The Court of Appeal for Bermuda

CIVIL APPEAL No 17 of 2016

IN THE MATTER OF SECTIONS 12 & 22 OF THE MINORS ACT 1950

AND IN THE MATTER OF A & B (Minors)

BETWEEN:

C

Intended Appellant

-and-

D

Intended Respondent

Before: **Baker, President**
Bell, JA
Bernard, JA

Appearances: Mr. David Kessaram, Cox Hallett Wilkinson Limited for the Intended Appellant
Mr. Adam Richards, Marshall Diel & Myers Limited, for the Intended Respondent

Date of Hearing and Decision: **10 November 2016**

Date of Reasons: **22 November 2016**

REASONS FOR DECISIONS

Ex parte applications, interim care and control orders, removal of children from the jurisdiction

Bell, JA

Introduction

1. This matter comes before the Court on an application for leave to appeal made by the Intended Appellant ("the Mother") against certain decisions made by Stoneham J. The first of these was an order made on 7 June 2016 in which the learned judge made orders granting interim care and control of the children of the family, A and B, to the Intended Respondent ("the Father"). The order also prohibited the Mother from taking or sending the two children of the family out of Bermuda. The order next made provision for the preparation of reports to assist the court in dealing with the substantive issue of the children's care and control. Finally, the order provided that the Mother should have liberty to apply, in the event that she wished to be heard in relation to the application and orders made, an application which one might have thought would be inevitable. However, although the formal order provided that such an application should be made on short notice, the ability to make an application was circumscribed by the following words: -

    .... "following the production of the expedited Social Inquiry Report".

It is notorious that such reports frequently take a considerable time to be produced, and in fact the length of time that it might take for such a report to be available was something which was canvassed between counsel for the Father, Mrs. Georgia Marshall, and the judge. Mrs. Marshall indicated that she was content that the Mother should have liberty to apply to the court on short notice "but only following the production of the expedited Social Inquiry Report". The judge indicated that she knew that generally such reports took six weeks to be produced, but asked Mrs. Marshall if she thought that the report might be made available more quickly if it was designated an expedited report. Mrs. Marshall then suggested that the report should be available within twenty-one days, a time frame which was accepted by the judge, and a date was then fixed for the parties to come back before the judge seven days thereafter, that is to say on 5 July 2016. Assuming the transfer of the children

to the Father to be effective as anticipated, that would be four weeks after the children had been removed from the matrimonial home, and the care and control of the Mother. The next order appealed against was the judge's refusal to admit a letter from Dr. Amanda Marshall at the time of the *inter partes* application to set aside the judge's *ex parte* order, and finally there was the judge's refusal to set aside her original *ex parte* order, which did not occur until 25 August.

2. There had been conflicts between the parties for some time before the original application was made, and particularly there had been incidents in January 2016 which had led to involvement on the part of the Department of Child and Family Services ("the DCFS"). The DCFS had prepared a plan designated "Safety Assessment", which both parties had subscribed to on 19 January 2016. The plan provided that in the event of any further parental conflict, the children would be taken to the home of their aunt, the Father's sister, as a place of "respite". In the event, there was further conflict, in May, in consequence of which the children went to the aunt's home on 21 May 2016, approximately seventeen days before the judge made her *ex parte* order. The children continued to reside with their aunt until the court order of 7 June was made.

The 7 June 2016 Order

3. As indicated above, this order covered both interim care and control and a prohibition on the removal of the children from the jurisdiction. Whilst there is no appeal in relation to this second matter, that application is relevant, and indeed Mr. Richards for the Father urged in his submissions to the Court that the two matters needed to be dealt with together.

4. We next turn to the *ex parte* nature of the 7 June 2016 order. We should start by commenting that it is not unusual for the court to make *ex parte* orders where there is a real fear that children are to be removed from the jurisdiction at short notice. Compelling evidence is required to justify the making of such an order on an *ex parte* basis, and invariably there should be an early return date at which the party against whom the order is made has an opportunity to put before the court his or her side of the story, and to argue that such an order's continued existence cannot be justified.

5. The position is entirely different in relation to orders for interim care and control, where it is hard to see any basis for an order being made *ex parte* unless the subject children are in fact at risk. In this case, there were no incidents which had taken place between 21 May 2016 and 7 June 2016, the date when the application was heard by the judge. Even then, the children could only be said to have been at risk by reason of their being exposed to conflicts between their parents; there was no suggestion of direct harm to the children.

6. On 7 June 2016, Mrs. Marshall for the Father appeared before the judge at 2:30 pm. Helpfully, there is a transcript available detailing how matters were put to the judge and dealt with by her. Mrs. Marshall began her submissions with reference to the provisions of the Minors Act, and moved quickly to the Father's apprehension that the children would be taken or sent out of the jurisdiction. Mrs. Marshall did not address the *ex parte* nature of her application, either at the outset, as one might have expected, or indeed at any other time during the proceedings. She made submissions as to the matters which had been set out in the Father's supporting affidavit. Towards the close of her submissions, Mrs. Marshall put matters as being that the Mother was "suffering through some mental incapacities, clearly not in a stable state of mind, she has got tickets already purchased, she has now got the passports. There is no doubt in my client's mind that this all makes the recipe for at least

prime facie evidence that these children but for an order will be taken off the Island"

7. In fact, while the Father's affidavit had referred to the fact that the Mother was a French national, he did not refer to the fact that the children had frequently visited France, both with and without him, to see their French grandparents and extended family. Significantly, attorneys for the Mother had sent a letter to the Father's attorney on 26 May 2016, which dealt with the proposed travel by indicating:-

> "Further my client will travel with the children to France this summer to visit extended family and undertakes to return them to Bermuda at the conclusion of the trip".

That letter was not included in the Father's extensive affidavit, and so was not something of which the first instance judge was aware.

8. In the event, the judge indicted her willingness to make the orders sought, without addressing the *ex parte* nature of the application. In fact, more than two months later, when the judge gave her judgment on the application to set aside the *ex parte* order, on 25 August 2016, she referred to the provisions of the Practice Direction which provided that such applications should ordinarily be on notice, unless the giving of notice was itself likely to defeat the application, and indicating that where prior notice of an *ex parte* application was not given, the supporting affidavit should ordinarily explain why. The judge did not indicate how she had felt able to make her order without there being any such explanation in the case before her, beyond saying that the facts "disclose a proper case of urgency and one in which a lack of notice is justifiable". Given the conflation of the two separate issues of removal of the children from the jurisdiction and their care and control, one would have expected some detail to have been provided.

9. The court file shows extensive further orders relating to case management, and transcripts of various proceedings where counsel for the Mother was seeking to persuade the judge to set aside her original *ex parte* order. For the most part, consideration of these matters falls away if this Court is satisfied that the original *ex parte* order itself should be set aside, and provides for the arrangements which should then pertain pending determination of the substantive application. However, there are two aspects of the continuing proceedings which do call for comment. The first is in relation to the judge's refusal to admit into evidence the letter from Dr. Marshall, a clinical psychologist who had been seeing the Mother since the start of the year, and who had assessed her; this letter was a comprehensive one, which confirmed that the Mother did not suffer from the mental health difficulties identified by the Father. The letter was particularly significant since it was the Father's primary case (as Mrs. Marshall urged) that the Mother was unfit to care for the children because of her mental condition. The second matter is that despite the fact that there were serious conflicts in the respective parties' versions of events, the judge did not hear oral evidence from either party, or indeed any other witness, and did not make any findings of fact which might explain the basis upon which the original order had been made, or her refusal to set that original order aside.

The Admission of Dr. Marshall's letter

10. Although the Mother's attorneys had sought to set aside the *ex parte* order by means of an *ex parte* summons on notice dated 22 June 2016, it appears that the matter was not argued until 5 July 2016, and that hearing itself was the first of five, which might be regarded as a large number when the judge was dealing only with counsel's submissions. At the outset of that hearing, Mrs. Marshall for the Father sought to have Dr. Marshall's letter excluded. Put shortly, the basis for this application was that the matter as a whole was governed by the Supreme Court Rules, and pursuant to Order 38 rule 36 of

those rules, expert evidence (which Mrs. Marshall maintained this was) could not be adduced at the trial or hearing of any matter unless the court had given directions in that regard. After argument, the judge held that the letter (which had been exhibited to the Mother's affidavit) had not complied with the Supreme Court Rules and consequently could not be adduced.

11. That finding was regrettable. Whilst it is the case that the Supreme Court Rules apply, the provision in question is not generally relied upon in an interlocutory matter such as was then before the judge. And as Mr. Kessaram pointed out in his submissions, one would have expected the judge to have had regard to the Overriding Objective provisions contained in Order 1A of the Rules of the Supreme Court, which provides that the rules should have the overriding objective of enabling the court to deal with cases justly. Given that the judge's primary consideration was the welfare of the children, that the Father had made serious complaints about the Mother's mental health, and that Dr. Marshall's letter addressed that aspect of matters, it is more than a little difficult to see the justification for taking a technical, legalistic approach to the admission of Dr. Marshall's letter on an interlocutory application. It is also to be noted that the letter had been disclosed to the Father's representatives on 22 June 2016, yet objection was taken by his counsel for the first time on 5 July 2016, when the matter came on for hearing before the judge. And as Mr. Kessaram pointed out, the exclusion of Dr Marshall's letter meant that the judge only had before her the Father's evidence as to the Mother's mental conditions, which the judge should have appreciated was likely to be subjective. While Dr. Marshall's letter may not have been in the appropriate form, that could have been rectified, and it should not have been rejected on the basis of a technicality.

12. As indicated, there were some five hearings on the set aside application, starting on 23 June 2016 and finishing on 19 July 2016. There were then further hearings in August, when the Mother changed attorneys. The judge referred in

her judgment to the competing positon of the parties, and referred to the four affidavits which had by then been filed. It was obvious from these affidavits that there were material conflicts between the two sides, yet the judge came to a conclusion on this serious matter without having taken steps to resolve the conflicts in the evidence and come to a view as to which side she preferred. One would have expected the parties to be sworn and cross-examined on their affidavits, but this did not happen. Indeed, the judge did not make findings of fact, or explain how it was that she had reached her conclusion that the *ex parte* order should not be aside. Somewhat bizarrely, in her judgment on the issues of leave to appeal the earlier decision and the grant of a stay, which the judge gave on 8 November 2016, the judge referred to the fact that over the five days of the *inter partes* application, she had considered comprehensive legal submissions and affidavit evidence of the parties. She then added.... "I also had the advantage of observing the demeanour of the Wife and Husband throughout the proceedings". The demeanour of the parties when they were present in the role of spectators is no substitute for hearing oral evidence.

The Ex Parte Nature of the Original Order

13. But what is most troubling about the *inter partes* hearing is that the judge completely failed to address why the application had been made without giving notice to the Mother in the first place. In this regard, the judge failed to distinguish between any urgency which there might have been in regard to the removal of the children from the jurisdiction (which in any event there does not seem to have been), and the position in regard to interim care and control. In her judgment of 25 August 2016, the judge referred to the need for any *ex parte* application to explain why notice had not been given to the other party, yet did not address why this was not done in the case before her, at least in relation to the issue of care and control of the children. The judge does not seem to have addressed her mind to it, or to appreciate the different criteria which might

have applied to the two entirely different applications. She did note that the involvement of the DCFS was on the basis that the children had been exposed to domestic violence between the parents, and not on the basis that the children were themselves at risk in consequence of the parents' behaviour. In paragraph 13 of her judgment she set out various facts which she described as relevant. Three of these related to the children's proposed travel to France, and when the judge moved on to say, as she did in paragraph 15 of her judgment, that "these relevant facts disclose a proper case of urgency and one in which a lack of notice is justifiable", she made no attempt to distinguish between the removal of the children from the jurisdiction aspect of matters, and the transfer of interim care and control. And the failure to give the Mother proper notice of the application was exacerbated by the restriction (sought by counsel for the Father, and acquiesced in by the judge) that the Mother should not have been permitted to make application for the order to be set aside until after the Social Inquiry Report was available.

14. As Mr. Kessaram pointed out, with reference of the case of *L –v- K [2014] 2 WLR 914*, citing the judgment of Mostyn J:- " it is worth remembering not only that the ex parte procedure is intrinsically unfair but also, and very importantly, that a case which begins with an *ex parte* order is usually poisoned from that point onwards.... every single subsequent step is covered by that fateful first step". That reflects what Saville J, as he then was, said in the case of *Commercial Bank of the Near East –v- A,B,C and D* [1989] 2 Lloyd's Law Reports, 319, namely that "It must always be remembered that the granting of *ex parte* relief provides (albeit so that justice can be done) an exception to the most basic rule of natural justice – that both parties should be heard."

15. Mostyn J's comment that following the grant of *ex parte* relief, the case is usually poisoned from that point onwards seems to represent what has happened in this case. As we indicated during the course of submissions, we

would not have expected an experienced family law practitioner to make an *ex parte* application, seventeen days after a domestic incident between the parents, without any evidence being given that the children were at risk if the order sought were not made. What should have happened is that the judge should have indicated straight away that she was not prepared to deal with issues of interim care and control without the proceedings being served on the Mother, and the initial hearing should have been limited to the question of the removal of the children from the jurisdiction, on which the evidence was in any event sketchy. We have referred to the Father's failure to refer to the terms of the 26 May letter in his application. The judge took the view in her 25 August decision that the Father had made full and fair disclosure of all relevant facts. The point is now academic, but for our part we would not agree. It was highly material that the Mother's attorneys had written to the Father's on the subject of removing the children from the jurisdiction, and confirming her intention to return them to the jurisdiction. The threshold on disclosure of all material matters is a high one which was not met in this case. And in case there be any doubt in the matter, we would wish to record our strongly held view that this was an application which should never have been made on an *ex parte* basis, and even then should have been set aside at the *inter partes* stage on the grounds of material non-disclosure.

Conclusion

16. In the event, we indicated throughout the course of submissions that the judge should never have made the 7 June 2016 order on an *ex parte* basis, and we concluded the hearing by indicating that leave to appeal was granted, that we had heard the substantive appeal on a *de bene esse* basis, that we allowed the appeal, and that we ordered the costs of the appeal to the Mother, as well as the costs of the *inter partes* application in the court below. At that point we gave an indication of the likely course that the Court would follow, namely that

so far as was possible at that stage of the proceedings, the position should revert to the status quo at the time that the judge's order was made on 7 June 2016, bearing in mind that the parents had separated then, so that time with the children needed in broad terms to be equally divided between the two parents. Counsel endeavoured to agree the details of interim care and control and access, pending the substantive decision, and in the event the Court was able to express a view, on 17 November, which assisted counsel in reaching agreement, and the terms of this agreement were annexed as a schedule to the order referred to above. We are grateful to counsel for their efforts in this regard.

17. We also ordered that the outstanding substantive issue of care and control of the children should be determined by a Justice of the Supreme Court other than Stoneham J. This had been Mr. Kessaram's application, and Mr. Richards indicated that he had no objection to the matter going before a different judge. In our view this is necessary, because the unhappy history of the matter which has been set out in this judgment would necessary mean that the Mother could have no confidence that she had been dealt with fairly were the matter to remain before Stoneham J.

Delay

18. Finally, we cannot record these reasons without also commenting that it was highly regrettable that in a matter concerning the welfare of children, the wheels of justice should have moved so slowly. The Mother's applications for leave to appeal and for a stay of the 7 June order were made to the judge on 8 September, and were not ruled on by the judge until 8 November 2016, very shortly before the appeal came on for hearing. That application should have been dealt with immediately, or certainly within days rather than weeks. Priority must always be given to cases concerning the wellbeing of children, and that is particularly the case in a matter such as this, where the

proceedings were initiated on an *ex parte* basis, and despite the best efforts of those advising the Mother, it took weeks before the matter came back before the judge, and many more weeks before the efforts to set aside the *ex parte* order were rejected by the judge, a total of more than 11 weeks in all. These children's best interest have not been served by the delay and events that have occurred thus far. This Court expresses the hope that the preparation of reports and the allocation of Court time will be undertaken with the early resolution of their future firmly in mind.

Bell, JA

Baker, P

Bernard, JA