[2013] SC (Bda) 64 Div (7 August 2013)

In The Supreme Court of Bermuda

DIVORCE JURISDICTION
2009: No. 154

BETWEEN:

BJ

Petitioner

-and-

J

Respondent

(Re: K – Permanent Removal)

Date of Hearing: 29th May-4th June.

Date of Judgment: 7 August 2013

Petitioner in person
Mr. A. Richards of Marshall Diel & Myers for the Respondent.

DECISION

1. This matter begun by summons dated the 20th August 2012 is brought by the Petitioner (hereinafter referred to as "the Mother") for the permanent removal of the child of the family (hereinafter referred to as "K") from the jurisdiction. The Respondent (hereinafter referred to as "the Father") opposes the application.

2. The hearing in this matter consisted of oral evidence of the parties and that of the Court Social Worker and took place over the following 4 days: the 28th – 29th May and the 3rd – 4th June 2013. Each party also filed for the Court's consideration affidavits in support by third parties.

BACKGROUND

3. The parties were married in Bermuda in December 2002. K was born to the parties in 2004. A Decree Nisi of divorce was issued on the 27th November 2009 and the Decree Absolute on the 20th January 2010. The Mother is Bermudian. She is 45 years of age this year. The Mother has had variety of work experiences in travel, tourism and most recently as a compliance coordinator. The Mother was not employed at the time of the hearing.

4. The father who is British is the holder of an extended Spousal Employment Rights Certificate; he is thereby entitled to continue to reside and work in Bermuda, notwithstanding the divorce, until the child has reached 22 years of age. He is 61 years of age this year. His is a qualified boat captain which keeps him in secured occupation with good compensation. His work can be demanding; it is also subject to the vicissitudes of the tourism industry.

5. An earlier consent order was entered into by the parties setting out, inter alia, custody care and control of K and terms for the removal of the child from the jurisdiction. The consent order was made an order of the court on grant of Decree Nisi. The order provided for joint custody of K with care and control vested in the Mother until "on or about the 1st August 2010" with consequential orders on access for the Father.

6. The Order provided that thereafter care and control vested in the father and further provided for K to visit the father in France "on or about 1st of August 2010" A condition provided that subject to the Father being settled and having made suitable accommodation and care arrangements for K, the child was to remain with the Father and be enrolled in school in France.

7. Provision was made for the Mother to fund K's travel to visit her in Bermuda for each holiday through the school year. There was a default clause reversing care and control to the Mother if the Father had not achieved suitable arrangements for K.

8. The child resided in France with the Father from August 2010 until he returned with the father to resume residence in Bermuda at some point during the summer of 2011. In July of 2012 the Petitioner obtained an order pursuant to her exparte application for interim care and control of K when she anticipated that the Father would remove K from the jurisdiction ostensibly on holiday, but then disappear with him.

9. Said order was amended on the 8th August following an inter parties hearing. It provided for shared care and control of K until further order of the court. Shared care and control resulted in the child alternating on a weekly basis between each parent's home. The Mother indicated in that hearing that she intended to apply to the court for permission to permanently remove the child from Bermuda. She was ordered to file application for removal within 14 days if she intended to pursue the matter.

10. By summons dated the 20th August 2012 the Mother applied for permission to remove the child permanently from Bermuda s she was leaving Bermuda to reside in Australia. She asked for joint custody to continue, but seeks sole care and control of K with defined access to the Father.

11. In her supporting affidavit the Mother refers to the fact that she has remarried, and that both she and her husband were made redundant from their respective places of employment. She states that they have been unable to find alternative employment in Bermuda and are unable to afford to continue to reside in Bermuda in the current financial climate. The Mother has been unemployed since she was made redundant and has remained so throughout these proceedings. Her spouse has now relocated to Australia where he has found employment and has secured rental accommodation in anticipation of being joined by the Petitioner and K.

12. Pursuant to a directions order the Father filed an affidavit in reply to the Mother's dated 13th September 2012 where he stated inter alia that he opposed the application. He stated that if the Mother chooses to continue or reside in Bermuda, then he supports joint care and control continuing. Should the Mother relocate to Australia his position is that sole care and control of the child should vest in him. The directions provided for the mother to file a further affidavit which she did on the 26th October responding to the Father's affidavit.

13. The hearing in this matter took place over four days. Each party was presented for cross-examination by the other. Mrs Charles the court social worker who wrote the social inquiry report was also subjected to cross-examination. In addition the Mother and Father each filed an affidavit by a third party in support of their position.

THE LAW

14. Mr. Richard's primary position on the law is that this court is being asked to consider an issue which is unique to the Bermuda courts; an application for removal of a child from the jurisdiction in circumstances were both parents share care and control.

15. His position is that *Fisher v Fisher and Stirling* 2001 Bda LR 71[1] which has its roots in the seminal decision of Lord Justice Thorpe in the English Court of Appeal decision in *Payne v Payne* EWCA civ 166,[2] on external relocation, can be distinguished as having been decided on the basis that the applicant parent was the primary carer of the child.

What is more, counsel for the Father argues that the guidance provided in (*Payne v Payne* as applied in) *Fisher v Fisher and Stirling* and the cases that followed[3] is not applicable

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[1] Robinson v Robinson Div Jur 2001 No. 149; M v M [2007] Bda LR 66; Re T; C v C (Permanent Removal from Jurisdiction) [2009] Bda LR 34 and S v S and RCL Div Jur 2009 No. 213.

[2] The Payne decision in the Court of Appeal followed a line of cases including Poel v Poel [1970] 1 WLR 1469 and Nash and Nash [1973] 2 All ER 704, affirming the welfare principle.

[3] See note 1 above

in a case where the parties have shared care and control of a child. As authority for this proposition he relies on the English case of *Re Y* (*Leave to Remove from Jurisdiction*) [2004] 2 FLR 330 and the English Court of Appeal decision in *K v K (relocation Shared Care Arrangement)* [2011] EWCA Civ 793.

16. Mr. Richard's submissions therefore can be succinctly stated. They are firstly that the guidance provided in the *Payne v Payne* case (or line of case of which the *Fisher v Fisher and Stirling* case in Bermuda is one) is not applicable in the instant case, as said guidance relates only to single parent care and control cases. Secondly, that the best interest of the child is, 'the course of Less detriment' for him/her.

17. The Mother as shown above is self- represented. She filed written submissions, and relied on the *Fisher v Fisher and Stirling* case and its application of the guidance in *Payne v Payne*. Her primary contention however, is that the simple premise by which the court is to be guided is the welfare of the child. The Mother's grasp of the crux of the law cannot be faulted. She has stated an unarguable and paramount principle which is underscored in the two recent cases referred to by Mr. Richards.

18. That principle of law has never been difficult to understand in relocation cases. The difficulty for the court has always been in weighing the factors of the case being considered in the light the welfare principle. This is especially so where, as in the case at bar, the facts reveal two parents who care very deeply for their child and who have provided for him in the best way that they can.

19. With that said, I shall make a brief review of the guidance now provided by the court in *Re Y (leave to remove from Jurisdiction)* and by the Court of Appeal in *K v K (Relocation Shared Care Arrangement)*. I am of the opinion that Mr. Richard's view of the non-applicability of the *Payne v Payne* guidance results from a narrow interpretation of the dicta of one Judge only, Lord Justice Thorpe (who wrote the leading judgment in *Payne v Payne*). The other 2 judges clearly did not reject the *Payne v Payne* guidance, but rather sought to explain it continuing relevance to cases in England.

20. I will further conclude that Mr. Justice Hedley's use of the phrase "the course of less detriment" in *Re Y (leave to remove from Jurisdiction)* is not be taken as raising to the status of a legal principle what is really a conclusion drawn upon assessment of all the relevant circumstances of the case. In *Re Y (leave to remove from Jurisdiction)* Hedley J was considering an application for removal of a child from England in circumstances where the child had been living equally with both parents in their respective home. He referred to *Payne v Payne* and Dame Elizabeth Butler Sloss's dictum which follows the list of considerations that she opined should be in the forefront of the mind of a judge trying the matter.

She said:

> "All the above observations have been made on the premise that the question of residence is not a live issue. If however there is a real dispute as to which parent should be granted

a residence order and the decision as to which parent is more suitable is finely balanced, the future plans of each parent for the child are clearly relevant. If one parent intends to set up home in another country and remove the child from school, surroundings, and the other parent in his family, it may in some cases be an important factor to weight in the balance. But in a case where the decision as to residence is clear … the plans for removal from the jurisdiction would not be likely to be significant in the decision over residence."

21. Hedley J interpreted this dictum as contemplating two different states of affairs. The more common one occurs where the child is living with one parent, and that parent wishes to leave the jurisdiction. He described the other state of affairs as the less common one; that being where there is a real issue as to where the child should live, or where the arrangements in place are that the child's home is equally with both parents.

22. The upshot of Hedley J's reasoning is that the more common state of affairs is the one that is exemplified in the facts of the *Payne v Payne* case, which, in Bermuda family law nomenclature is where the parent seeking removal has sole care and control of the child. *Fisher* was such a case.

23. Hedley J found that the facts in *Re Y (leave to remove from Jurisdiction)* placed it among the less common state of affairs because the child lived equally with each parent. He states that such a case was unique to his experience. He opined that on the facts of the case before him, many of the factors referred to in *Payne v Payne*, while relevant, *may* carry less weight than they do in the more common state of affairs (emphasis added).

24. To the extent that Mr. Richards is saying that guidance offered by the court in *Payne v Payne* is not relevant in a shared care and control case, this authority on which he relies, does not support that proposition. The opinions of the majority of judges of the Court of Appeal in *K v K (Relocation Shared Care Arrangement)* do not support his contention either. I will return to this.

25. Before I move on I should like to make this point. In Family Law in Bermuda, court orders made for arrangements such as shared care and control are not unique, although as is the case in England, I believe that they form a small percentage of the arrangements made involving the care and control of children in Bermuda. Without the benefit of a statistical analysis, and drawing on experience only, I nonetheless believe that incidents of shared custody, care and control are on the increase in Bermuda.

26. A case involving an application for removal of a child from the jurisdiction where the parents shared care and control has come before the courts before. The parents of the children in *S v S and RCL* Div Jur 2009 No. 213 enjoyed shared custody, care and control. The Mother successfully applied to remove the children from Bermuda. However, it would appear from a reading of that case that Wade-Miller J determined on the facts that, notwithstanding shared care and control, the mother was the primary carer of the children in issue. Hence Wade Miller J placed great weight on that factor in reaching her decision.

27. One of the considerations that these two recent English cases cited by Mr. Richards bring to the table is a requirement of the focus by the trial judge on the infinite varieties of ways in which parents provide care for their children as opposed to the labels attached to the care provided by the parents. In *K v K (Relocation Shared Care Arrangement)* Thorpe LJ stated that he was in no doubt that the guidance in *Payne v Payne* is posited on the premise that the applicant is the primary carer. Mr. Richards submits that our jurisprudence to date has been predicated on the applicant being found to be the primary carer.

Thorpe LJ went on to explain the historic content in which focus was put on the primary carer by reference to *Poel v Poel* [4] which predated *Payne v Payne*:

> "In 1970 when *Poel v Poel* was decided, the count's statutory power was to make custody orders and access orders. Granting custody to one parent and care and control to the other was judicially criticized. Equally it was said that custody should not be awarded jointly to both parents, save in exceptional circumstances. So the ratio of the court was that, while the welfare of the child was paramount, the custodial parent should be supported in her choice of habitual residence… ."

He went on to say:

> "Of course that now seems archaic given our shift from parental power to parental responsibility introduced by the Children Act 1989 and given the more recent emphasis on the value to children of shared parenting were the parental relationship and the circumstances are favourable…The survival of the authority of *Poel v Poel* into this century, in my judgment depends crucially upon the primacy of the applicant's care…, if she is supplying so much she must be supported in her task precisely because the children are dependent on her stability and wellbeing. Once the care is shared there is not the same dependency and the role of each parent may be equally important. The Judgment in *Poel v Poel* considered only the position of the primary carer, and an earlier position where there is a pending contest as to who should be the primary carer. *Payne v Payne* does not anywhere consider what should be the court's approach to an application where there is no primary carer."

28. Thorpe LJ opined therefore that what is significant is not the label 'shared residence' (shared care and control) because this may represent no more than a conventional contact order (access order) what is significant is the practical arrangements for sharing the burden of care between two equally committed carers. He went on to say that in such a case the approach in *Payne v Payne* should not be used but rather the judge should exercise his discretion to grant or refuse by applying the statutory checklist in section I (3) of the Children Act 1989.

The question arises was Thorpe LJ making a statement of general application?

[4] See note 2 above; at paragraph 43

29. It is convenient to make an aside aside here. Mr. Richards correctly points out that the Matrimonial Causes Act 1974 (the Act) lacks specific provisions dealing with the removal of children from the jurisdiction. All that can be relied on in bringing and defending this application is section 46 of the Act which provides so far as is relevant:

(1) The court may make such orders as it thinks fit for the custody and education of any child of the family who is under 18;

(a) in any proceedings for divorce, nullity of marriage or judicial separation, before or on granting a decree or at any time thereafter…

(6) The power of the court under subsection (1) (a)… to make an order under with respect to a child shall be exercisable from time to time;

(7) The court shall have the power to vary or discharge an order made under this section or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended.

30. The paucity of these provisions impose in the judge a wide discretion in relation to incidents of custody, care and control and relatedly applications for removal from the jurisdiction must fall to be determined therein. This relegates our law to the annals of the arcane and archaic in comparison to the law in England and other progressive jurisdictions.

31. It also demonstrates that gaps exist in family law in Bermuda because we have a Minors Act 1950 (not yet repealed) which for all practical purposes has been supplemented by the Children Act 1998. The Children Act has as one of its primary purposes abolishing the distinction in law between children born outside the bonds of wedlock and those born within a marriage. The Children Act also sets out very forward thinking provisions inter alia protecting children from abuse and concerning the treatment of overseas orders. Both the Minors Act and the Children Act referred to the welfare principle.

32. What is relevant for our purposes is that section 4 of the Children Act defines parental responsibility; section 6 establishes the welfare principle, neither of which by inference applies to removal from jurisdiction cases being decided under the Matrimonial Causes Act.[5]

33. I am left therefore to consider this case in light of the English authorities that specifically incorporate not just the welfare principle but a statutory welfare check list as guidance. In particular the English Court of Appeal cases, although not binding on our Courts are treated as persuasive authority. While the welfare principle has clearly guided our courts historically, strictly speaking the English statutory checklist is not binding on a judge in Bermuda. There is clearly a need in Bermuda as there was in England at that time to

[5] see section 36 G

restructure the framework of the Courts to facilitate management of family proceedings.[6] This necessarily means sweeping legislative reform is needed.

Does *Payne v. Payne* have any relevance to cases in which the parents share equally in the care of the child?

34. Moore-Bick LJ and LJ Black indicate in *K v K (Relocation Shared Care Arrangement)* that the guidance in *Payne v Payne* should not be swept aside as readily as Thorpe LJ seems to have suggested. They indicate that the legal position comes down to the one legal principle; the welfare of the child, and the guidance as is relevant to the important factors in the case.

Moore-Bick had this to say:[7]

> "I accept, of course that the decision in *Payne v Payne* is binding on this court, as it is on all courts apart from the Supreme Court, but it is binding in the true sense only for its ratio decidendi. Nonetheless, I would also accept that where this court gives guidance on the proper approach to take in resolving any particular kind of dispute, judges at all levels must pay heed to that guidance and depart from it only after careful deliberation and when it is clear that the particular circumstances of the case require them to do so in order to give effect to fundamental principles… having considered *Payne v Payne* itself and the authorities in which it has been discussed, I cannot help thinking that the controversy which now surrounds it is the result of a failure to distinguish clearly between legal principle and guidance."

35. I take from this that cases in this area are fact specific and that nothing can substitute the use of guidance provided by the authorities on the inquiry into the facts. What clearly must be done by the Judge is weighing up the factors that are considered to be relevant and accessing the impact of them on the welfare of the child.

He went on to join in a warning against endorsing a parody of the decision. He then had this to say:

> "As I read it the only principle of law enunciated in *Payne v Payne* is that the welfare of the child is paramount; all the rest is guidance. Such difficulty as has arisen is the result of the treating that guidance as if it contained principles of law from which no departure is permitted. Guidance of the kind provided in *Payne v Payne* is of course very valuable both in ensuring that judges identify what are likely to be the most important factors to be taken into account and the weight that should generally be attached to them. It also played a valuable role in promoting consistency in decision-making. However the circumstances in which those difficult decisions have to be made vary infinitely and the judge in each case must be free to weigh up the individual factors and make whatever decision he or she considers to be in the best interest of the child. As Hedley J said in *Re*

[6] See Overview Children Act 1989, wwwrcpsych.ac.uk accessed July 2013

[7] At paragraph 86

Y(Leave to Remove from Jurisdiction) the welfare of the child overbears all other considerations, however powerful and reasonable they may be. I do not think that the court in *Payne v Payne* intended otherwise."

36. I think that what LJ Moore-Bick is conveying is simple and straight forward; that even in a case where a parent is a primary carer and has good reasons to leave the jurisdiction and may suffer severe disappointment if not granted leave to remove the child, the removal must nonetheless be conducive to the welfare of the child.

37. In *K v K (Relocation Shared Care Arrangement)*, Black LJ explained that while he arrived at the same conclusion as Thorpe LJ had his reasoning differs. I must say that I find the reasoning of Black LJ to be exceptionally helpful. It coincides with the reasoning of Moore-Bick LJ. He stated that he would not put *Payne v Payne* so completely to one side as it may not be without significance more generally. Black LJ did not endorse the view expressed by Hedley J that the case of *Re Y (Leave to Remove from Jurisdiction)* fell outside the ambit of well-settled authorities in the area of the law under consideration.

Black LJ's invaluable opinion is stated as follows (in two admittedly lengthy quotations)[8]:

> "The first point that is quite clear is that, as I have said already, the principle – the only authentic principle – that runs through the entire line of relocation authorities is that the welfare of the child is the court's paramount consideration. Everything that is considered by the court in reaching its determination is put into the balance with a view to measuring its impact on the child.
>
> Whilst this is the only truly inescapable principle in the jurisprudence, that does not mean that everything else – the valuable guidance – can be ignored. It must be heeded for all the reasons that a Moore-Bick gives but as guidance not to rigid principle or so as to dictate a particular outcome in a sphere of law where the facts of individual cases are so infinitely variable. Furthermore the effect of the guidance must not be overstated. Even where the case concerns a true primary carer, there is no presumption that the reasonable relocation plans of that carer will be facilitated unless there is some compelling reason to the contrary, nor any similar presumption however it may expressed."

Black LJ went on to demonstrate that *Payne v Payne* remains a valuable authority in applications to remove a child from the jurisdiction. He states:

> "*Payne v. Payne* therefore identifies a number of factors which will or may be relevant in a relocation case, explains their importance to the welfare of the child, and suggests helpful disciplines to ensure that the proper matters are considered in reaching a decision but it does not indicate the outcome of a case. I do not see Hedley J's decision in *Re Y (Leave to Remove from Jurisdiction)* as representative of a different line of authority from *Payne v Payne*, applicable were the child's care is shared between the parents as opposed to undertaken by one primary carer; I see it as a decision within the frame work of

[8] at paragraph 141-145

which *Payne v Payne* is part. It exemplifies how the weight attached to the relevant factors alters depending on the facts of the case.

Accordingly, I would not expect to find cases bogged down with arguments as to whether the time spent with each of the parents or other aspects of the care arrangements are such as to make the case a '*Payne v Payne* case' or "*Re Y (Leave to Remove from Jurisdiction)* case', nor would I expect preliminary skirmishes over the label to be applied to the child's arrangements with a view to a parent having a shared residence order in his or her armory for deployment in the event of a relocation application. The way in which parents provide for the care of their children, are and should be, infinitely varied. In the best of cases they are flexible and responsive to the needs of the children over time. When a relocation application falls to be determined, all of the facts need to be considered."

38. I accept as very persuasive the views expressed by Black LJ. In doing so I must reject the view of Mr. Hedley J's dicta that influenced Mr. Richard's submission that the principles enunciated in *Payne v Payne* only apply in cases where the applicant has care and control or is the primary carer. *Re Y (Leave to Remove from Jurisdiction)* and *K v K (Relocation Shared Care Arrangement)* both reiterate that there is only one principle that applies and that is that the welfare of the child is paramount. Everything that can be gleaned from the authorities is guidance, which should not be wholly disregarded.

39. Thorpe LJ posed certain questions in paragraph 40 in *Payne v Payne* that he termed discipline which in the circumstances of *K v K (Relocation Shared Care Arrangement)* he suggested should not be utilized, instead he indicated that the statutory checklist in section 1 of the English Children Act should be used. I believe that Mr. Richards had read too much in that, and has taken that to mean that the guidance provided by the *Payne v Payne* line of cases cannot be utilized.

40. In my Judgment what these two authorities establish is that the decision to grant or refuse leave to remove the child from the jurisdiction comes down to the weight to be given to relevant factors in considering the welfare of the child. Disciplines or guidelines provided by authorities ought properly to be considered by a judge. However, a judge must be free to assess the facts and circumstances of the particular case without fixed and rigid disciplines, without presumptions and without mechanistic application of any guidance provided in the authorities.

How relevant is a consideration of 'the course of less detriment'.

41. In his submissions, Mr Richards, relying on the dicta of Hedley J urges the court to adopt 'the course of less detriment' for K. For completeness, I should state that my general observation of the authorities leads me to say that as a matter of law this phrase should not be taken to be synonymous with, or a substitute for the only legal principle, which is of course, the welfare of the child.

42. The ‘course of less detriment’ may be a primary consideration based on the factors to be weighed in a particular case. In *Re Y (Leave to Remove from Jurisdiction)* Hedley J found that if the child were removed from the jurisdiction he would lose contact with the language and culture that he most identified with. However, it should be observed that not every case will consist of circumstances amounting to *detrimental* loss to a child.

43. There is likely to be some loss in most cases for the child or children in issue. The loss of direct contact with one parent for example cannot be over looked. A decision, however, may turn on the existence of factors that for example indicate a positive gain for a child in some other way in another jurisdiction which, on balance may go some way to mitigate the loss. Proof of detriment however can be a relevant factor to weigh in the balance in determining the welfare of the child.

44. This necessarily calls for a consideration of the factors raised by each of the parties.

THE SOCIAL INQUIRY REPORT

45. The Social Inquiry Report (SIR) is dated 22nd March 2013. It was authored by Mrs Charles the court social worker. Both parties have criticized the report or the report writer for various reasons. Mrs Charles was subjected to considerable cross-examination.

46. Counsel for the Father is critical of the report because in his view Ms Charles has stated in it conclusions that she has reached without giving a basis in the evidence or research or other reasons for her conclusions. He criticizes the report for being devoid of any real analysis. Further he criticizes Mrs Charles for relying on out of date research.

47. The Father’s case essentially is that Ms Charles has indicated in her report that a blended family is the better option for a child than being reared by a single father. This was indeed the evidence of Ms Charles based as she said on her years of experience in Bermuda. The Father put an American article that indicated the converse to Mrs Charles; however Mrs Charles strenuously defended her view.

48. Mr Richards grilled Mrs Charles on conclusions that she had drawn and illustrated to her that much of her view was based on the test applied in the case of *Payne v Payne* case, ie a situation where the mother is the primary carer. He submits that notwithstanding her finding that the child views the father as being the stabilizing influence in his life, Mrs Charles’ conclusions have been drawn with a clear bias for the mother.

I must admit that of all the reports and evidence given by Mrs Charles in cases before me, the report in this case has not been very helpful primarily for the reasons indicated by Mr Richards. Mrs Charles was unable in my view to redeem her position by attempting to reassure the court that she had made the relevant assessments “in her head” but had not put them into writing in the report. This is not the standard that she has set in the past, and I must say that it falls short on reliability for that reason.

49. In all the circumstances it would not be appropriate for me to rely on the conclusions and recommendations set out in the report. Indeed it is difficult to justify picking out the plumbs and leaving the duff behind. Some evidence given by Mrs Charles she stated as arising from her considerable experience. Where that is relevant I set it out below. I did not interview the child. I saw that as a responsibility of the court social worker. I also believe that it would not help in the circumstances relating to this child. However I should point out what I believe is uncontroversial that is contained in the report.

50. There is no dispute that everyone is of the view that the child is considerably conflicted about which parent in the circumstances he wants to reside with. I also believe that there is no controversy that the child will need some professional help in making an adjustment to his inevitable separation from one of his parents should leave be granted to remove him from Bermuda, or should leave be refused and his mother departs for Australia without him. The emotional wellbeing of K is of paramount concern to this court.

51. Mr Richards has included in his submissions content based on matters that have transpired since the hearing in this matter concluded. Developments since the hearing were brought to the Registrar's attention and she directed the parties that if they wished to have those matters taken into account then an appropriate application ought to be made to bring the matter back before the court. Neither party sought to take that step. In the circumstances I am unable to consider those matters that Mr Richards has included, or communications on the topic from the Mother and the court social worker.

52. I have considered whether it would assist the court or be in the interest of the child to order another report. I have concluded that it is not likely that a further report will assist the court and that a further delay in reaching a resolution in this matter militates against the welfare of the child. Accordingly I have assessed this case based on the evidence.

THE EVIDENCE

Decision Making

53. The Father makes several complaints about the Mother. Principle among them is that the Mother is a bad decision maker. He complains that the Mother put a great deal of pressure on him to have K returned from France to Bermuda after K spent a Christmas holiday in Bermuda. The Father suggests that the Mother manipulated the situation by having the child examined by a child psychologist. Throughout his evidence the Father reiterated that he returned with K to Bermuda after one year in France due to the pressure applied by the Mother but also because he thought it was in the best interest of K to be with both parents.

54. I must admit that I fail to understand the Father's complaint. The Mother did not force the child's return. The Father said that he took time in making the decision to return to Bermuda and did so when it was in the child's best interest. It would seem to me that each parent saw him or herself as acting in K's best interest. This in my view does not

reflect negatively on the Mother's decision making anymore that it can reflect negatively on the Father's.

55. The Father complains that the Mother's position has flip-flopped as she now seeks to remove the child from Bermuda. He goes on to indicate matters that suggest that the Mother expects K to move depending on her whim. He suggests that the Mother wanted the divorce; wanted the child to go to France with the Father, then wanted him back in Bermuda and now wishes to take him to Australia. The Father blames the Mother for wanting to pull the child 'from pillar to post'.

56. Again it seems to me that the Father is blaming the Mother for some decisions that she did not make alone. Each party was represented in the divorce. The agreement providing the Father with leave to remove K from the jurisdiction was entered into by each parent by consent, with each having had the benefit of independent legal advice. As observed, the return of K to the jurisdiction appears to have been mutual or at least motivated by the Father. I fail to see why the court should hold that against the Mother. The focus of the court is to consider the possible or probable effect of this additional change of residence on K.

57. The Father suggests that the Mother packed up house and home including K's personal belongings and had them sent to Australia to place pressure on the court to accede to her application. He contends that she had made an earlier application to the court to prevent the temporary removal of the child from the jurisdiction by the Father for the same reason.

58. The suggestion that the Mother tried to place pressure on the court to decide in her favour would ordinarily not deserve comment by a judge. After all, persuasion is what each side in an adversarial system of justice attempts to do before a judge. Provided that this is done within accepted bounds of advocacy no complaint can be made. In this case it is quite clear that the Father complains about something that he through counsel has resorted to himself.

59. The Father filed an affidavit dated 24th April 2013 well after the Social Inquiry Report had been filed with the court wherein he raised for the first time an allegation that the Mother was suffering with a named personality disorder. In said affidavit he asserted that a friend of his who has a background in psychology suggested the disorder to him. On that basis the Father exhibited to the affidavit a downloaded Wikipedia print out purporting to explain that disorder. The Father obtained an order before another judge for psychological reports on the parties, which as events turned out could not be obtained at a reasonable cost or within a reasonable time frame. The order had to be abandoned in the circumstances as it could not be complied with.

60. The Father was cross examined by the Mother during the hearing about the source of the suggested disorder. I find as fact that the evidence provided clearly indicates that the friend upon whom the Father relied had no basis for making such a determination of the Mother. The Mother's father filed an affidavit in support of the Mother's case and

categorically stated in it that he is unaware of any mental disorder in the Mother. He further states that there has always been a fierce rivalry between the Mother and her twin sister. His belief is that the twin and K's Father have made an outrageous suggestion, and that it was made deliberately.

61. I find the allegation of a mental disorder to have been baseless. I would have come to this view without the maternal father's evidence; however that evidence fortifies my view. I find that this wasted exercise of requesting psychological reports was based on nothing more than clutching at straws. It amounts to an attempt by the Father to influence the court to decide an application in his favour, but it has also affected the Mother's position by delay. Resorting to this sort of tactic without a proper factual basis is not helpful and should be discouraged.

Finances

62. The Father has expressed concerns about the Mother's ability to manage her finances. He cross- examined her about funds that were provided to her from the financial settlement after divorce, suggesting that she misdirected those funds and consequently ran into difficulty in financing the former matrimonial home. The Mother denies wasting the funds. The Mother no longer lives in the property and has admitted in her evidence that she has had to work with the bank because she has been unable to keep up the mortgage payments. She has a substantial mortgage debt.

63. The Mother's evidence is that she moved out of the home to facilitate a sale, and did not rent it for the same reason, although she had sought short term rentals to no avail. Nonetheless no sale has materialized. She has expressed the view that she was caught out financially as many have been in the current financial climate with a mortgage based on an inflated valuation that is unsustainable now.

64. Her evidence is that since she is not earning an income, she has been unable to meet the mortgage. She has however expressed the intention to honor her commitment to the bank once she is employed in Australia. The Mother states that had the removal application taken 3 months, as she had expected, and not 10 months she would not be in the financial position that she is now in. One obvious reality is that she will be obligated to the mortgage whether she remains in Bermuda or takes up residence in Australia. If a sale takes place the likely equity in the property will leave her with a far less albeit substantial commitment for some time to come.

65. One can have some empathy for the predicament that the Mother is in on her evidence; many have come before the courts in similar straits. The mother may well have believed that the removal application would take only a short time. She may not have anticipated that such applications have a proper course to follow. There was delay caused when action was taken by her to speed up the Australian home study and the court social worker had to find another individual to carry it out.

66. There was also delay in obtaining the social inquiry report (a sad but real feature in family law cases in Bermuda). Delay may be caused for a variety of reasons. While I have not concluded that delaying this matter was the Father's intention, the fact is that ultimately there has been inordinate delay in the matter. Judges are always mindful of the time sensitivity of removal applications. Delay in my view is not conducive to the welfare of K. In England there is now a strict regimen for moving this type of application through the courts without delay. Such a case management scheme lends itself to removal of the vagaries of our practice.

67. The home study report obtained from Australia indicates that the Mother's husband Mr. N. is gainfully employed, provided bank statements up to October 2012 and a current withdrawal slip (February 2013) showing a balance of $20,490 odd dollars, some $9,000 less than was in his account in October. He did not provide further statements that were requested. The home study indicates that his salary is more per month than his expenses; he can make commissions on sales and may be entitled to tax breaks. He has not been adjudicated a bankrupt. I accept this as evidence of financial viability.

68. I can understand that the Father is not impressed with the work that the Mother's husband Mr. N. is now doing as he is earning less than his last job reportedly paid in Bermuda. The Father's affidavit evidence indicates that he is skeptical of Mr. N's earning capacity as well as the reliability of his employment history in Bermuda. I am satisfied however, that the Australian home report exhibits letters of proof of the husband's long service to two substantial companies in Bermuda and one foreign company at a management level. All of these indicated to the report writer consistency, reliability and stability in the workforce; all of which I find proved.

69. The Father complains that the Mother has failed to adhere to the court order requiring her to file evidence of her financial circumstances. The Mother's evidence is that she offered the information to the court social worker Ms Charles, but that Ms Charles did not require it. The Mother's evidence is that she had an indication that she would be employed in a business run by her husband Mr. N's family. She has now lost that immediate prospect however she believes that she will have no problem finding employment and employment by Mr. N"s family business is still possible. The Australian home study report supports the Mother's evidence the she was offered work through the family business.

70. I take the Mother's evidence to mean that she did not think that she was meant to file the financial information with the court. In my view the Mother should not have thought the decision rested with the court social worker. Court orders of course must be complied with, and had the Mother filed the financial information with the court or the social worker, for that matter, she would not be facing criticism for her omission now.

71. The Mother had not complied with an agreement after divorce to receive her settlement money into a joint account with a named third party. This requirement was motivated she stated by the Father as he was still attempting to control her finances after divorce. The Father believes that she still has that money or wasted it without paying the mortgage.

The Mother asserts that she spent the major portion of it on the mortgage, condo fees and the care of K. A small portion she states is in an account in Australia.

72. The Father contrasts his financial position with that of the Mother. He is a partner in the business in which he is employed. He asserts that the business is successful, that he is settled in his accommodation, that he manages his financial obligations and readily meets K's financial needs. He argues that he presents a clear picture of financial security for K. The Father's position cannot be faulted. He does have seasonal work; however there has been no evidence that that impairs his ability to meet K's needs. Beyond a salary he enjoys and yearly bonus.

73. Financial stability of course is important to the welfare of a child. However as I have found above Mr. N's financial circumstances are adequate for his family, and the Mother has good prospects for finding employment in Australia.

74. As I see it, the purpose of the exercise of ordering the financial information was not to poke into the Mother and her husband's financial affairs generally. The financial information requested in this matter would have assisted the court in determining whether K would be safe and have his needs met by the Mother and step-father, and that K would not be dependent on the vagaries of family and friends or the state for his support.

75. I am satisfied that the Mother's husband Mr. N is now employed and has rented a home in which he resides and in which it is intended that the Mother and K will reside. The Australian home study report indicates that the home is well suited to the safety and comfort of the mother and K. continues to seek higher paid employment for which he has excellent references but nonetheless is presently capable of supporting his family. I am satisfied that the Mother intends to work and has at least one prospect for employment that may work in her favour in Australia. I am further satisfied that the Mother has some funds in Australia, although the quantity is not known. In all the circumstances concerns of the risk to K of the Mother's impecuniosity is not a factor that I would rate as highly significant in the balancing exercise.

Risk of Disobeying Access Order

76. Counsel for the Father asserted by cross-examination that having disobeyed the court order regarding her finances, the court ought to infer that the Mother will not comply with any access order that may be made if leave to remove K is successful. The Mother refutes the implication. She asserted her awareness of the existence of international conventions regarding corporation with respect to child abduction, and stated that she does not intend to keep the child from having access to his father.

77. This concern is of course high on the agenda of relevant factors to take into account. The truth is that a court can never be certain how a parent will behave once an order is made by a court. It would be relevant in my view to look at evidence of how the Mother has conducted herself with the Father with reference to the child. What I am able to find as fact is that when K came to Bermuda from France for access to the Mother, she returned

him to the Father as required. Further since K's return to Bermuda and throughout the period of shared care and control there has been no complaint of contumacious refusal by the Mother to return K to the Father.

78. I have not heard any cogent evidence that suggests other reasons why the Mother would not comply with access if provided leave to remove K. I find that the Mother is aware that she would be subjected to arrest in Australia or elsewhere if she violates any order made by the Bermuda Court concerning access by K to his father. Having had the opportunity to judge the Mother as I have, I do not believe that failing to comply with an order to produce financial proof equates with a credible risk that the Mother will keep K from his father if leave is granted to remove K from the jurisdiction. I am aware that this offers scant comfort to the father but I believe the risk of absconding is very low indeed.

79. The Father asserts that the Mother's decision to move to Australia was made within a week of being made redundant. He also asserts that the Mother's husband was not made redundant from his former employment but that he voluntarily left his job. In support of that allegation the Father relies on a letter from the husband's former employers that speaks in terms of a voluntary departure from the company. The Father's concern is that this move was a hasty decision made without regard to the welfare of K.

MOTIVATION FOR APPLICATION

80. I believe that the Father relates what he determines to be the haste in departing from Bermuda to a desire in the Mother to separate him from K. The Mother denies that the decision to move to Australia was a hasty one or aimed at separating K from his father. Her evidence is that she and her husband, Mr N, had been discussing the prospect of living in Australia for a long time, ever since they had visited there. They had not put a timeframe on the move but it remained a prospect for them. She said that the decision to put that prospect into motion was brought into focus once the husband was made redundant and then she was made redundant the week following.

81. The Mother's evidence is that her husband decided that he had better prospects for employment in Australia. Further, that he wanted to move to Australia to be closer to his parents and family. The Mother denies that the letter of 2nd June 2012 from Mr. N's employers meant that he was not made redundant; rather that it indicates that he had decided to return to Australia, having been made redundant.

82. The Mother explained the circumstances of the husband's redundancy. The company for which he had been employed had been negotiating for the purchase of another company. If the sale were to go through, one of the principles would leave. The negotiations fell through, the company had to realign, the principle stayed on and her husband had to go. All was understood and amicable and the husband received his redundancy pay. He apparently took advantage of an opportunity to forward a container of household and personal items to Australia. Against this context the Mother agrees that the move from the home appears to be sudden.

83. I have considered the Mother's evidence on this point, and I find on the balance of probabilities that she has characterized the decision to move to Australia in a plausible way. Having had the opportunity to observe her giving her evidence I did not get the impression that she was being untruthful about this matter. Does this indicate a risk that the Mother is acting to separate K from the Father? In similar circumstances another couple may have taken a different approach to their redundancies or to relocation; however I have to judge this application on the evidence before the court.

84. I am not convinced that the Father has shown any untoward reason why the Mother would want to interrupt the relationship between him and K. The fact that the Mother stated in evidence that she wanted the child returned from France but not the Father, I took as a glib statement showing her sentiment at that time. Again, looking at the facts, the shared care arrangements had been working.

85. The only break down in communications between the parents appears to have happen in relation to mediation, and that only surfaced in so far as is relevant, after she informed the Father of the intended move. It was in those circumstances that she indicates that the father became intractable, and refused to discuss the prospects of the move with her or with K. I find that this evidence simply does not indicate a risk that the Mother intends to disassociate K from his father. Again I rely on my earlier finding in support of the view.

86. The Father's motivation for resisting the application is based no doubt in his natural love and affection for his son. His concern that the mother has a psychological problem I have found to be wholly misplaced. According to the Mother's evidence the Father refused to discuss the prospect of the move to Australia with his son at all. The Mother is of the strong view that the Father's intractability in that regard has caused discomfort and confusion for K because K wants to talk about it and have his father talk about it with him.

87. The Mother denies that she has convinced K that he will be going to live in Australia. She said that her approach was to inform the child of her intended move, inform him that she wished to take him but reiterate throughout that the decision lay with the judge in the case. The Mother has been severely criticized by counsel for the Father for discussing the matter with K and for that matter with the school counselor. I find this a clear indication that the Father disapproved of discussing the possible move with K.

88. Mr Richards also criticized the Mother for packing up K's belongings and sending them to Australia and the possible effect on K. I find that the Mother could have dealt with K's belongings in a different way, both to avoid the possibility of any sense of loss and to prevent an impression of a foregone conclusion. Putting that criticism aside, however, I find that the Mother's evidence indicates that she has had the child's best interest at heart by broaching the topic of the possible relocation to Australia with K as and when he has been curious about it or sought information.

89. I find that K is 8 years old and is by all accounts an intelligence boy. He has in my view the moral right to know that he might possibly be moving to Australia or that his Mother

may possibly move there without him. The welfare check list to which the English authorities speak and the practices of this court show that there is a growing recognition of a child's right to be heard on any serious issues that affect them such as this one.

90. It is in this context that I question why the Father would fail or refuse to discuss the matter with K rather than just indicate his disapproval of the possibility. Preparing a child for any possible major change in his living circumstances involves a process. One can only hope for a balanced process if the child's best interests are to be served. The process does not mean trying to persuade the child one way or the other but rather giving the child an opportunity to be heard.

91. I understand that the Father has made a substantial investment in a business in Bermuda. I accept his evidence that he returned to Bermuda for K so that he could have the benefit of living with both parents. I accept that as laudable. However it is clear on the evidence that the Father did not appreciate that K needs to know that he can be open with his father and his father will be sensitive and responsive to his concerns. This did not necessarily require a commitment either way.

92. I am left with the strong impression on the evidence and so to conclude that the Father is not as intuitive about the emotional needs of K, and is not as flexible as the Mother in meeting challenging emotional circumstances that the child faces. I have not found however that the evidence indicates that the Father has put his business interest first in regard to his opposition to this application.

Sporting Activities

93. The Father's evidence is that there is nothing to be gained by K in the move to Australia. He asserts that there are sporting activities available in Bermuda that K enjoys with his father the benefit of which is not available to him in Australia. I do not think that much turns on the type of sporting or outdoor activities available in Bermuda as opposed to Australia. The Father's concern is that he and K have enjoyed so much outdoor activities together that he is worries that the Mother will not involve K in activities but will encourage too much television watching, a criticism he has made of her to date. The mother denies a lack of interest in having K involved in physical activities. She demonstrates an awareness of his sporting activities and indicated that she encouraged K's participation in martial arts and motocross.

94 .I accept that the child will miss being involved in sporting activity with his father. However the mother has made it clear in her evidence that she is aware of sporting opportunities available in Australia some of which she has discussed with K for which he has shown enthusiasm. In addition the Australian home study report indicates that Mr. N is athletically inclined running and/or working out in a gym on a daily basis. He is shown by a medical report to be mentally and physically fit and capable of providing the needs of a young family.

95. The Australian home study indicates that Mr. N was active with his own son (now teen aged) in sporting activities when the son was growing up. That son has indicated that he would be happy to be involved with K in sport should he come to Australia. I was impressed by the Mother that she maintained an interest throughout K's life in getting him involved in outdoor activities. I accept that this all bodes well for K should he go to Australia.

Education

96. The Father's position is that the education standard is Australia is not as good as or no better than in Bermuda, so there is no discernible benefit in K being educated in Australia. He contends that there is no proof that the Aveley School which has been chosen for K to attend is better than the school he now attends in Bermuda. Counsel submits that going to Australia means K will have attended 3 schools in four years. That he will be the new boy in school and will probably be teased and bullied because he is different. I take that to mean teased because he is British or Bermudian as opposed to Australian. He further argues that K needs to continue to receive the benefit of counseling with his current school counselor.

97. The Mother's evidence suggests that due to the reversal of the seasons K will in fact benefit from the repetition of a part of a terms work that he has already completed. This she argues will ease K's transition into the new school. I do not think that the educational standard available in Australia is less than comparable to Bermuda. Further I disagree with Mr Richards that this is a case where the education in Australia must be shown to be superior to that in Bermuda.

98. I accept Mrs Charles expressed view on that aspect of her knowledge and experience. According to her in the developed world we live in a global society. The mother points out that K is quite adaptable. He will not be confronted with a fine language barrier as he was in France. I have heard no evidence that suggests that any meaningful distension exists between the curriculum of primary school in developed English speaking nation. I agree that there is nothing to distinguish between the curriculums of primary schools in developed nations.

99. It is inevitable that contact with school friends in Bermuda will also be lost and possibly not regained, however that is a reality for school children period, and in Bermuda this is even more a reality because it goes with the mobility of our expatriate population with school aged children; the children leave Bermuda when the parents employment terminates.

100. I am mindful of the fact that school represents for a child, stability beyond the familiarity of mere bricks and mortar. School friends are important to the development of self-esteem and the acquisition of social skills. However in my view high on the list of matters to be taken into consideration when evaluating the welfare of a child in this regard is the extra school support that a child receives from a parent whether in conjunction with the school or in the home.

101. In evaluating the evidence of the parties I find on the facts that the Mother has been the more proactive parent in both regards. She is the parent that initiated counseling for K by the school counselor. She took the initiative to consult the counselor when the child was tied to the monkey bars at school, slapped and otherwise bullied. She maintained contact with the counselor regularly. The Father's evidence amounted to wanting to wait and see if anything else materialized out of the incident by the bully involved. Other than that the Father was content to leave resolution of the bullying incident to the Mother.

102. Further on the mother's evidence it took her effort to bring K up to par with education standard of his class in Bermuda when he returned from France. This was not disputed by the father and I accept as reasonable founded on the evidence that K had fallen behind as a result of being immersed in all French instruction school.

103. The Mother also kept the counselor apprised of the proceedings before the Court so that K could speak freely and confidentially with the school counselor about his concerns. I can only assume from the nature and content of Mr Richard's sustained cross-examination of the Mother on that issue that the Father distrusted the integrity of that process. To the extent that he did mistrust the process it was to K's detriment in my estimation.

The Care Plans

104. High on the list of considerations for the court in this application is the consequence to K should leave be granted of the loss of shared care by his father and loss of direct contact with his mother's family; in particular his mother's sisters and his cousins. The Father argues that contact with his family will also be lost. The Mother's position is that K will not entirely lose those contacts as she proposes that he can travel to Bermuda for two substantial school holidays.

105. Whatever decision is made, K will sustain the loss of substantial contact with one parent or the other over an extended period of time. The social inquiry report indicates that the Father has been a stabilizing influence in K's life. This relates to the fact that K was in France with the Father. The report also indicates that this should not infer that the Mother is not a stabilizing presence in his life but rather that she is seen by K to fulfill his need for exploration and adventure. The question arises what value can be put to the social worker's assessment particularly as she has given little to substantiate her view.

106. The mother in her evidence rejected that statement by Mrs. Charles that the Father has been the stabilizing influence in K's life. Her evidence is that for the first fifteen months of K's life the Father was at sea and she solely had the care of K. She arrived in Bermuda in August of 2005 months before the Father arrived in Bermuda. Of course K may not have been made aware of this, the SIR does not reflect this either.

107. The mother raises various concerns about the Father's ability to provide for K on a full time basis. She cites the nature of the Father's business. Principle among her concerns is the fact that during the tourist season, that is, early April until the end of October the Father will be working long hours. She is concerned that the work is very demanding, has tight scheduling requirements and often requires the Father to be available to work on an impromptu basis on short notice.

108. The Father's evidence is that, when required he would rely on the Mother's family for assistance in caring for K in the circumstances outlined above. In his oral evidence he indicated that he had been in touch with a woman to whom he had been referred who could assist as a child minder. She lives very near his residence and has indicated a willingness to assist with K on short notice. Few further details were provided about this person, although an undated letter provides her name and address. She merely refers to herself as a caregiver.

109. The Father also provided the name of the mother of one of K's school friends. She indicates in her letter of the 17th May 2013 that her child and K are long time class mates who travel from school together frequently, play and do homework together. She indicates that in the past she has assisted the Father with caring for K. She is not always available due to shift work but she asks her husband to assist in her stead.

110. The mother argues that the Father does not have a well thought out plan for assistance in caring for K when the occasion requires it. She expresses concern that K will not be assisted in school work and in consequential home work. Of her family, she states that it is her mother's intention to join her in Australia in the fall, so she will not be available to the Father in Bermuda. The Mother expresses concern that her younger sister will not be in a position to assist in any meaningful way with K as she is pregnant and will have her 3rd child shortly, is in full time employment and supports her husband in his business. Of her twin sister, the Mother states that she runs her own business and does not seem able

111. On the facts before me I have great reservations about the plan on the Father's part to put into place a reasonably sound support system for K. It is not just the parent seeking leave to remove the child from the jurisdiction that must demonstrate a reasonable plan to care for the child. Where care has been shared the parent resisting the removal application must also demonstrate that he or she has the ability to care for the child as a single parent where the application refused and the applicant leaves the jurisdiction.

112. One of my primary concerns is that the Father provided scant evidence of the person in his neighborhood upon whom he intends to rely in the event of an out of hours call out to work or overtime. He did mentioned her hourly rate and the fact that she cares for an elderly couple on a part time basis however I am of the view that more should have been provided. I was left with the distinct impression that the Father obtained the information at the last minute. In my estimation he has not made satisfactory inquiry into the person's history and reputation.

113. I do not know whether or not anyone else will be in her home when K is there, or if it is intended that the carer will only look after K in the Father's home. There is also the fact that with the school friend it may be the mother or it may be the father of the friend providing the care when needed. That amounts to three different people K will be relying on for care outside of family members. I find this plan to contain too many uncertainties which may prove confusing or unsettling for K.

114. What is more concerning however is the fact that the Father intends to rely on the support of the Mother's sisters. It is clear on the evidence that K has enjoyed the company of his aunts and his cousins. It is clear on the affidavit evidence of the Mother's twin that she enjoys the company of K and the Father and is willing to support K in any way that she can. The Father testified that K sees his maternal family on a weekly basis, sometimes several times a week. The Father's position is that the child is better off being supported by blood relatives. This of course is in direct conflict with the part of his care plan outlined above.

115. The difficulty in this case is that the court cannot ignore the fact that the Mother, the twin sister herself and their father all testify to the bad relationship between the Mother and said twin. How should the court assess this evidence? The twin sister relates the breakdown in the relationship to her disappointment that the mother and Mr N engaged in an adulterous relationship during her marriage with the Respondent, an accusation the Mother denies but which clearly stains the twin sister's judgment of the Mother.

116. The other evidence in the case[9] along with the Father's evidence however supports the conclusion that the bad relationship between the Mother and her twin sister has been long standing, sustained and harmful. The twins' father has attested to the continuing strife that it has caused in the family and to him. He characterized the relationship as being unhealthy, vindictive and hateful. These are strong terms and paint a picture of family dysfunction a high level.

117. In the circumstances I find that if leave to remove is refused, and the Mother leaves the jurisdiction to join her husband, and the Father relies on the sisters and in particular the twin sister for support with K, then a real risk exists that K will become aware of his aunt's negative feelings and comments about his mother in circumstances where the Mother will not be readily available to counterbalance any negative effect on him. This does not strike me as a case where the twin sister will be content that out of sight is out of mind. I find on the evidence that the twin sister's contempt for the Mother goes as deep as if not deeper than the twin's allegiance to the Father. The Father will in all events have to communication with the Mother regarding K. I have no doubt the he will discuss those matters with the twin sister.

118. This in all likelihood could result in either emotional pain to K or some estrangement from his mother as he is of an impressionable age. I find this particularly so in light of the Mother's evidence that K is a sensitive boy and is becoming aware of the estrangement. I am not suggesting that negative comments will be deliberately expressed directly to K,

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[9] Including an affidavit of petitioner's mother dated 9th May 2013; Affidavit of S. DeSilva

but the risk is a high one on the evidence that he may be so exposed. The Mother has testified that K has questioned why she was not present at her twin sister's birthday celebration for example.

119. I find on the facts that the dysfunction in the Mother's family is historic. It is the type of family discord that K will become aware of at some point in his life, probably soon rather than later. I believe that his mother is the best person to guide him through that quagmire. It is a delicate matter that should be handled in such a way as to preserve K's relationship with his aunts and cousins. However the welfare of K requires his relationship with his mother to be placed before his relationship with other family members. This is especially so in light of his need for emotional security. I am not convinced that in the circumstances the Father is best suited to this task.

120. I find on the facts that the Father has not established nor proposed regular contact between K and the Father's family. He has expressed an interest in his parents coming to Bermuda on holiday, and K has seen them on at least two occasions outside of Bermuda. I am not persuaded however that the contact with his father's family will be negatively affected if leave to remove K from the jurisdiction is granted.

121. The Mother argues that the child has established a good relationship with his stepfather over the three years they lived together with the Mother. He has remained in constant contact with him during the time the stepfather has been in Australia. The stepfather has a teen aged son who has expressed an interest in being a big brother to K. They have all been in constant contact via Skype since the stepfather's departure from Bermuda.

122. The Mother has indicated that she will have sufficient time before she commences fulltime employment to assist K with his transition into school in Australia. She testified to the fact that the Aveley School has a programme called 'e pals' where it is possible for K's new class in Australia to interact during school time with his class in Bermuda. Such a programme in my view would go some way to easing the transition. The Mother contrasts her plan with the estrangement that K experienced while in the Father's care in France. Her evidence is that K will be walking away from friends and family.

123. The Mother's evidence is that the school is walking distance from the home that they will be residing in. K is an outgoing boy who makes friends easily. She does not anticipate that he will have difficulty adjusting to a new school. She anticipates that K will become familiar with the new neighborhood in a matter of two or three weeks. The Mother has not visited the school however she had carried out research on it and appears very knowledgeable about it. I find in the circumstances an acceptable alternative to visiting the school.

124. The Mother will rely on her husband Mr. N to assist her with caring for the child. She also indicates that Mr. N's son when home from college would be willing to care for K as would be normal in a family unit. The Mother's evidence is that Mr. N and K have even shared meal times together when Skyping on a daily basis. I understand her to mean that

the transition to living in the home with Mr. N and his son will be easy for K. Mother has confirmed that she intends to facilitate similar contacts between K and his father.

125. I am impressed that the Mother is keenly aware of how to assist K to adapt if allowed to go to Australia. One the facts I find that notwithstanding that relocation is stressful on a child due to separation from one parent, that K's personality and his mother's plan to facilitate daily contact with his father will lessen the sense of loss that K may feel in the circumstances.

CONCLUSION

126. I have shown in my review of the law in the above cited cases that the paramount consideration for the court in this application is the welfare of K. I have reviewed the expressed concerns and submissions of the parties. I have given due weight to each of the relevant considerations as they relate to the welfare of K.

127. In arriving at my conclusions I have had at the forefront of my mind the guidance gleaned from the cases, which includes a consideration of the English welfare checklist referred to in *Re Y (leave to remove from Jurisdiction).*

Applying the law and guidance to the facts I have determined the following:

1 That the child requires emotional security and that the Mother is best able to meet the child's emotional needs.

2 I have further determined in the circumstances that there is a real risk that the child may suffer emotional harm or disaffection from his mother in light of the maternal family dysfunction where the application refused and the Mother removes to Australia without K.

3 That the Mother has been the parent who has best supported the child's educational needs, and the school chosen in Australia is suitable to the child's needs.

4 That while the Father, subject to my other findings, is otherwise capable of meeting the child's needs, his care plan exposes the child to too many uncertainties.

5 I have determined that Mr N the stepfather of K is settled in a home and is gainfully employed. He is financially stable and capable of meeting the Mother and K's needs until the Mother has found employment. Also that the Mother has real prospects of employment notwithstanding the delay in concluding this application.

128. In all the circumstances I find on the preponderance of the evidence that the welfare of the child is best met by granting the Mother's application to permanently remove K from the jurisdiction. I have deemed that time is of the essence in applications of this nature.

This has been particularly so in this case, where further delay in my opinion would be detrimental to the child.

129. In the circumstances I took the opportunity of disseminating to the parties ahead of this judgment an order so that they would be apprised without further delay of the ultimate decision reached. I further gave directions in that order to facilitate a transfer of K's passport to the Mother. Additionally I thought it best to give the parties an opportunity to settle all issues relating to access by the child to the Father. I set a date for the matter to come back before me so that a final order can be made regarding access.

Dated this 7th day of August 2013

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Charles-Etta Simmons
Puisne Judge