IN THE SUPREME COURT OF BERMUDA

DIVORCE JURISDICTION
2008: No.3

BETWEEN:

C

Petitioner

-and-

C

Respondent

(RE: T -PERMANENT REMOVAL FROM JURISDICTION APPLICATION)

REASONS

Date of Hearing: July 24, 2009
Date of Reasons: July 29, 2009

Mrs. Georgia Marshall, Marshall Diel & Myers,
for the Applicant

Mr. Richard Horseman, Wakefield Quin,
for the Respondent

Introductory

1. The Applicant mother applied by Summons dated June 5, 2009 to permanently remove the child of the family, T (a girl now aged 8 years) from the jurisdiction. On that same date she was granted leave to temporarily leave the jurisdiction to travel to Ireland with a view to deciding whether to take up an offer of employment there.

2. On July 2, 2009 by consent, directions were ordered for the expedited hearing of the present application, which was heard in Chambers on July 24, 2009, later on the same morning that I granted Decree Nisi. The Applicant, like the Respondent a Bermudian, was under pressure from her current employers, a Bermuda re-insurance company, to confirm whether she would be able to take up the overseas job offer as soon as possible.

3. After hearing oral evidence from both parties and submissions from counsel, I granted the application for permanent removal, but on the basis that the Applicant would give an undertaking to continue to submit to the jurisdiction of this Court in respect of access matters. I made no order as to costs I now give reasons for so doing.

Applicable legal principles

4. This Court has in recent times dealt with two main types of permanent removal applications. The first is where the applicant is seeking to return to her permanent overseas home; the other is where a Bermudian applicant seeks to relocate abroad. The present application falls into the latter category.

5. The leading local decision on this topic is *Fisher-v- Fisher*, Divorce Jurisdiction 1997: 88, Judgment dated November 15, 2001, a judgment of Simmons AJ (as she then was). This was a case where the two parents enjoyed joint custody and the applicant mother had care and control. Of the various passages relied upon by Mrs. Marshall from this case, I find the following passage from page 8 most instructive:

> " *The general principles by which courts are to be guided in these cases came under careful scrutiny by the Court of Appeal in* ***Payne-v-Payne*** *[2001] All ER (D) 142 (Feb). The Court of Appeal observed that the welfare of the child remained of paramount consideration. It confirmed that the reasonable proposals of a parent with custody or care and control wishing to leave the jurisdiction was genuine and not an attempt to bring contact between the children and other parent to an end. The effect of the refusal of the leave on the applicant and the new family was an important consideration when assessing the welfare of children, as was the effect of reduced contact between the child and other parent if leave was granted. The court found that the ability of the remaining parent to continue contact*

with the children was of great significance in determining the welfare of a child or children."

6. The central factors which I found fell to be taken into account in determining the present application were: (a) whether the Applicant was the primary carer who should be granted care and control; (b) whether her planned move abroad was reasonable in the sense of not being motivated by a desire to reduce paternal access to the child; (c) the likely extent and impact of reduced paternal access on the child; and (d) the likely impact of refusal of the application on the mother, assuming her to be the primary carer. In addition, I take into account as an important legal principle the following observations I made in paragraph 13 of my Judgment in *M-v-M* [2007]Bda LR 66:

> "*The right of freedom of movement is protected by section 11 of the Bermuda Constitution, and matrimonial courts should surely be reluctant…to make orders which …punish primary carers, be they Bermudians or foreign nationals, for seeking to exercise constitutional mobility rights.*"

Factual findings

7. I found that the parties first separated in or about October 2007. The present proceedings were commenced in January 2008. An attempted reconciliation in 2008 lasted for approximately six months and came to an end in late December. Although the father exercises access three times a week (at least twice with overnight access), I find that the mother is clearly the primary carer and should be awarded care and control. The mother's oral evidence that she offered the father the opportunity to assume primary care and control while she was abroad was not challenged.

8. I found that the mother acted unreasonably in delaying telling the father that she was seriously considering taking-up an attractive promotion abroad until just before she travelled to Dublin to investigate the detailed viability of relocating for her and for T. She admitted learning of the job opportunity in or around March 2009, and only discussing the matter with the father nearly three months later after he learned of the exploratory trip from the child. The father was understandably enraged. I accepted that the Applicant was reluctant to raise the matter with the Respondent for fear of a negative reaction on his part and the belief that he might respond more favourably if given detailed plans.

9. However, in my judgment it bordered on an abuse of process (at a time when the current proceedings were pending and the Applicant was legally represented) for the father to be presented with, in effect a *fait accompli*. Had he been notified in March that the mother was contemplating a possible relocation, and still opposed the present application despite having had some time to digest the proposition, his

opposition could perhaps have been characterised as unreasonable. Be that as it may, I determined that this issue went only to the issue of costs and not to the merits of the application.

10. The mother's plans were clearly reasonable from her perspective. She is currently an Executive Vice-President with her company, and has been offered overseas employment on more generous financial terms. She has investigated schooling, will receive an education allowance for T's private schooling and hopes to have more family-friendly working hours. Her proposal of a detailed and reasonable access schedule, combined with her willingness to provide daily telephone (and possibly computer video-link contact between the Respondent and T) demonstrated that the relocation was not designed to minimize paternal access. She offered to pay for four trips a year for T to travel to Bermuda during school breaks to visit her father. This would also afford the child an opportunity to maintain her strong bonds with the Respondent's apparently close-knit family as well.

11. In these circumstances there was no or no tangible evidence that reduced paternal contact would adversely impact on the child to a material extent. On the contrary, the child may well benefit from living away from the scene of the divorce. In addition, the parties' relationship is obviously strained, with recriminations about who was to blame for the divorce being liberally exchanged in the course of the hearing in an emotional manner. It is difficult to believe that the child is blissfully unaware of these tensions and not being adversely affected by them. It is possible to hope that these tensions might subside with the passage of time and a geographical divide between the parents. A central issue between the parties appears to be the unequal earning power of the parties. The father was understandably unhappy about being chastised by the mother for not pulling his financial weight and, she suggested, falling short of his own family's achievement standards as well.

12. I made no findings as to culpability on either party's part as the various jibes seemed to me to have no central bearing on the present application. In light of the mother's undisputed comparatively greater financial success, it seemed to me that the child's best interests would be served by a happy father who has found his own niche in the world, no matter how modest its financial rewards. The mother's relocation would quite possibly afford the father a better opportunity to find such a niche, freed from the shackles of the emotional fall-out of this divorce. In early 21st century Bermuda, as elsewhere, there will often be tensions between traditional notions of gender roles (in which the male is expected to be the primary or a substantial breadwinner and the female is expected to play a supporting role) and modern realities economic and legal equality of opportunity. Emotional adjustment to these new family and social roles often lags behind intellectual apprehension of them, in the case of husband and wife alike. It is becoming less and less uncommon for fathers to choose to exploit the freedom afforded by less intense income-generating activities to spend more time with

their children while the mother is more heavily involved in work. In other cases, both parents work intensely utilising external child support. What path is followed is always a matter of choice for the parties concerned, ideally dictated by what works best for the adults concerned. Parental contentment will almost always be beneficial for the interests of the child.

13. It also seemed clear that the Applicant, still obviously distressed about the divorce, would be at the very least extremely disappointed at being refused the opportunity to take up what she views as a wonderful job opportunity which is a deserved reward for her labours over the last nine years. This further mitigated in favour of granting the application. Bermuda is one of the most internationalised countries in the world and this Court should be slow-save with very clear justification- to restrict the rights of divorced primary carers to live and work wherever in the world they choose.

14. I considered anxiously one matter which was not formally in controversy. The parties agreed to proceed without a Social Inquiry Report, but it is-as Mr. Horseman was keen to point out- somewhat unusual for an application of this nature to be dealt with so quickly without independent reports. In my judgment the Respondent did not raise any sufficient issue touching upon the competency of the mother or the emotional health of the child to warrant ordering such a report. I considered the possibility of granting temporary leave to remove for one year and reviewing the position, but based on my previous experience with adopting such a course in *M-v-M* , delaying a final decision would likely only guarantee prolonged stress, strain and uncertainty surrounding what plans the primary carer could make. Moreover, the mother in the present case, herself Bermudian, is leaving Bermuda to work for a Bermuda-based employer and may well only end up being abroad for a limited period of time in any event. I believed her when she testified that if things did not work out for T, she would return to Bermuda. This was a cogent response to the father's legitimate concerns that T would be disadvantaged by the absence of extended family support systems should she and her mother move abroad.

15. I insisted upon the Applicant undertaking to submit to the jurisdiction of this Court for access purposes to protect the Respondent's access rights in circumstances where it is foreseeable that some other Court could in the future acquire jurisdictional competence over T on grounds of residence.

Conclusion

16. For these reasons, I granted the mother's application for care and control of T and leave to permanently remove her from the jurisdiction, granting the parties liberty to settle the terms of an order also dealing with access.

Dated this 29th day of July, 2009 _____
KAWALEY ACJ