In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2011: No. 28

BETWEEN:

S

Appellant

-v-

S

Respondent

(Re: Access to Child Abroad-Jurisdiction)

JUDGMENT
(In Court)

Date of Hearing: July 8, 2011
Date of Judgment: July 22, 2011

Mr. Adam Richards, Marshall Diel & Myers, for the Appellant
The Respondent in person.

Introductory

1. The present case raises for the first time the question of when the Family Court has jurisdiction to regulate a parent's access rights in respect of a child lawfully residing with the custodial parent abroad. The Appellant mother, who resides in the United Kingdom with the 10 year old child, appeals against the decision of the Family Court (Wor. Tyrone Chin, Mrs. Joan Burgess JP and Mr. Winston Rawlins JP) dated May 2, 2011 holding that the lower Court continued to enjoy jurisdiction over access based on the original order made when the child resided in Bermuda where he was born.

2. The background facts are as follows. The parents were not married and were separated by the time the child (C) was born in Bermuda on August 8, 2000. The first order made in relation to C was dated April 6, 2001 and gave the Father liberal and general access and required him to pay maintenance. On September 2, 2004, a defined access order was made. Although the Mother apparently left Bermuda for Atlanta with the child in or about late 2007 without the Father's consent, at the hearing below (on May 2, 2011) he confirmed that he consented to her remaining in the US for educational purposes and understood that she initially left Bermuda because she heard gunshots.

3. Although the Father took out a warrant of arrest when she returned to Bermuda briefly in 2008, on April 23, 2008 this Order was discharged and the Family Court imposed no restrictions on the Mother removing the child from the jurisdiction. Paragraph 3 of the Order stated: "*The Respondent is to continue to have liberal access during school holidays and to continue major insurances* [sic] *cover for* [C]." The Father had three visits with C pursuant to this Order.

4. In August 2010, the Mother moved with C to the UK. There is no suggestion that this in breach of any Court order or that access is being refused although certain difficulties have arisen.

The Family Court's decision

5. On December 13, 2010, the Father issued a Summons in the Family Court seeking a defined access order and a variation of the April 6, 2001 maintenance order. At the May 2, 2011 hearing of this Summons, the Father sought an order requiring the Mother to pay 50% of the access travel costs in relation to C and complained that his access rights were being infringed by the Mother. In response, Mr. Richards for the Mother submitted that the Court lacked jurisdiction having regard to section 36L of the Children Act 1998. This submission was rejected by the Court below. According the appeal record and the Learned Chairman's notes of the hearing:

> "*When asked by Mr. Richards why the Court rules that it had jurisdiction the Court replied that Mr. Swan was the very original applicant in this matter in 2000 regarding access and that access is still the core and primary issue even today.*"

6. In essence, the Court below appears to have responded instinctively to the submission that it lacked jurisdiction by concluding that it ought not to be possible for the Family Court's jurisdiction to lapse while it had a matter before it. Accordingly, the relevant time for determining jurisdiction had to be when the very first application was made; not the date of any particular subsequent interlocutory application within the same proceedings. This was my own instinctive response to the present appeal.

Section 36L of the Children Act 1998: the merits of the appeal

7. The essence of Mr. Richard's case on jurisdiction was that (1) the Family Court's jurisdiction is based upon the habitual residence of the child in Bermuda at the date when the relevant application before the Court is made and (2) since the child in the present case was no longer habitually **a** resident in Bermuda, by operation of law the Court's jurisdiction had lapsed. Unable to find any relevant local or overseas authority, counsel relied upon the following relevant provisions of the statute:

> "***Jurisdiction***
> *36L (1) A court shall only exercise its jurisdiction to make an order for custody of or access to a child where —*
>
> *(a) the child is habitually resident in Bermuda at the commencement of the application for the order; or*
>
> *(b) although the child is not habitually resident in Bermuda, the court is satisfied —*
>
> *(i) that the child is physically present in Bermuda at the commencement of the application for the order,*
>
> *(ii) that substantial evidence concerning the welfare of the child is available in Bermuda,*
>
> *(iii) that no application for custody of or access to the child is pending before an overseas tribunal in another place where the child is habitually resident,*
>
> *(iv) that no overseas order in respect of custody of or access to the child has been recognized by a court in Bermuda,*
>
> *(v) that the child has a real and substantial connection with Bermuda, and*
>
> *(vi) that, on the balance of convenience, it is appropriate for jurisdiction to be exercised in Bermuda.*
>
> *(2) A child is habitually resident in the place where he resided —*
>
> *(a) with both parents;*
>
> *(b) where the parents are living separate and apart, with one parent under a separation agreement or with the consent or implied consent of the other or under a court order; or*
>
> *(c) with a person other than a parent on a permanent basis for a significant period of time,*
>
> *whichever last occurred.*
>
> *(3) The removal or withholding of a child without the consent of the person having custody of the child does not alter the habitual residence of the child unless there has been acquiescence or undue delay in*

commencing due process by the person from whom the child is removed or withheld."

8. The above provisions contain the following key elements for the purposes of the present appeal. Firstly, under section 36L(1)(a), the "*court*"[1] "*shall only exercise its jurisdiction to make an order for custody of or access to a child where…(a) the child is habitually resident in Bermuda at the commencement of the application for the order…"* This umbrella principle embraces two subsidiary questions: what is "*habitual residence*" and what does the phrase "*at the commencement of the application for the order*" mean? Fourthly, it is necessary to note that the Family Court did not consider the alternative discretionary basis for founding jurisdiction in relation to a child not habitually resident in Bermuda. This alternative jurisdiction depends on meeting the various conjunctive requirements of section 36L (1)(b), the first of which is "*that the child is physically present in Bermuda at the commencement of the application for the order".*

Is the child now habitually resident outside Bermuda?

9. The Family Court implicitly accepted that the child is now habitually resident outside of Bermuda. This flows from the reference made in the brief reasons for decision to the factor clearly considered pivotal to the Court's jurisdictional ruling: that C was habitually resident in Bermuda at the commencement of the application for the original April 6, 2001 Order. It is impossible to find that a child who has lived abroad with the sole custodial parent from the age of 4 to nearly 11 years is presently habitually resident in Bermuda.

10. Although this conclusion may seem obvious, I find reinforcement for such a straightforward interpretation of the phrase "*habitually resident*" from the holding of the Jersey Royal Court construing the same statutory phrase in a similar statutory context in *S v. S* [2008 JLR Note 26], a case not referred to in argument and referred to here for illustrative purposes only. In this case two year's residence in Jersey where the family's only home was located was held to constitute "*habitual residence*".

11. The record can only sensibly be construed as indicating that C is abroad with his mother with the implied consent of both the Father and the Family Court. So no question of the change of habitual residence being vitiated pursuant to the provisions of section 136L(3) arises.

[1] This term is defined in section 2(1) of the Act to mean "*the Family Court and, where the context so requires, includes the Magistrates' Court and the Supreme Court*".

Does section 36L(1)(a) require the child to be habitually resident in Bermuda when the current application before the Family Court was made?

12. Mr. Richards for the Mother made the following central submission in his Skeleton Argument in response the argument that the relevant jurisdictional date was the date of the commencement of the original proceedings:

> "*4. If this was the reasoning behind the decision (and it is far from clear) it is submitted that this must be plainly wrong...orders in relation to children are, by their very nature, interim orders as they are at all times variable. Applying the reasoning that the commencement of the application is the first time the matter comes before the Court would mean that Bermuda would always retain jurisdiction of a matter relating to a child if proceedings have at one time been commenced in Bermuda. The practical implications are nonsensical...*"

13. This submission is fundamentally sound. When the statutory provisions are carefully considered, through a lens unclouded by the natural judicial antipathy for losing control to another forum of a case pending before one's own court, this analysis accords with the natural and ordinary meaning of the relevant words in their legislative context.

14. The crucial phrase is "*the commencement of the application for the order"*. The Act does not refer to the date of the commencement of the "proceedings". Jurisdiction under section 2 of the Matrimonial Causes Act 1973, by way of contrast, is defined with express reference to the date of the commencement of the proceedings:

> "*(2) The court shall have jurisdiction to entertain proceedings for divorce or judicial separation if (and only if) either of the parties to the marriage—*
>
> *(a) is domiciled in Bermuda <u>on the date when the proceedings are begun</u>; or*
>
> *(b) was ordinarily resident in Bermuda throughout the period of one year <u>ending with that date</u>."*
>
> *[emphasis added]*

15. So the natural and ordinary meaning of the words used in section 36L(1)(a) of the Children Act suggests that jurisdiction depends on habitual residence in Bermuda on the date when the relevant application for the relevant order is made, not the date of the commencement of the proceedings as a whole.

16. However, construing the statute in this manner is also consistent with the structure of section 36L of the Act as a whole. It is necessary to make sense of the phrase "*the commencement of the application for the order*" not just in the context of section 36L(1)(a), but as the same words are used in section 36L(1)(b) as well. In this second context, jurisdiction may be founded if "*the child is physically present in Bermuda at the*

commencement of the application for the order" and if five other conjunctive requirements are met. Sub-paragraph (b) of section 36L(1) makes no sense at all if the phrase "*application for the order*" does not mean the current order sought from the Court, but relates back to the date (possibly years earlier) when the first application in the proceeding was made. The discretionary jurisdiction to be exercised where a child is not habitually resident in Bermuda clearly depends on conditions existing in present time, not in the past. The relevant sub-paragraph, it bears repeating, provides as follows:

> "*(1) A court shall only exercise its jurisdiction to make an order for custody of or access to a child where-*
>
> *(a)...*
>
> *(b) although the child is not habitually resident in Bermuda, the court is satisfied —*
>
> *(i) that the child is physically present in Bermuda at the commencement of the application for the order,*
>
> *(ii) that substantial evidence concerning the welfare of the child is available in Bermuda,*
>
> *(iii) that no application for custody of or access to the child is pending before an overseas tribunal in another place where the child is habitually resident,*
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> *(iv) that no overseas order in respect of custody of or access to the child has been recognized by a court in Bermuda,*
>
> *(v) that the child has a real and substantial connection with Bermuda, and*
>
> *(vi) that, on the balance of convenience, it is appropriate for jurisdiction to be exercised in Bermuda.*

17. Construing "*commencement of the application for the order*" in section 36L(1)(b)(i) of the Act as referring back to the date of first application ever made in the proceedings is patently absurd. It is impossible to sensibly construe section 36L(1) as assigning different meanings to the same phrase in two sequential sub-paragraphs in the same subsection. Interestingly, if persuasive support for this conclusion was required, the "*relevant date*" under Article 1(1) of the conceptually analogous Child Custody (Jurisdiction) (Jersey) Law 2005 for the purposes of either "*habitual residence*" or "*presence in*" Jersey for jurisdictional purposes (under Articles 5-6) is defined even more clearly with reference to the date of the current application before the Court:

> " *'relevant date', in relation to the making or variation of an order, means –*

(a) where an application is made for an order to be made or varied, the date of the application (or the first application, if 2 or more applications are determined together); and

(b) where no such application is made, the date on which the court is considering whether to make or vary the order, as the case may be."

Summary on jurisdiction

18. For the above reasons, I am bound to conclude that the Family Court erred in law in finding that it continued to enjoy jurisdiction over C despite the fact that, as of the date of the Father's December 2010 application to vary the May 6, 2001 maintenance order, the child had ceased to be habitually resident in Bermuda for the purposes of section 36L(1)(a) of the 1998 Act.. As the child was also not physically present in Bermuda at the relevant time, no need to consider the alternative discretionary jurisdiction under section 36L(1)(b) arose.

Conclusion

19. It follows that the Mother's appeal must be allowed and the decision of the Family Court dated May 2, 2011 that it enjoyed jurisdiction over C is liable to be quashed.

20. The effect of the Mother's success on the present appeal appears to be that the maintenance order made by the Family Court on April 6, 2001 cannot be directly enforced by her in the Bermuda courts. Subject to hearing counsel for the Mother, it seems to follow from any order setting aside the May 2, 2011 jurisdictional ruling that the proceedings below (including the Father's maintenance obligations) must also be stayed until further order.

21. I encouraged the parties at the end of the short appeal hearing to seek to agree the terms on which the Father's original liberal and generous access rights may be enjoyed without the need for him to seek the assistance of the United Kingdom courts. If neither party wishes to incur the costs of commencing fresh proceedings in Britain, they have a mutual interest in resolving all issues of access and maintenance on an amicable basis in the best interests of the child.

Dated this 22nd day of July, 2011, _____
KAWALEY J