In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2005: No. 182

BETWEEN:

J Petitioner

-v-

J Respondent

(Re: S and A, Custody, Care and Control)

REASONS FOR DECISION

Date of Hearing: September 21-24, 2009
Date of Reasons: October 15, 2009

Ms. Margaret Burgess-Howie, Wakefield Quin, for the Petitioner ("the Father")
Mrs. Georgia Marshall, Marshall Diel & Myers, for the Respondent ("the Mother")

Introductory

1. On September 29, 2005, the Father petitioned for divorce and sought joint custody of two children of the marriage, S (born on February 17, 2000) and A (born on December 12, 2001). The Mother initially contested the divorce. On February 13,

2006, he acknowledged that C (born on January 31, 1993) — the Mother's child from a previous marriage —was also a child of the family.

2. On October 10, 2006, the Father was ordered by the Registrar to disclose the value of his share in his business; however, the matter was adjourned to October 31, 2006. By letter dated October 27, 2006, the Father's attorneys advised the Mother's attorneys that the Father (whose work permit renewal application had been pending since June 30, 2006) had decided to resign from his employment and return to the United Kingdom where his father was about to undergo heart surgery.

3. By letter dated November 29, 2006, the Mother's attorneys confirmed the parties' October agreement that the divorce would proceed on an uncontested basis on the Mother's Amended Answer and Cross-Petition, which sought sole custody, care and control. By letter dated December 6, 2006, the Father's attorneys confirmed the Father's agreement to the divorce proceeding on the basis of the Cross-Petition. Although a letter was sent to the Court evincing their intention of ceasing to act for the Father, the requisite application for removal was never made and the Father did not file a Notice of Intention to Appear in Person.

4. The parties separated in or about June 2005 and that in the interim the Mother was their primary carer. On an unopposed basis, the Cross-Petition was listed for hearing on December 15, 2006 and granted on terms that sole custody and care and control of the three children of the family was granted to the Mother.

5. By Summons dated November 20, 2008, the Father applied to vary the December 15, 2006 Order by granting him joint custody and joint care and control (one week with each parent) of S and A. On December 11, 2008, Wade-Miller J ordered a Social Inquiry Report ("the SIR") and gave directions for the filing of evidence. Mrs. Elaine Charles, the Court Social Worker produced the SIR dated April 24,

2009. On June 4, 2009, the parties appeared before me and I directed that the Father's application be set down for hearing.

6. After a hearing at which each party and Mrs. Charles were cross-examined, I ruled on September 24, 2009 (as regards S and A) that (a) the Father's application for joint custody should be granted, and (b) that his application for joint care and control should be dismissed. However, I lifted travel restrictions, subject to the usual undertakings, and clarified access to meet both the Father's desire for mid-week overnight access and the Mother's concern that the children attend church on Sunday. I awarded the Mother 75% of her costs. I now furnish the reasons which I promised to give for this decision.

Findings: the parties' evidence

7. In light of the history of the proceedings as it relates to care and control of the children, the Father's application for joint care and control was a surprising one. After Mrs. Marshall's thorough cross-examination of him, however, the Court found that he now realised that he had terminated the marriage in less than honourable circumstances and was sincerely motivated by a desire to take up his rightful place in the life of his children.

8. In seeking to heal past wounds, however, he opened fresh ones by making exaggerated criticisms of the Mother's ability to care for the children's educational and health needs. He also seemed to be genuinely oblivious of the importance he still played in the life of C. At the end of the hearing he made a significant gesture of rapprochement by agreeing to take all three children onto his medical insurance.

9. Under cross-examination by Ms. Burgess-Howie, the Mother revealed herself to be devoted to her children, honest, intelligent, hard-working but somewhat

stretched by the pressures of combining mothering with the rigid conditions of domestic hotel work. She admitted that she would welcome further involvement on the Father's part, despite her re-marriage and opposition to the home-hopping shared care and control regime favoured by the Father.

10. The conflict between the parties in my judgment was materially influenced by the pending application, with the Father's case requiring him to demonstrate that the existing regime was not working. The conflict between the parties was certainly no worse than the typical case of acrimony where joint custody is typically ordered. The parties' evidence did not support a finding that joint custody was not feasible.

11. The Father's agnosticism was not said to be new, just as the Mother's Catholicism pre-dated the divorce. The children attended church during the marriage and should be permitted to continue to do so. The Father's desire for the children to move school also seemed somewhat overstated; nevertheless, as a native English-speaker it seemed credible that he could provide greater assistance with homework and/or extra tutoring than the Mother. It also seemed likely that educational achievement is more important to him than to her but this was hardly any ground for refusing his joint custody application.

12. Nevertheless, this was not a case where the non-custodial parent had agreed to sole custody and years later sought to change the status quo in circumstances where there were compelling grounds (such as death, incapacity or incarceration of the custodial party). The Mother's opposition to this aspect of the application was not, in all the circumstances, unreasonable.

The SIR

13. The recommendation in the SIR that the Father's application for joint custody, shared care and control should be granted (on the basis of the children spending two weeks with each party in every month) was also surprising. However, after withering cross-examination of Mrs. Charles by Mrs. Marshall, it was clear that this recommendation ought not to be accepted *in full* by this Court. This was essentially because there was nothing in the body of the report which cogently supported a finding that the children's present living arrangements of being with their mother primarily for over four years were so unsatisfactory as to justify, as it were, a leap into the unknown. Shared care and control is an exceptional order to make save by consent of both parents, particularly where it appears that one party has been the primary carer both during and after the marriage.

14. Mrs. Charles in answer to the Court agreed that it would be unprecedented for this Court to make a shared care and control order in circumstances where:

    (a) the parents did not consent, and

    (b) no prior pattern of shared care and control existed.

15. The general proposition that fathers should be given a more equitable role in their children's lives cannot justify making a radical change in children's living arrangements without concrete grounds for so doing. I found no such grounds in either the SIR or the other evidence. Moreover, the overworked Court Social Worker was bound to admit under cross-examination that her report was based primarily on interviews of the parents, with no consideration being given to the Court file. Such a review might have influenced some of her findings and the lack of it undermined the weight to be attached to her controversial recommendations.

16. I accepted the recommendation that there be joint custody because, irrespective of what may have happened in the past, the Court accept the findings that the children "*are very attached and bonded to their father*" (SIR page 3) and that

both parents "*have established with each child a strong sense of connectedness, and a vested interest in their wellbeing*" (page 5). I do not accept that both parties have "*clearly demonstrated that they are able to meet the daily needs of their children*" (SIR, page 5); the Father has never had primary care of the children for any extended period of time over the last four (or more) years. The Mother's objection to shared care and control, in all the circumstances, is quite understandable.

17. I accepted in part the recommendation that the Father should be given more access, and rather than disposing of the other recommendations, I ordered a review of the joint custody regime in six months time.

Costs

18. This application was necessitated by the Father's own conduct in consenting to an order which he later decided to challenge. He made no attempt to save costs by offering to consent to joint custody alone and increased access prior to his application and/or the hearing and declined my invitation to pursue such a settlement in the course of the hearing. The application for joint care and control was at best an unrealistic one; moreover this was the issue which clearly formed the main focus of the contested hearing which took place.

19. However, having regard to the fact that he succeeded in part and also threw out an olive branch at the end by agreeing to put C on his health insurance, I found that it would not be just to award the Mother all of her costs. Accordingly I awarded her 75% of her costs.

Conclusion

20. Although I have not found it necessary to refer to any of the authorities cited by counsel, this should not be taken as indicating that in a somewhat unusual application of great importance to the parties, such researches were not reasonably required. Having regard to the views I formed of the oral evidence adduced in the course of the hearing, I have simply concluded that applying established legal principles, the present application ultimately turned on its facts.

Dated this 15th day of October, 2009

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KAWALEY J