



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2021: No. 280

BETWEEN:

PMC

Applicant

and

VNL

Respondent

RULING

Date of Hearing: 7 June 2022

Date of Ruling: 22 June 2022

Appearances: Adam Richards, Marshall Diel & Myers, for Plaintiff
Respondent in Person

RULING of Mussenden J

Introduction

1. This is an application by the Applicant (the "**Father**") for a summary return order in respect of his daughter ("**PJ**" or the "**Child**") for her return to Bermuda from Texas, USA. The child is the daughter of the parties (the "**Parents**"). The Child was born in 2006 and is currently 15 years old. In essence, the Father seeks confirmation of the Court's earlier order to enable the summary and immediate return of the Child from being in Texas with her mother, the Respondent (the "**Mother**").

2. In the Court proceedings before me, the Father was represented by an attorney. During the course of these proceedings and prior to the hearing, I granted various adjournments so that the Mother could obtain legal advice and retain an attorney if she so wished. At a preliminary hearing on 14 April 2022, the Mother explained that she endeavored to retain an attorney but made a decision not to proceed with an attorney and to represent herself. I gave further directions for the hearing of this matter which included that submissions on behalf of the Father were to be filed and served by 29 April 2022 followed by the Mother filing any submissions if she wished. The reason for directing sequential filing of submissions was to ensure that the Mother had a full understanding of the Father's legal and factual bases prior to having to draft and file her own submissions.
3. The Summons dated 7 March 2022 seeks the following relief:
 - a. For a declaration that the Bermuda Supreme Court has jurisdiction to make determinations as they relate to the custody, care and control, and access of the Child;
 - b. For a declaration that the Child is ordinarily resident in Bermuda;
 - c. That the Child shall be immediately returned to the jurisdiction of Bermuda. The Mother shall pay the associated travel expenses affiliated with this return;
 - d. Following the Child's return to Bermuda, the Mother and her agents shall be prohibited from taking or sending the Child out of Bermuda without the prior consent of the Father or further Order of the Court;
 - e. That the Father be awarded sole care and control of the Child with reasonable access to the Mother; and
 - f. The Father shall have sole custody of the Child.

Ex Parte Order dated 20 October 2021

4. The Father caused an Originating Summons dated 19 October 2021 to be issued in this matter in respect of the return of the child to Bermuda. He relied on his first affidavit sworn 16 September 2021 ("**Father1**"). The Father later relied on his second affidavit sworn 25 February 2022 ("**Father2**") for this hearing.
5. On the 20 October 2021, having heard submissions on behalf of the Father on an *ex parte* basis, I granted Orders (the "**Bermuda Order**") as follows:
 - a. The Mother immediately return the Child to the Father in Bermuda;
 - b. Determination of custody for the said minor child is adjourned to an inter partes hearing to be held via Zoom on a date to be determined;
 - c. Determination of restricted visitation by the Mother with the Child to be held within the jurisdiction of Bermuda and under the supervisor of the Department of Child and Family Services is adjourned to an inter partes hearing to be held via zoom on a date to be determined; and
 - d. Leave is granted by way of email in lieu of personal service on the Mother.

6. Mr. Richards informed the Court that the Father tried to enforce the Bermuda Order in the Texas Court. On 23 November 2021 the Mother was served with the Bermuda Order and she was notified that the Father intended to register it in the Texas Court. The Mother contested the validity of the Bermuda Order in the Texas Court which found that she could properly contest it as she was required to receive notice of the Bermuda proceedings in accordance with Texas Family Code 152.108 and due to the hearing being ex parte, she did not receive such notice. The Father has filed the summons for an inter partes hearing after which an order would be enforceable under Texas law.

Background

The evidence of the Father

7. The Father set out a number of facts in Father1. He stated that he and the Mother were in a relationship, living together in Canada with the Mother's other two daughters ("**Sister1**" and "**Sister2**", together the "**Sisters**"), when the Child was born in 2006. In February 2010 they had plans to move to Bermuda to be married and to live and work. In May 2011 the Father moved to Bermuda and later secured employment and accommodation in a three bedroom apartment unit owned by his mother. Within weeks, before the Mother moved to Bermuda with the children, the relationship ended.
8. Shortly afterwards, the Parents discussed the Child moving to Bermuda to live with the Father. On or around 8 August 2011, the Mother and the Child arrived in Bermuda when the Mother handed over the Child to the Father. The Father states that they made an agreement (the "**Agreement**") that the Father would have full legal custody, care and control of the Child while she resided with him in Bermuda. He exhibited the Agreement with his affidavit Father1. I should mention here that upon my review of the one-page Agreement, it is dated 3 July 2013, signed by the Parents, each witnessed by an individual, and signed and sealed before an unidentified Commissioner. Thus, the date of the written Agreement is nearly two years after the Child moved to Bermuda. The Agreement did not require the Mother to make any financial contribution to the maintenance and welfare of the Child.
9. The Father states that for the next ten years, the Child resided with him in Bermuda, where she attended various schools. During that period the Child would travel to her Mother about once year when school was on holiday. On occasion the Father paid for the Sisters to travel to Bermuda to spend time with the Child. Also during that period, the Mother would make a contribution of about \$1,000 once or twice a year to the Child's maintenance.
10. The Father stated that around December 2017 the Mother left Canada and moved to Texas, leaving Sister2 in Canada with family. She married her current husband in January 2018 and lived with him. The Child found out about the move to Texas and the marriage some months after it happened and was upset that visitation would have to be to Texas to her Mother and not to Canada which would have included visit time with her Mother and her Sisters.

11. During the summer of 2018, the Father took the Child to Texas where she visited for the summer, returning to Bermuda at the end of August 2018 without incident.
12. During the summer of 2019, the Child visited the Mother in Texas and returned in September 2019 without incident.
13. For the summer of 2020, the Parents agreed that because of the Covid-19 pandemic, the Child would not travel to Texas.
14. The Parents agreed that the Child would travel to Texas for the summer of 2021. She was Covid-19 vaccinated and travelled to Texas in July 2021 with an intention to return to Bermuda in September 2021 to resume school. Within a short time of the Child's arrival in Texas, the Mother made a request to the Father for the Child to remain in Texas in September to live with her. However, the Father did not agree, putting off further discussions until after the Child returned to Bermuda. During the 2021 summer, various incidents took place in respect of the Child's health and welfare in Texas that caused some concern to the Father including the Child receiving a second Covid-19 vaccination (that is, a vaccination that she already had as opposed to a booster) and the Mother's husband prescribing and giving some medication to the Child.
15. In August 2021 the Mother informed the Father that the Child would not be returning to Bermuda in September 2021 but would remain in Texas to live with her mother despite the Father's objections and lack of agreement. Thereafter, he contacted the Canadian and US Consulates for assistance. The Child was not returned to Bermuda in September 2021. Soon afterwards, the Father commenced these proceedings.
16. At the hearing, the Father gave further evidence to provide the Court with an update on events with the Child since his last affidavit. He spoke of learning about some self-harming issues, counselling and the need for the Child to attend summer school in June 2022. Further, he stated that he had discussions in June 2022 with the Child when she was interested in looking for larger accommodations in Bermuda and returning to school in Bermuda.

Supporting evidence - The Evidence of Sister1

17. The Father filed an affidavit from Sister1 (originally sworn 15 September 2021 and re-sworn on 15 May 2022) in support of his application for a summary return order. Sister1 is 25 years old and gave a background of information pertaining to her relationship with the parties. Although the Father in this case is not her biological father, she always referred to him as "Dad" and still does. She was affected by the breakup of the Parents' relationship, not moving to Bermuda, her Mother moving to Texas without her and not being able to see her Father and the Child on a daily basis. These circumstances caused her to harbor anger towards her Mother for quite some time. She gave a negative view of her Mother as it related to her relationships with her various partners and her children which involved physical, verbal and

emotional abuse and abandonment. She expressed serious concerns for the Child in living with the Mother.

18. Sister1 had a positive view about the Child living in Bermuda with her Father and her own visits with the Child in Bermuda.

The Evidence of the Mother

19. The Mother filed a letter dated 6 April 2022 as her affidavit along with the pictures of her home in the US. The letter was not sworn. The Mother explained that as the Father's family owned property in Bermuda, he wanted the Child, as his only child, to be a Bermudian and entitled to inherit the property. Therefore, they agreed that the Child should live in Bermuda for a period of time, supposedly seven years, in order for the Child to be qualified to obtain Bermudian status. Thus, the Child was moved to Bermuda. Later on, in 2013 they agreed to execute the Agreement in case a signed document was required by the Father in an emergency situation. She had never rescinded any of her parental rights by signing the Agreement. In 2018, once the seven years had passed, she initiated talks with the Father, but he had suggested that they wait until the Child had finished her junior high school in Bermuda. Thereafter, the Covid-19 pandemic occurred and the Child did not travel to the US.
20. The Mother explained that the Child came to the US in July 2021 for the summer holiday. The Mother had learned of various things that had happened back in Bermuda, including about the Child's relationship with a boyfriend in Bermuda and about the Father and Child moving from a three-bedroom home to a one-bedroom apartment where the Child had to sleep on a couch. In the US, the Child has her own bedroom, bed, bathroom, desk, gym, and other recreation rooms. The neighborhood has two swimming pools and a tennis court. She now has a younger brother and a two-parent household where she, the Mother, is a stay at home wife/mother. The Child has friends at school where free hot breakfast and lunch is offered daily as well as free tutoring and where she is doing well academically. She stated that the Child now has access to summer pre-college programs, various scholarships that she is eligible to apply for and is also eligible to apply for college funding under her husband's military veteran status.
21. The Mother explained that she had seen some evidence of self-harm and upon discussion with the Child, first she said it was from about two or three years ago but then said it was from earlier this year. She then gave the Child advice about how to deal with stress and that she should not be self-harming. At some point thereafter, a Child Protection Service officer attended the home and had some discussions with her and offering to provide information about dealing with self-harm. I add here that the Father spoke to the school counsellor about the self-harming who in turn contacted the Child Protection Service.
22. The Mother stated that the affidavit of the Father and Sister1 were full of untruths and lies. The Child did not want to return to Bermuda. She explained that on 15 January 2022 the

Child was considered a resident of the state of Texas as she had resided therein for six months. Shortly thereafter, the Mother's attorney filed a petition in the state court seeking orders on custody, visitation and child support. They await a court date. The Mother stated that there was no court order indicating that the Father had sole custody, so the Child's choice to remain in the US did not breach any custodial order issued by a Court in any country. Her desire was to facilitate open communication and visitation rights with the Father and for the parties to repair their relationship so that they can co-parent as best they could so that the Child can continue to flourish.

Supporting Evidence - The wishes of the Child

23. The Mother filed a letter dated 1 May 2022 from the Child, the signature witnessed by a US Notary Public. The Child expressed the view that her life had changed since she was in the US, her school grades were better, she loved living there, she had made new friends, she loved her house, she had her own bedroom and her own bed, she loved her little brother, she had a great relationship with her mother and stepfather who both gave her love and attention. She recognized that her Father had given her the same love but he was always busy with his work. She stated that her mental health was affected by her Father ignoring any discussion about her remaining in the US after she had waited so long to move there. Her desire was to remain in the US.

Supporting Evidence - The position of the Mother's husband

24. The Mother filed a letter dated 2 May 2022 from her husband along with his medical licenses. He stated that he is employed at a medical practice in Texas and as a Board Certified Family Nurse Practitioner he has privileges to prescribe scheduled medications which includes narcotics. He also included the results of a Google search of his name. He objected to the Father's accusations that he had falsely prescribed a medication to a patient within his state of residence.

Supporting Evidence - Further evidence by the Mother at the hearing

25. The Mother filed submissions in this matter. At the hearing, during the Mother's submissions, I clarified to her that at some points she was starting to give further evidence and to rely on hearsay evidence from various other people. On the basis that the Mother is not an attorney, I was prepared to give as much latitude to her as I could on proper new evidence from her but not the hearsay evidence. The Mother took the oath that her evidence was true and she was cross-examined by Mr. Richards.
26. During the hearing, I repeatedly sought clarification from the Mother as to what access was she prepared to grant to the Father if the Court considered leaving the Child with her. The Mother submitted that as a result of these proceeding she had serious concerns about the intention of the Father in respect of access to the Child. She resisted the idea of the Father visiting the Child at the Mother's home, or in the town of residence. She resisted the idea of

the Father taking the Child on vacation to other parts of the US or to Bermuda. She stated that she feared the Father would come to the US as a foreign national with a foreign court order and try to take the Child out of the US jurisdiction against her will. She was also upset that the Child Protection Services had visited her home as a result of the reporting conduct of the Father. After various attempts, I was unable to elicit from the Mother, any position on access by the Father to the Child.

27. In the final submissions of the Mother, without prompting from anyone, she made it clear that she had no complaints about the parenting provided to the Child by the Father. To her credit, she commended the Father on his parenting skills and his caring and nurturing relationship with the Child.

The Law

28. The Courts have emphasised that abduction/unlawful retention should not be tolerated. The immediate return of abducted children is to be encouraged. The Hague Convention is specifically designed for this purpose. In *KAB v The Attorney General for Bermuda (Central Authority)* and *KT Bermuda Court of Appeal Civil Appeal No 7 of 2019*, 12 July 2019 Smellie JA made reference in the footnote to the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the "**Convention**")¹.

29. In the case of *Re M (Children) (Abduction: Rights of Custody)* [2007] UKHL 55, Baroness Hale stated:

"42. In Convention cases, however, there are general policy considerations which may be weighed against the interest of the child in the individual case. These policy considerations include, not only the swift return of abducted children, but also comity between the contracting states and respect for one another's judicial processes. Furthermore, the Convention is there, not only to secure the prompt return of abducted children, but also to deter abduction in the first place. The message should go out to potential abductors that there are no safe havens among the contracting states".

30. In the case of *VB v TR* [2020] EWHC 28 which concerned an application for a return order of a Bermudian Child abducted to the UK, Mostyn J stated:

"Pulling the threads together I am abundantly satisfied that it would be in RR's best interest for him to be returned to Bermuda. This is a case where the mother clandestinely and deceitfully engaged in self-help. The law has always set its face against self-help. One of the oldest statutes in force in this country, the Statute of

¹ The Convention has legal effect in Bermuda having been signed by the United Kingdom on 19 November 1984, incorporated into Bermudian law by section 4 of the International Child Abduction Act 1998 ("the Act") and brought into effect in Bermuda on 1 March 1999 by section 2 (3) of the International Child Abduction (Parties to Convention) Order 1999 made pursuant to section 3 of the Act.

Marlborough 1267, explicitly outlaws self-help. It is important, unless it is shown to the contrary to the best interests of the child, that the self-help engaged in by the mother in this case is reversed, and that status quo ante restored."

...

"The decisions of the House of Lords in RE J (a Child) (Custody rights: Jurisdiction) [2005 UKHL 40 ... and of the Supreme Court in Re NY (a child) [2019] UKSC 49 ... confirm that this is a permissible path. However such a cause of action requires the paramount principle in section 1(1) of the Children Act 1989 to be applied; for the first six specific matters in section 1(3) to be specifically addressed; and for the eight matters mentioned in paras 56 - 63 of Lord Wilson's judgment in Re NY (a child) to be worked through."

The Application for Summary Order for Return

31. I am satisfied that I should make an order for the summary return of the Child to Bermuda for several reasons as set out below.
32. First, the legal position in Bermuda on all applications concerning children is that the paramount principle is that the child's welfare is the paramount consideration.
33. Second, in my view the starting position is that if there has been self-help by the Mother then the general position is that it should be reversed and the status quo ante restored unless it is shown to be contrary to the best interests of the child. Thereafter, there would be discussions and a further enquiry regarding the child's custodial arrangements in the longer term.
34. Third, I will take the approach set out in *VB v TR*, considering the eight matters in turn.

"1. Is the evidence sufficiently up to date"

35. The Father and the Mother have filed affidavit evidence and made further factual updates at the hearing of this matter. Additionally there has been supporting evidence filed from other people. In my view, the evidence is sufficiently up to date.

"2. Have sufficient findings been made"

36. There are a number of matters which are not in dispute, thus I satisfied to make the following findings.
 - a. The Parents had an Agreement about the care of the Child.
 - b. The Father was the primary care giver for 10 years, providing a home, financial and emotional support as well as, according to the Mother, excellent parenting to the Child.
 - c. The Mother had limited access, generally occurring during summer vacations.
 - d. The Child is habitually resident in Bermuda.

37. There are a number of matters which are in dispute. I make findings as set out below:

- a. The Mother unilaterally breached the Agreement without recourse to any impartial party for example a mediator or the Court, thus engaging in self-help.
- b. The Child is equivocal as to where she wishes to reside.
- c. The Mother is not prepared to grant access to the Father under almost any circumstance.

"3. The Welfare Checklist"

38. Mr. Richards conceded that section 1(3) of the UK Children Act 1989 in respect of the welfare checklist was not a part of Bermuda law. However, he contended that it was a useful tool when considering the welfare and best interests of the Child as set out below.

- a. Wishes and feelings of the Child - In my view I have given considerable weight to the wishes of the Child as set out above. It is laudable for the Child to welcome new experiences with her family, home environment, school and friends all which have been positive to her. I have set aside that the Child might be being influenced by the Mother in expressing those views as she is now a teenager and she can form and express views on those issues on her own. However, the Child has had recent discussion with the Father about a return to Bermuda. Thus, in my view, the Child, through no fault of her own, is equivocal about where she wishes to reside.
- b. The physical, emotional and educational needs of the Child - In my view, these needs seem able to be met by both Parents albeit to a different level. On the one hand, the Father can provide for them in Bermuda although he has a present difficulty in providing suitable accommodation for a teenage girl. On the other hand, the Mother can provide for them in Texas, with better and immediate accommodation. Significantly, the mother describes herself as a stay at home wife/mother. This concerns me as in my view her husband, who appears to be the source of means for the Mother's existence, has no legal obligation whatsoever to care or provide for the Child. However, the best interests of the child are not based on accommodation only. As stated already, the Father provided a nurturing structure for the Child for almost all her life. At this stage, I do not think it is proper to upend the Child's upbringing with her Father because the Mother has now married someone who can provide his wife with a better life.
- c. The likely effect on the Child of any change in circumstances - I agree with Mr. Richards that returning the Child to her home in Bermuda will be in the Child's best interests at this stage pending any further enquiry or order of the Court. I attach significant weight to the fact that the Child was almost entirely raised in Bermuda in a structure that was provided for by her Father. He provided the financial support, the emotional support, a home and the structure in which she was raised. The Mother in her evidence commended the Father on his parenting skills with the Child.
- d. The Child's age and background and other relevant factors -In my view, in addition to the points set out in the preceding paragraph, the Child seems to understand the

education stage of her life by attaining good grades and having an interest in college and university.

- e. Any harm suffered by the Child - Mr. Richards submits that the Child was harmed by the deceitful way in which she was removed by her Mother and there are concerns about long-term care. However, I am not satisfied that the Child has suffered such harm as she went to stay with her Mother for the summer holiday in the usual manner. Once there she enjoyed the summer forming and/or strengthening her desire to remain living there. In respect of the long-term care, I have expressed my concerns that the Mother's husband appears to be the sole source of provision for the Mother and the Child and he is under no obligation to provide for the Child.
- f. Capability of each parent of meeting the Child's needs - As indicated above, it appears that each parent is capable of meeting the needs of the Child. Mr. Richards has submitted that the Mother's history of instability, broken relationships, impulsivity and retaining the Child without following proper channels is a cause of concern. He relies on his own knowledge and the affidavit of Sister1. I am not satisfied with that argument as the Mother has been in a stable relationship since 2018. However, I agree with Mr. Richards that the Parents had an Agreement in which the Father was to have custody, care and control of the Child and who was to be habitually resident in Bermuda. In my view, the Mother has breached that Agreement unilaterally and without regard to the fact that the Father had provided a home, financial support, emotional support and stability in Bermuda for over ten years.

39. In respect of the welfare checklist analysis above, in my view, the best interests of the child is for her to be returned to the *status quo ante* position in Bermuda with immediate effect. This will afford the opportunity for her to have a reset on her upbringing with her Father who on all accounts, especially the Mother's account, was and is an excellent parent. Further, this will give the parties the opportunity to give proper consideration to all the circumstances.

"4. Are there any disputed allegations of domestic violence"

40. There has been no evidence of any such domestic violence.

"5. Are the arrangements in Bermuda sufficient to meet the Child's needs"

41. I accept that the Child has been in the Father's care in Bermuda for over 10 years. I have not been provided with any issues of concern that raise doubt that her needs would not be met sufficiently in Bermuda. The Mother raised concerns that in the US, the Child has her own bedroom and bathroom in a large house whilst in Bermuda she lives with the Father in a one-bedroom apartment sharing a bathroom. The Father gave evidence that he has had recent discussions with the Child when she was interested in looking for renting properties in Bermuda that will allow her to have her own bedroom. He has also given evidence that he has the opportunity to renovate an area of the premises where he lives into a larger apartment thus affording the Child her own bedroom. The Mother says such renovation plans have been

promised for some time but have not materialised to date. I am satisfied with the Father's options to provide the Child with her own bedroom and I do not consider this an issue to undermine the reasons why the Child should be returned to Bermuda. The Mother also raised concerns about the education system in Bermuda and the limited selection of schools in Bermuda noting that in the US, the Child had a range of schools to attend in her area. In my view, Bermuda has a robust education system in which the Child can again be enrolled and provided education. Although the Father may not be able to afford private school education, there are public schools in Bermuda that provide education to a high level and that produce graduates who go on to college and university.

"6. Is oral evidence required"

42. The Father gave further evidence on oath at the hearing and was cross-examined by the Mother. The Mother during her submissions gave what I considered to be further evidence and she was cross-examined also. I explained the difference between submissions and evidence but indicated to the parties that I would accept the updated information from the Mother as evidence. I am satisfied that there has been oral evidence from the parties before me that I can duly take into consideration.

"7. Should a social inquiry report be ordered"

43. The parties have not sought a social inquiry report at this stage. In my view, a social inquiry report is not needed as the matters are not overly burdensome at this stage. Further, in my experience the preparation of such a report in this case, would no doubt take some time and lead to further delay in this matter. I accept that a social inquiry report would be required for an extended enquiry once the Child is returned to Bermuda.

"8. Is the Court in Bermuda fully equipped to address these matters"

44. Bermuda has a robust legal system that deals with a range of matters on both domestic and international scales. Further, Bermuda's legal system gives utmost importance to matters involving children and the family. I recognise and give utmost respect to the US legal system that also considers matters of children and family. However, in this case, I am satisfied that the Child should be returned summarily with further proceedings to take place in the Courts of Bermuda, where she has resided habitually.
45. Fourth, I am not satisfied with the Mother's reluctance if not outright refusal to provide or allow any access to the Father despite the Court's repeated requests for clarification of her position on this point. In my view, the Mother's position is entirely unreasonable in not allowing the Father any proper access or any access at all. In my judgment the Mother has sought to alienate the Father from the Child except for communication over electronic devices. I take a strong view at this stage that the Mother feels entitled to make a unilateral decision to keep the Child, to refuse to return the Child to Bermuda and to not provide any form of access to the Child by the Father. Further, I am concerned about the Mother placing

blame on the Father for causing the Child Protection Services to visit her home in Texas. She seemed to take this as a threat to her losing care of the Child rather than accepting that there was some evidence that the Child may have needed some mental health or emotional support. In applying the case law, the Court cannot be seen to sit on the sidelines and allow the Mother to engage in this form of self-help without intervention.

46. Fifth, I am satisfied that in light of my findings as set out above, that all the factors support a summary return order. This will allow the status quo to be restored, the Father not having had any access to the Child for nearly a year. Moreover, the order for summary return will underscore the Court's position over time that the law continues to set its face against self-help as stated by Mostyn J in VB v TR. Whilst in Bermuda, the Father and Child can have further discussion on their respective wishes, taking into account the fact that the Child has spent a year in the US and an academic year in school. This would allow a fresh look at all the circumstances by all the parties.

Conclusion

47. For the reasons above, I allow the Father's Application and make the orders in respect of the relief sought in the Summons dated 7 March 2022.
48. I order that any further proceedings in this matter be proceeded with on an expedited basis.
49. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Father against the Mother on a standard basis, to be taxed by the Registrar if not agreed.

Dated this 22nd day of June 2022



**HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT**