



IN THE SUPREME COURT OF BERMUDA

DIVORCE JURISDICTION

2004: No. 239

BETWEEN:

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Petitioner

-and-

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Respondent

(Re: Child Maintenance during temporary absence abroad of primary carer)

RULING

Date of hearing: July 18, 2007

Date of Ruling: July 25, 2007

Ms. Keren Lomas, Lomas & Co., for the Petitioner

Ms. Jacqueline MacLellan, MacLellan & Associates, for the Respondent

Introductory

1. This is a case where two capable parents have been unable to agree on the financial provision the father should make for the two children of the marriage (a 10-year old girl and 6-year old boy), while the mother cares for the children for a three-year study period abroad. This Court is duty bound to have regard to the best interests of the children. The main risk to their welfare appears to me to be that the parents will fail to appreciate the emotional significance for their children of the former spouses liberating themselves from the animosities associated with their divorce. Developing a healthy post-marital relationship is essential for custodial and access rights to be meaningfully exercised in a way which is beneficial for the children.
2. The father, to his credit, eventually consented to the mother leaving Bermuda with the two children of the marriage to study in the United States for three years. Both parties eventually agreed to sensible access terms at the hearing on July 18, 2007. The sticking point was the financial provision to be made for the children by the father, in circumstances where (a) he has made plans to study abroad as well, and

(b) the mother creditably seeks a contribution to the children's expenses commensurate with the fact that she was the higher earner during the marriage. Both parties' unilateral plans for studying abroad in different locations provide grounds for concern about the extent to which the parties will, going forward, be able to manage the already strained process of managing joint custody in a post-marital context.

3. Few men are progressive enough to be comfortable with a marital or parental role in circumstances in which their wives are the primary breadwinners. Few wives, in such a marriage, are enlightened enough to respect a man who does not conform to traditional notions of male dominance. Nevertheless, both parties appeared to me to have the integrity and intelligence to realise that they can achieve more personal success in the future if they work together as parents in the interests of their children, and put whatever differences they have behind them.
4. Against this background, this Court is duty bound to deal with the application for financial support in more than a mechanical manner and to encourage the parties to use their best endeavours to ensure that both parents continue to play an emotional and financial role in the children's lives. In these circumstances, I make no order as to costs.

The importance of avoiding parental conflict and exercising custodial rights without recourse to the courts

5. In the course of the hearing, I encouraged the parties to work towards a situation where they raised their children without recourse to the courts in light of the fact that social scientific research demonstrated that emotional conflict between divorced parents was a risk to the emotional welfare of the children of the family.
6. It appears to be accepted wisdom in the United Kingdom that the dominant public policy goals in terms of managing parental rights in a post-divorce situation are (a) reducing parental conflict, and (b) encouraging the parties to adopt consensual arrangements in place of orders of a court. The following extracts from a Paper presented to the U.K. Parliament in July 2004 by the Secretaries of State for Constitutional Affairs, Education and Skills and Trade and Industry, '*Parental Separation: Children's Needs and Parental Responsibilities*'¹, are instructive in this regard:

"Where the process of separation is handled well, the adverse impact on children is minimised. Where separation goes badly and, in particular, where children are drawn into parental conflict, then the effects can be profoundly damaging to children. Evidence shows that children in this situation are likely to do less well in life. They are more likely to do less well at school, to truant or to run away from home. But these risks can be reduced if parents can resolve parenting issues in an amicable fashion...."

...The law has as its central focus the needs of the child and this has to be the state's prime interest. It is in the interest of the child to have a meaningful ongoing relationship with both parents and so the system needs to be much better at securing this outcome. This aim is central to this consultation document. If achieved, more parents will experience an ongoing relationship with their child. This consultation document therefore puts forward proposals, which are intended to help those undergoing parental separation better to resolve disputes so that children's needs are better met. These are based on the recognition that the primary responsibility for caring for children rests with parents rather than with the state. The proposals focus strongly on what children need and how parents can be assisted better to meet those needs during and after relationship

¹ Cm 6273, at pages 1-2, 9.

breakdown. They are aimed at minimising conflict and supporting good outcomes both for children and their parents, preferably without recourse to courts...

....We know from survey work conducted by the Office of National Statistics (ONS) of parents who have made contact arrangements for children following relationship breakdown that satisfaction with these arrangements varies between those going to court and those able to reach informal agreement. In general, perhaps unsurprisingly given their ability to reach an agreed plan for future parenting, satisfaction with arrangements based on informal agreement is significantly higher than when arrangements are ordered by the courts. Specifically, resident parents are satisfied or very satisfied with informal agreements in 82 percent of the cases involved. Non-resident parents, who are usually fathers, are satisfied or very satisfied in 88 percent of the cases involved. When court orders are involved the picture is very different. Resident parents, who are usually mothers, are satisfied in 61 percent of the cases. But non-resident parents are only satisfied with the outcome of the court process in 35 percent of the cases. Of course, there is a likelihood that the cases resolved by the courts are those in which there is a higher level of conflict between the parents which must be resolved in the interests of the child but the evidence suggests that court solutions are less satisfactory than informal agreement. Thus, a policy aim is to increase the proportion of parents making arrangements for themselves..."

Factual findings

7. The father, a mason, agreed that when he is working he should be liable to pay \$1000 per month towards the children's expenses. The mother seeks a continuance of the level of support he was liable to provide while the children were in Bermuda, namely \$1380 per month, which is less than 50% of her estimate of the children's monthly expenses. She wishes these payments to be secured in that they are paid out of monies held in trust (\$24,500 held by Michael Telemaque Associates) because if the father is studying abroad, no mechanism would exist to enforce his payment obligations. While he completes a degree in the U.K over the next 18 months to two years, the father is willing to pay no more than \$560 per month (\$160 per month towards the Heritage Scholarship Trust, \$200 towards health insurance, and \$200 towards the children's food etc.). However, he will have to spend an additional \$375 per month in travel expenses to exercise his access rights in the USA and/or Bermuda. He wishes to use some of the monies held in trust towards these expenses. He also agrees that if he does not become a full time student as he presently plans, he should pay \$1000 per month.
8. I find that the mother, using her share of the proceeds of the sale of the former matrimonial home to support herself as a student abroad, is acting reasonably in seeking no more from the father than he is presently providing pursuant to existing orders of this Court. It also seems clear (based on her own budget) that her expenses while in the U.S. will be lower than when she was in Bermuda. The father's decision to become a student in a geographical location which will make both his ability to enjoy parental access and to provide financial support more difficult than it presently is somewhat less reasonable, although it is understandable in both rational and emotional terms. He can complete an interior design degree programme in London, which he has already started, in less time than if he became a student in the US as the mother suggests. And because he is upset by the departure of his children, he sees no reason why he should remain in Bermuda while they are abroad. He also suspects that his ex-wife's relocation may be linked with her desire to commence or continue a new romantic relationship abroad, which understandably has undermined his already modest enthusiasm for financially supporting her new independent life.

9. The mother made plans to study abroad and take the children with her (the father would have been happy to keep the children in Bermuda), unilaterally deciding (in effect) to diminish the father's quality of access to the children during a somewhat delicate post-divorce period. She honestly admitted that while the father was failing, for whatever reason, to promptly meet his financial obligations to the children after the parties separated, there was no material diminishment of the children's quality of life. But this was not because of her resources alone; it was due in part to her parents' support. It is clear that if she eats more into her savings than she likes, a last resort, the mother could make do without the father's financial support. But throughout the marriage and since, the father has always made important contributions to the financial maintenance of his children. And such financial contributions are an important element of his ongoing parental involvement, although the emotional relationship with his children is more important still. So the mother has, no doubt unintentionally, both created a situation where the financial support of the father is more important than before and one in which it is quite understandable, that the father undoubtedly feels more inclined than before to minimize his financial contributions.

Decision

10. It is to be hoped that the parties will decide to cooperate in the future without the supervision of this Court, with respect to financial support for the children and their upbringing generally. But the only way in which any financial provision order will be enforceable in practical terms if the father leaves the jurisdiction for the next 18 months or two years is if those obligations are secured by an order that the monies held in trust at Michael Telemaque's office, some \$24,500, be paid into the mother's account at the Magistrates' Court Collection Office. The mother is ordered to write to the Transport Control Department relinquishing her interest in the former family car and to close the parties' joint bank account.
11. The father's agreement to pay at least \$1000 per month when he is working is in my view reasonable. The \$1380 sought by the mother based on his present obligations ought to be discounted having regard to both travel costs the father will incur to enjoy access and the fact that the children's living expenses will be reduced while they are in the U.S. It is presently unclear if he will in fact pursue his present study plans, but if he does he expects to be back in Bermuda in two years time at the latest and 18 months time at the earliest. In my view the simplest approach is to order that, with effect from September 1, 2007, the father shall pay \$1000 per month through the Magistrates' Court Collection Office. This will guarantee the mother \$24,500 over the next two years at the rate of some \$1000 per month, because payments will be secured.
12. If the father does in fact study, on his return he can apply for appropriate relief and the payments for the period of his study, subject to the evidence, will likely be reduced, but not below an amount (roughly \$680 per month) which would exhaust the secured payment into the Collection Office Account over the next three years. The parties will hopefully reach agreement on all future financial contributions towards the children's expenses, but on a worst case scenario the mother would receive approximately \$680 per month over the next three years. However, the parties should be encouraged to reach agreement on all future issues by the following factors: (a) the mother is likely to require additional financial support after three years, if not before, (b) the father will have the payment obligations hanging over his head after the trust monies are exhausted, while being interested in exercising his access rights and (c) both parties have professed on oath that they are sufficiently concerned about the welfare of the children to make a genuine effort to improve their post-marital relationship in the interests of their children.

Dated this 25th day of July, 2007

KAWALEY J