehemently denied by the respondent. The evidence on this is too vague to be of any assistance. Charges of sexual perversions are by their nature extremely grave and serious and a Court would therefore require strong proof before it could accept and act on them.

As regards Items (15) and (16) the incidents recited and tending to demean the conduct of the respondent as a married partner were in my view nothing more than the conduct of a man who saw his marriage seriously threatened by the new liaison that petitioner had formed about that time with Ian Hoskinson and the existence of which was not lost to the respondent. In the light of all this respondent's conduct was quite understandable and indeed it spoke a lot for his forbearance and good sense that he did not in the circumstances resort to sterner measures against her.



As regards Item (17) there is evidence that there was an incident in Korotogo where the respondent had admonished his elder son Robert, a sensitive and quiet boy, with more harshness than he perhaps should have in the circumstances. This was an isolated incident. Apart from this we have a rather vague and general evidence of respondent's alleged tendency to belittle this particular child at every opportunity. I cannot therefore give much credence to such evidence not only because of its general nature but because I accept on the evidence before me that the relationship between respondent and his children has been and still is a good one. Both boys respect and admire their father and he in turn has always shown a great sense of responsibility for them and for their welfare.

As regards Item (18) all I can say on this is that on the totality of evidence before me I find it hard to subscribe to the general conclusion set out therein in relation to respondent's conduct towards his wife throughout their marriage.

To amount to cruelty in the legal sense the conduct of the marriage partner whose conduct is being impugned must be "conduct of such a character as to have caused danger to life, limb or health (bodily or mental) or to give rise to a reasonable apprehension of such danger" (see Rayden on Divorce (7th Edition) page 111). In Gollins v. Gollins (1962) 3 W.L.R. 180 at p.191 Sir Simon P. illustrated some of the tests which the Courts had accepted in determining what conduct may be regarded as constituting cruelty. He illustrated them as follows:

"Many tests are useful in coming to this conclusion: whether the conduct complained of amounts to more than a manifestation of defect of character which has been bargained for in the promise to take for better, for worse; whether it is displayed not primarily within the respondent's own sphere of living, but involves a substantial invasion of the complainant's; whether it consists of wilful and unjustifiable acts against the other spouse which inflict pain and misery; whether it is aimed at the other spouse; whether it is directly relevant to the conjugal obligations; whether it is persisted in in the knowledge that it is causing injury; whether it is prompted by more than mere self-indulgence and is at least in part motivated by a

"desire to cause hurt to the other spouse; whether it amounts to a grave and weighty cause making it virtually impossible for the duties of married life to be discharged. But such tests are not to be regarded as expressing doctrines of universal application: Simpson v. Simpson per Lord Merriman P.; King v. King. They are valuable because conduct which does not satisfy those of them which are relevant can seldom be properly described as matrimonial cruelty."

In the present case I am not satisfied that the respondent's conduct, reprehensible though it may have been on some occasions, was aimed at causing injury, bodily or mental, to his wife nor were they so grave in character as to cause serious concern about his wife's health. Indeed the evidence does not show that the petitioner had suffered serious risk to her health by the conduct of her husband. It seems to me that his conduct during the crucial part of the marriage which I take to be the years 1973 to 1976 was to a large extent attributed to the petitioner herself in not choosing to be honest with herself or with her husband. The conduct of the husband towards his wife must be seen in this light. The parties are obviously incompatible in temperament and outlook and this is undoubtedly one of the main causes for the difficulties in their marriage. I am satisfied that the conduct of the respondent towards the petitioner, taking a broad and reasonable view of the matter over the past ten years during which the marriage has subsisted, could not be regarded as constituting cruelty.

I find that the charge of cruelty brought against the respondent has not been made out and accordingly I would dismiss the wife's petition for divorce.

As regards the respondent's cross-petition I find abundant evidence before me establishing the adultery of the petitioner with Ian Hoskinson with whom she has been living since September 1977. The allegation of adultery has not been refuted in any way. Accordingly I grant the respondent's petition for divorce on the ground of his wife's adultery with Ian Hoskinson.

There will therefore be an order that the marriage between the parties be dissolved from this day and a decree nisi to issue in respect of the said marriage.

As regards the claim for damages filed by the respondent against Ian Hoskinson, I can find no proper ground for allowing it. So far as the petitioner was concerned I find her marriage to respondent was as good as over when Ian Hoskinson came on the scene and provided the prop she needed to break out from what she no doubt imagined was a hopeless marriage. As I see it, it was not as though Hoskinson had descended upon a marriage which was at the time stable and happy and which he deliberately set out to wreck. It was only when he saw the marriage was not working out that he moved in, so to speak, because by then he had taken a strong liking for the petitioner. In these circumstances I cannot find that it was Hoskinson who caused the break up of this marriage. It is significant to note that Hoskinson was not the first man with whom the petitioner had formed a liaison. The petitioner's wayward conduct during the subsistence of the marriage was clearly of her choosing. I cannot accept, as has been alleged, that she took up with other men because of circumstances created in the home by her husband. There were other courses of action of a blameless nature open to her which if she were minded to she could have followed. Given this background of this marriage I cannot see any justification in this claim for damages against Hoskinson. The claim is therefore dismissed.

With regard to the question of custody and maintenance of the children of the marriage, I must say at once that I have been very impressed by the genuine concern of either parent to give the children the best upbringing possible in the circumstances that have arisen. Indeed, from the children's point of view there is very little to choose between the two available and competing home environments i.e. between the Pacific Harbour home and the Nadi Airport home. I am satisfied that the children would feel equally at home in either. I am also satisfied that

educational arrangements that could be made for them as between the two places are comparable and either would serve the purpose in hand admirably. However, on balance I think it would be best for the children to remain with their mother and in the present environment. The reason is that they have become used to it and any change now in the status quo so far as their living conditions are concerned may be too disruptive and unsettling and there is the added risk that their schooling may suffer in the process. When things appear to be going well for them it would not seem right, so far as this Court is concerned, to do anything that might give rise to unforeseen difficulties. Therefore I will order that custody of the children be given to the petitioner with reasonable access to their father. I also order that the children may not be taken out of jurisdiction without the leave of this Court.

I now turn to the question of maintenance of the children. In this case this responsibility falls on the respondent who unlike the petitioner has always been gainfully employed. The existing arrangements have been that he would pay \$60 per month per child of the marriage and also pays for their school fees, books and clothes. The petitioner now seeks an order that the amount payable per month for the maintenance of the children be increased because of the rise in the cost of living. This involves an inquiry into the means of the respondent. For this I can do no better than use the findings of the Chief Registrar dated 26th November 1979 with respect to the financial earnings and liabilities of the respondent. His findings were summarised as follows:

- "(a) An annual salary of \$13,022 as Manager of the Flight Kitchen for Qantas Airways at Nadi Airport.
- (b) Annual rental of \$4,200 (net \$3,300) in respect of the letting of 109 Princes Road, Tamavua, Suva.
- (c) A total net income of \$F10,959 being \$16,322 (\$13,022 + \$3,300) less tax of \$5,363. This is \$913 per month net but could be subject to slight variation dependent on the respondent's tax allowances.

- "(d) Ownership of 109 Princes Road, Tamavua the value of which is uncertain since no formal valuation has been carried out. The petitioner and respondent did agree three years ago to a value of \$45,000 but this will now have increased.
- (e) A Ford motor-car which if sold at present would realise approximately \$8,000.
- (f) Sundry personal effects of no exceptional value.
- (g) 3,000 shares in the Fiji Property Centre Ltd. which at present due to lack of buyers have only a nominal value.
- (h) \$50 in his bank account in Suva as at the 15th November 1979.
- (i) \$260 overdraft in bank account in Sigatoka as at 15th November 1979.
- (j) \$4,000 per annum payable by his mother by way of gift in two instalments of \$2,000 in January and July of each year. This appears to have been paid throughout most of the marriage and therefore it is assumed will continue even though the respondent has now moved to work in Nadi."

I appreciate that there may have been changes in the figures shown but I am satisfied that overall the picture would be more or less the same then as now. From all this I am satisfied that the respondent is in a position to stand a variation in the amount of maintenance payable and justified by the great increase in the cost of items required for the maintenance of the children. I would therefore order that the respondent pay from the date hereof \$80 per month for each child. In addition respondent will continue as before to meet his children's school fees and costs of books and clothes.

Finally I turn to the claim by the petitioner against her husband for settlement of property. The property in issue here is that property at 109 Princes Road, Tamavua which for several

years had served as the matrimonial home for the parties. It is a freehold residential property of which it is agreed the value must now be well in excess of \$45,000. The land on which the house was built was given by the respondent's mother as a wedding gift to the couple. This was just before the couple had married in January 1967. In 1969 a house was built on the land from a bank loan obtained by the respondent who met all expenses thereon. The petitioner did not contribute financially towards the cost of construction of this house. The property is registered in the name of the respondent who strongly resists any claim therein by or on behalf of the petitioner because of her part in breaking up the marriage.

I have given the most anxious attention to the petitioner's claim to a share in this property. However, I feel there is no ground on which I can properly do this as the law stands in Fiji. As I see it the land which was a wedding gift from the respondent's mother was given on the basis that this marriage would subsist to the end and it was never credited that the marriage would do other than that. Unfortunately such has not proved to be the case as is now very apparent. What is more, and this is a conclusion this Court has reluctantly come to on the evidence before it, the main cause for the breakup of this marriage was the petitioner herself. However strongly she may have felt about her husband's conduct and attitude during their marriage, it was not in my judgment a sufficient reason for her to indulge in extra-marital affairs which were in the end to prove fatal to this marriage. The respondent was prepared to forgive and forget the Nek Mohammed affair in order to save the marriage and he did so and apparently accepted in good faith by the petitioner. However, the reconciliation did not endure. It only lasted until the Hoskinson affair started and took hold which was barely twelve months after the other affair had ended. Bearing all this in mind and bearing in mind the history behind the acquisition of the land and construction of the house thereon I can find no legitimate basis on which this Court can sustain petitioner's claim to a share in the property in question. I must therefore though with some reluctance dismiss this claim.

That brings me to the end so far as all matters in dispute in these proceedings are concerned.

As regards costs I think having regard to all the circumstances in this case each side should bear its own.



(T.U. Tuivaga)  
Chief Justice

Suva,  
27th June 1980.