IN THE SUPREME COURT OF BERMUDA
APPELLATE JURISDICTION (CIVIL)

2006 No. 6

BETWEEN:

S

Appellant

-v-

M

Respondent

(RE K-ACCESS)

REASONS FOR DECISION

Date of Judgment: April 5, 2007
Date of Reasons: April 20, 2007

Mr. Ian Connell, Marshall Diel & Myers, for the Appellant
Mr. Edward King, Peniston & Associates, for the Respondent

Background

1. On April 5 2007, I indicated that I would give brief reasons for allowing the Appellant's appeal, a decision which was made against the following background.

2. The unmarried parties are the mother of the child, K, a boy born on May 16, 2001 and the father, who has been seeking to exercise his access rights through proceedings commenced in the Magistrates Court (Family Court). On November 21, 2001 the father was ordered to pay child maintenance and permitted to have access. On or about April 18, 2002 the parties were ordered to attend the Family Resources Network to resolve communications difficulties. It appears that only sporadic access was exercised by the father over the next few years.

3. Before the orders which form the subject of the present appeal the Worshipful Arlene Brock (Acting) discharged a May 22, 2003 access Order (made by a differently constituted panel chaired by the Worshipful Tyrone Chin) on the grounds that the father "*is unwilling to consider a gradual program for getting to know his 2 year old son.*" The parties and the grandparents were ordered to appear at a hearing on October 17, 2003 at which supervised access arrangements would be worked out.

4. That hearing never took place, and it is common ground that no access was enjoyed during the intervening period before the main impugned order was made on February 2, 2006 and the second impugned order was made on March 29, 2006.

The impugned orders

5. On February 2, 2006, the father appeared represented by Counsel and the mother appeared in person before the Family Court (Worshipful Juan Wolffe, sitting with two Justices who had also not previously dealt with the matter in 2003).

6. The father submitted that the mother had repeatedly blocked access although Mr. King very properly drew the attention of the Family Court to the fact that access had been revoked in 2003. The mother urged that access should be both supervised and graduated as the then four year old child had had no contact with his father for two years.

7. Without recording any reasons for its decision, the Family Court granted the father alternative weekend access on February 2, 2006 ("the February 2, 2006 Order"). The Appellant filed a handwritten Notice of Appeal and a formal Notice of Intention to Appeal on February 6, 2006. The Respondent declined to agree to a stay of the February 2, 2006 Order and mother and child left Bermuda on March 1, 2006.

8. The second impugned order was made by yet another differently constituted panel chaired by the Worshipful Tyrone Chin who had previously granted access to the Respondent on May 22, 2003. It was submitted on behalf of the Respondent that since August 2003, the Appellant had been flouting orders of the Court, and she had now absconded in circumstances where it was not known when she might return. The Appellant did not appear at this March 29, 2006 hearing when the Family Court ordered in material respects as follows:

> "*The Court is very displeased that access has not occurred for Mr.* [S's] *benefit. The Court orders a contempt warrant for Ms.* [S] *for failing to facilitate access of their son to Mr.* [S]."

9. Although the Learned Magistrate's decision makes it clear that the Court took into account a March 1 2006 written request by the Appellant that access be suspended while she was abroad, there is no indication that regard was had to her then lawyer's February correspondence on the issue of a stay which was copied to the Family Court. In particular it was contended in Lomas & Co's February 10 2006 letter that as the Appellant had taken all steps required of her to advance her appeal and was willing to pay any fees that might be requested by the Magistrates' Court, the February 2, 2006 Order should be regarded as stayed.

Reasons for setting aside the February 2, 2006 Order

10. The Appellant advanced several grounds of appeal which may conveniently be distilled into one: the Family Court erred in all the circumstances in ordering immediate unsupervised access without making any or any adequate factual inquiries as to what form of access (if any) was in the best interests of a very young child, who had only ever enjoyed limited contact with his father and no contact at all over the preceding two years.

11. The second substantive ground of appeal was that no reasons were given for the decision. It was not open to serious argument that no reasons for the decision were recorded and that the decision was liable to set aside on the grounds of an error of law by virtue of non-compliance with the requirement for reasons contained in section 21 of the Summary Jurisdiction Act 1930.

12. In my judgment it was unarguably clear that, in the absence of reasons explaining why it was considered to be in the best interests of the child for immediate access to be granted, this Court could not decline to allow the appeal on the grounds that no substantial miscarriage of justice had occurred. A Family Court, particularly a panel which has no (or no recent) prior dealings with a case, in my view may not ordinarily order unsupervised access, against a history of limited and/or problematic access and the absence of consent, without seeking independent professional support for such decision, such as a written or oral report from the Court Social Worker. Exceptional cases may well occur, but clear reasons for departing from a more precautionary approach would have to be spelt out in order to support such an adventurous decision.

13. It seems likely that the Family Court before whom the Appellant appeared unrepresented were, perhaps understandably, swayed by the advocacy of the Respondent's Counsel Mr. King. This doubtless led to the Court overlooking the importance of the crucial fact that (a) the last panel to deal with the case formed the view that supervised access was appropriate, and (b) the Respondent was not, between August 14, 2003 and February 2, 2006, legally entitled to exercise access, because the necessary supervisory mechanisms had not yet been put in place.

14. The Order was set aside and the matter remitted to the Family Court so that the issue of access can be considered afresh after input has been sought from the Court Social Worker, the Department of Child and Family Services and/or some other appropriate independent professional.

Reasons for setting aside impugned portions of the March 29, 2006 decision

15. The decision to issue a contempt warrant was purely ancillary to the February 2, 2006 Order and was based on the premise that the Appellant was deliberately flouting said Order despite the fact that an appeal had been filed. Mr. King correctly contended in correspondence with the Appellant's former attorneys which was copied to the Family Court that the filing of the appeal did not automatically result in a stay.

16. The merits of this ground of appeal turn on an analysis of the relevant provisions of the Civil Appeals Act 1971 which provide as follows:

> ***"Conditions of appeal***
>
> *6 (1) Subject to section 7, an appeal shall not lie unless —*
>
> *(a) the notice of appeal is given within fourteen days after the date of the delivery to the appellant of a copy of the record of the proceedings in the court of summary jurisdiction and such notice is served upon the magistrate and also upon the respondent or respondents within the above-mentioned time;*
>
> *(b) the appellant has complied with any order for security made under section 5; and*
>
> *(c) the appellant, in the case of an appeal under the Friendly Societies Act 1868 [title 13 item 11], complies with such order as is mentioned in section 9.*
>
> *(2) A notice of appeal shall state specifically and concisely the grounds of the appeal and upon the hearing of the appeal no ground other than one appearing in the notice shall, without the leave of the Court, be relied on by the appellant...*

Stay of proceedings pending appeal

8 *Upon the appellant fulfilling the conditions as to appeal hereinbefore set forth, all proceedings under the judgment shall, pending the hearing or abandonment of the appeal, be stayed."*

17. An automatic stay comes into play only after the notice of appeal is given (within fourteen days after delivery of the record) and assuming the appellant has complied with any security for costs ordered to be provided, although time for filing the Notice of Appeal may be extended under section 7. Section 4 of the 1971 Act requires an appellant to start the appeal process by (a) filing a Notice of Intention to Appeal and (b) paying the requisite fee for preparation of the record. But this does not suffice to give rise to a stay, absent a Court order as section 5(3) makes clear:

> *"(3) The filing of a notice of intention to appeal in accordance with this section shall not operate as a stay of proceedings under the judgment unless the magistrate, on application, so orders."*

18. The Appellant was technically required to apply to the Court for a stay of the February 2, 2006 Order, until such time as the Magistrates' Court prepared the appeal record. Sadly the record was not certified until March 2, 2007, almost 13 months after her Notice of Intention to Proceed had been filed and over a year after she had seemingly paid for the record to be prepared. For these provisions to be applied in a way which does not interfere with civil litigants' constitutional right of access to the court, the Magistrates' Court should not require a litigant in person to hire a lawyer to apply for a stay while depriving the same litigant of the "free" automatic stay through the court's own delay in preparing a record.

19. Nevertheless the Family Court was technically correct in implicitly concluding that absent the making of an order staying the February 2, 2006 Order, the Appellant was arguably in contempt of court by leaving the jurisdiction and preventing enforcement of the access order. It is perhaps understandable, in the circumstances that undoubtedly presented themselves to the Family Court on March 29, 2006, that a contempt warrant was issued without further enquiry. Where a party discontented with a Court order leaves the jurisdiction and frustrates the ability of the successful party to enjoy the benefits of his judgment, a strong inference arises that any appeal which has been filed unfortified by a stay application probably lacks merit or is not being seriously pursued.

20. In my judgment, however, it will ordinarily be incumbent upon the Magistrates' Court when invited at an effectively ex parte hearing to issue a contempt warrant against an Appellant who has filed a Notice of Intention to Appeal to (a) consider whether the Appellant has raised through her Notice of Intention to Appeal arguable grounds of appeal and, if so, (b) to consider whether justice requires the Court to grant a stay of its own motion or to refuse the application for a contempt warrant pending either (i) the filing of a Notice of Appeal (where the merits of the appeal cannot be determined from the Notice of Intention to Appeal[1]) or (ii) the determination of the appeal.

21. This is particularly the case in Family Court matters where issues such as the enforcement of access orders in relation to children are far more sensitive than enforcing money judgments. The paramount consideration is the welfare of the child and in any case where access to a small child has manifestly been problematic from the date of the child's birth, courts at all levels should adopt a precautionary approach. Where a litigant appears in person, the court should assume that she cannot afford a lawyer and, particularly where the other party is represented, the court should be alert to take points that might be taken if the

[1] Here, the Appellant's own Notice (but not her attorneys, who were not formally on the record in any event) set out arguable grounds of appeal.

unrepresented person had counsel. The "who dares wins" adversarial impulses of ordinary civil litigation ought not to prevail in Family Court matters.

22. In the present case it was a matter of record that the February 2, 2006 Order was made against a background that cried out for independent verification as to how the father's access rights should be exercised. One panel, in May 2003, felt that unsupervised access was permissible. Another panel, in August 2003, (based on representations made by the mother's parents) took a contrary view. No access was exercised for a period of over two years, and the mother's departure from the jurisdiction could be construed as evidence of genuine concerns on her part about the risks of unsupervised access, particularly since a lawyer (not on the record) had written letters seeking to invoke an automatic stay.

23. The Appellant had filed a Notice of Intention of Appeal four days after the decision complained of and this Notice set out arguable grounds of appeal. The main impugned decision required immediate unsupervised access to the child while the grounds of appeal contended against a generally corroborative case history, that the interests of the child would be prejudiced if such access was not supervised. If the Appellant had been represented by Counsel at the March 29, 2006 hearing, an application for a stay pending appeal would undoubtedly have been made and could not properly have been refused by the Family Court. The Family Court erred in law, in my judgment, in failing to consider (and/or failing to give reasons for considering and rejecting) the option of granting a stay on its own motion of the February 2, 2006 Order pending appeal.

24. For these reasons, and because justice so required in light of the setting aside of the February 2, 2006 Order, I ordered that those portions of the March 29, 2006 Order relating to the issuance of a contempt warrant should be set aside.

Conclusion: the assignment of child access cases in the Family Court

25. The present appeal arises in a case which has touched upon four decisions made by four separately constituted Family Court panels. In May 2003, one panel ordered unsupervised access. In August 2003, an entirely different panel ordered supervised access. In February 2006, an entirely new panel ordered unsupervised access, and in March 2006, an entirely[2] new panel issued a contempt warrant for breach of the February 2, 2006 Order. Some guidance on the assignment of cases in the Family Court must be proffered to properly discharge the supervisory obligations of this Court when exercising its appellate jurisdiction. Data is not presently available to concretely ascertain whether what happened in the present case reflects more the exception than the general rule, but how cases are assigned is still the subject of review at the Supreme Court level and, as a topic, case management is very much an emerging science.

26. In my view the interests of justice would be poorly served by a case assignment system which assumed that family law matters require no more individualised judicial attention than debt collection matters in the Magistrates' Court. It is well accepted that once a trial commences before a particular tribunal, its composition must remain constant until judgment is delivered. Contested access cases are, for all practical purposes, akin to an ongoing trial. In any event, in most modern jurisdictions, civil and criminal cases are typically assigned to a particular judge at an interlocutory stage to avoid a dilution of justice which inevitably flows from inconsistent decision-making at the pre-trial phase. If it is not always possible to ensure that the same lay justices deal with all aspects of an ongoing case before the Family Court, a system ought, in my view, to be devised whereby particular cases are assigned to a particular Magistrate who will always (save for in emergency cases) preside over the relevant panel.

27. The case for the same tribunal dealing with contested access cases in the Family Court is far more compelling than for other cases generally because the court's

[2] The Chairman had presided in May, 2003.

jurisdiction in child-related matters has a unique character. In civil and criminal matters generally the traditional adversarial character of common law proceedings prevails and the courts are concerned with whether the party who bears the ultimate burden of proof has proved his or her case. The role of family law courts dealing with children who do not possess the legal capacity to represent themselves is a more inquisitorial one. Irrespective of the case presented by the parties, the court is required, by section 6 of the Minors Act 1950 and section 6 of the Children Act 1998, to have regard to the welfare of the child as "*the paramount consideration*". Accumulated knowledge about the family is indispensable to both (a) the court's ability to make rational decisions in often volatile situations and (b) the confidence of often vulnerable litigants that the judicial system is according their cases appropriate levels of care, consideration and respect.

Dated this 20th day of April, 2007

KAWALEY J.