IN THE SUPREME COURT OF BERMUDA

DIVORCE JURISDICTION

2010: No. 39

Between:

K. S.

Petitioner

-and-

G. S.

Respondent

AND

CIVIL JURISDICTION

2009/448

IN THE MATTER OF SECTIONS12 AND 22 OF THE MINORS ACT 1950

AND IN THE MATTER OF C S BORN ON 6 APRIL 2006

A MINOR

Between:

G. S.

Plaintiff

-and-

K . S.

Defendant

Date of hearing: 21st September 2010
Date of decision: 21st September 2010

Mrs. J. MacLellan for the Respondent/ Plaintiff
Mr. V. Caesar for the Petitioner/ Defendant

DECISION

1. This matter arises by way of a preliminary point taken by counsel for the Respondent/ Plaintiff (hereinafter referred to as "the Father" for ease of reference). His application is for a stay of the above two proceedings. He bases his application on the basis of the doctrine of Forum Non Conveniens. He contends that Ontario Canada is the most appropriate forum to settle the issues raised by this litigation concerning the custody, care and control of the child of the family.

2. The substantive application before the court in the Divorce Jurisdiction is an application by the Mother for sole care and control of the child of the family; leave to remove the child from the jurisdiction to Jamaica; consolidation of the two above titled matters; and alternatively interim care and control of the child and leave to remove the child from the jurisdiction pending the determination of the parties applications.

HISTORY

3. The parties were married in the island of Jamaica on the 30th of April 1994. They spent their married years in Ontario Canada. It was there on 6th April 2006 the child of the family was born. The parties continued to reside and work in Canada. On 16th June 2008 the parties moved to Bermuda where the Petitioner/Defendant (hereinafter referred to as "the Mother") had been granted a 3 year work permit.

4. The Father filed the Originating Summons in the Minors Act matter on the 23rd December 2009. In it he sought that the parties be granted joint custody of the child of the family, sole care and control of said child and leave to remove the child from the jurisdiction.

5. The Mother filed a petition for divorce on the 17th March 2010. In it she sought joint custody of the child of the family with care and control to her. By summons dated the 28th May 2010 the Father sought inter alia a dismissal of the Petition or alternatively for a stay of the Petition. He based his application on the doctrine of Forum Non Conveniens.

6. On the 23rd June the court dismissed the Father's application. The court based its decision inter alia on the fact that the Matrimonial Causes Act requires a party to a divorce to be resident in Bermuda in Bermuda for one year preceding the presentation of the petition. The Mother so qualified. For the purposes of obtaining the divorce no other forum could be considered more convenient.

7. On the 23rd July 2010 the Decree Nisi was granted. The Decree Nisi was made final and absolute on the 3rd of September 2010. The orders made on the grant of Decree Nisi were that the child remain in the joint custody of the Mother and Father; that care and control on an interim basis be vested in the Mother and the Father until further order of the court. Travel restricts were placed on the removal of the child from the jurisdiction without the leave of the court.

8. The Mother applied for ancillary relief before the Registrar. On the 18th August the Registrar made an order for the maintenance of the child of the family. She further made an order for a joint valuer to be appointed for the parties' properties in Canada.

The Father's case

9. Counsel for the Father argues that Bermuda is not the appropriate jurisdiction to determine the matter now to be determined by the court. The Father's position is that Ontario Canada is the appropriate forum. The Father's position is that:

1. The parties have no ties with Bermuda. The family has been asked to leave by the immigration Department. Neither party holds a valid work permit.
2. The mother is required to leave notwithstanding that she remains for the sole purpose of seeking leave to remove the child from the jurisdiction.
3. At no time prior to the breakdown of the marriage or since has the Mother discussed removing the child to Jamaica to take up residence.
4. The mother is not thinking about the welfare of the child and the disruption to the child that a move to Jamaica would entail for him.
5. That the court would need the assistance of a social inquiry report and possibly other investigations to determine whether residing in Canada or Jamaica would be in the

interest of the child. That there is insufficient time for the court to order and receive such report/s before the Mother and Child would have to leave Bermuda.

6. The Mother is pursuing an interest in working in the Cayman Islands and not Jamaica.
7. The parties have lived in Ontario since their teens. The child was born and raised for the first two years there. The Father's extended family resides there, including the child's god parents. The Mother has employment to return to there.

The Mother's case

10. Counsel for the Mother argues that Bermuda is the appropriate jurisdiction as it has held so in a previous ruling in this case. Her case is that she had communicated to the Father her intention to return to Jamaica to resume residence. That while the court would normally use a social inquiry report in making its determinations on issues of care and control of a child o the family, in this case it would delay matters and be stressful for the child.

11. Counsel for the Mother further argues that the bond between the mother and the child is stronger than that of the child and father. That the court has orders at its disposal, to ensure that the Mother does not abscond with the child. That any further delay will be stressful for the child. In the circumstances the Mother asks that the request for a stay be denied. The Mother's case is that the court should go on to consider the Mother's application for sole care and control.

THE LAW

12. The principles to guide the court on the issue of Forum Non Conveniens has been decidedly determined by The UK House of Lords case of **Spiliada Maritime Corp-v-Cansulex Ltd** [1986] 3 All ER 843. The basic principle is that a stay will only be granted where the court is satisfied that an available forum of competent jurisdiction is the appropriate forum to try the action for the interest of all the parties and the ends of justice.

13. The Principles therein have been applied in a long line of case in England concerning matters that fall for determination in Family Law Act cases. This is the case in particular in regard to the upbringing of children. The case at bar concerns matters directly touching upon the

upbringing of the child of the family. Rayden and Jackson on Divorce and Family Matters in section 4 (G) provides a useful statement on the principles and procedure:

> "Thus the court will grant a stay if the respondent shows that there is some other available forum having competent jurisdiction which is the appropriate forum, for the trial, that is, a forum in which the case may be tried more suitably for the interest of all the parties and the ends of justice; if the respondent satisfies the court that such a forum exists, a stay will be granted and the burden shifts and it is for the applicant to show that there are circumstances by reason of which justice requires that a stay nevertheless should not be granted. In discharging this burden the applicant has to show substantial injustice and not merely loss of some personal or juridical advantage; fairness will depend on all the circumstances of the case."

CONCLUSION

14. I am satisfied on these authorities that a stay based on considerations of the principles of Forum Non Conveniens is therefore an appropriate consideration for this court. The only matter on which the authorities seem somewhat unsettled is whether in the Spiliada analysis the welfare of the child is the paramount consideration. I am satisfied that in the substantive application before the court all of the circumstances of the ancillary relief matter are yet to be determined. These matters include the care and control of the child of the family as well as financial and property rights between the parties.

15. It would appear to the court that Ontario Canada is the appropriate forum for the conclusion of all of the outstanding ancillary relief matters between the parties. The Parties are Canadian citizens. They own property in Ontario including the matrimonial home. They live for the whole marriage in Ontario apart from the last two years. The Father is employed in Ontario. His income will be relevant to any application that may be made regarding maintenance whether for the Mother of for the child of the family.

16. The child of the family is a Canadian citizen. The child has no connection to Bermuda. The child has a right to have his future decided by a court in the jurisdiction of his birth and citizenship. The Canadian authorities would appear to me to be best equipped to determine what is in his best interest in the Canadian context. That court will be in the best position to make the

necessary inquires of the Jamaican authorities to determine if it is in the child's interest to reside in Jamaica with his mother.

17. The Mother has not satisfied the court that a stay should not be granted. There was no suggestion that the Canadian courts would not consider the mother's application for leave to remove the child to take up residence with her in Jamaica. There was no suggestion put forward on her behalf that suggested that she would not be able to obtain justice in a Canadian court. The Mother's application seems more to be based on the practical convenience of obtaining a summary decision in Bermuda consonant with her timeline for departure.

18. The Mother's basic argument was that a delay would be stressful for the child. Marital discord can be stressful for a child. Marital breakdown can be stressful for a child. Divorce can be stressful for a child. Separation from a parent can be stressful for a child. It is no answer to the present application to say that a stay will be stressful to the child of the family. It will be to a great degree up to the parties just how quickly they can get this matter before a Canadian court, or settle the issues between them.

19. In the courts view the Bermuda Courts have not been shown by the Mother to be the appropriate or more suitable forum for the determination of the ancillary relief application which application includes issues of custody, care and control and residence. It is the case that the divorce was granted in Bermuda; however that decision was based on the Mother's right at that time as a lawful resident with the necessary period of residence which qualified her to apply for the divorce. Matters have now moved beyond that point, and her right to reside is of limited duration.

20. In all of the circumstances the Court considers Ontario Canada to be the appropriate jurisdiction in which to determine the outstanding matters in the divorce ancillary relief application.

Dated this 21st day of September 2010

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Madam Justice Charles-Etta Simmons
Puisne Judge