



In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2016: 58

RE D (a Child)

JUDGMENT

(in Court)¹

Appeal- overseas access to child-variation of Family Court access Order-importance of reasons for decision

Date of hearing: November 2, 2016

Date of Judgment: November 16, 2016

Ms. Alma Dismont, Marshall Diel and Myers Limited for the Appellant
The Respondent appeared in person

Introductory

1. The Appellant mother (“M”) appealed against the decision of the Family Court (Wor. Ms Maxanne Anderson, Chair) dated September 9, 2016 giving defined access to the Respondent father (“F”) to the one year old child (“D”) (“the Access Order”). D is in the custody of M who recently relocated on a temporary basis to the United Kingdom (“UK”).
2. The Appeal had two limbs to it:
 - (a) M’s urgent complaint that the Access Order needed to be varied as regards access for F over the forthcoming Christmas holidays;

¹ The present judgment was circulated to the parties without a formal hearing in order to save costs.

(b) M's broader complaint that the Access Order needed to be varied as regards access for the next two or so years.

3. There were no reasons appearing on the face of the Record for the basis on which access (in particular overnight access) was granted (over M's objections) to F for the pre-Christmas period. I appreciated that oral reasons might have been given but considered it was unlikely that they could be identified and transcribed in time to avoid rendering the present appeal nugatory.
4. Accordingly on November 2, 2016 I varied the terms of the Access Order as regards December 2016 access and now give reasons for that decision. I also reserved judgment on the non-urgent aspects of the appeal in relation to which I set out my decision below.

Reasons for varying the Access Order-Christmas Access

5. The parents are both Bermudians who are unmarried and no longer live together. F consented to M relocating to the UK on a temporary basis for career reasons with the infant D shortly after the Family Court hearing which culminated in the Access Order. The timeline quite obviously did not permit a Social Inquiry Report to be obtained, and the Family Court clearly did its best to meet the best needs of the child by ensuring that F's access rights were adequately protected during D's residence with her mother abroad.
6. Both parties appeared in person before the Family Court. The Father sought overnight access in the UK before Christmas. M opposed this on the grounds that she and D had never been separated and F still needed directions with regard to the details of the child's care. The Family Court granted F access from 10.00am on Sunday December 18, 2016 until 12.00 noon on Saturday December 24, 2016.
7. M appealed this aspect of the Access Order on the grounds that, *inter alia*, she was still nursing the child who had never spent a night away from the M in the F's sole care. Ms Dismont very persuasively argued that the Access Order, in the absence of reasons, failed to have sufficient regard for the impact on the very young child of being suddenly placed in the overnight care of a non-custodial parent.
8. On the other hand, having heard F, it was easy to see why the Family Court Panel had been persuaded that he could be trusted to be a responsible parent who would not place his own interests ahead of those of the child. I formed a similar view when F readily agreed that the Access Order could merit with modification to permit a more gradual re-acquaintance between himself and his daughter. It was clear that he has suitable accommodation arrangements with his sister in the same city and not too far from the M's temporary home.

9. For these reasons I varied the Access Order so that as regards December 2016 UK access, it provides as follows. F shall have daytime access to D between 9.00am and 6.00pm from December 17-19, 2016 inclusive, with overnight access for December 20-23, 2016. The child shall be returned by F to M on December 24, 2016 at 6.00pm.

2017-2018 Access

10. M considered that the access provisions for 2017, in particular, needed to be graduated. She opposed in particular the provision for D to travel to Bermuda with F between May and June 2017. I found this direction somewhat surprising for a baby which is still being breastfed, but entirely accept that this instinctive reaction may well be simply an old-fashioned and outdated view of child-rearing.
11. Because of the absence of any reasons for the Access Order, I find that that the Access Order is liable to be set aside. If I were to set aside the Access Order altogether, F would potentially be left in limbo until such time as another access hearing can be scheduled. M would have no incentive to cooperate in the scheduling. No substantial miscarriage of justice has yet been caused by the Access Order as it relates to access in 2017 and beyond.
12. I also consider the Family Court as a specialist tribunal is the best forum for reviewing its own Orders in this matter, especially since no Social Inquiry Report is available. That is why I decline Ms Dismont's invitation for me to vary the entire carefully crafted access schedule.
13. Accordingly, I dismiss the appeal against the balance of the Access Order subject to the following condition. M shall be at liberty to apply to the Family Court to further vary the Access Order, without being required to show a material change of circumstances, with respect to future access.
14. This Court should be slow to interfere with the factual findings of the Family Court which is a specialist tribunal.

The importance of parental cooperation

15. As I stated at the end of the hearing of the present appeal, it is to be hoped that the parents will develop the degree of trust necessary to deal with access going forward on a consensual basis without troubling the courts. Such cooperation can only benefit the child as social science has clearly demonstrated that parental conflict takes an emotional toll on their children.

The importance of the Family Court giving brief reasons for its significant decisions

16. The Family Court should endeavour to record short written reasons for all of its significant decisions, especially those dealing with access to young children in circumstances where no independent Social Inquiry Report is obtained, as in the present case. This was an important decision involving delicate judgments concerning the welfare of 1 year old following a contested hearing. It had to be dealt with urgently and the Learned Magistrate was right not to reserve judgment to give a fully reasoned decision. No doubt brief oral reasons for the decision were given.
17. In such cases, however, it is likely that appeals will be launched which require speedy adjudication before a transcript of such oral reasons can be obtained. A few short written sentences summarising why the issues in controversy have been resolved in terms of the final order made would make it easier for this Court to give deference to and, where appropriate, uphold the decision made by the Family Court.

Costs

18. Unless either party applies within 21 days by letter to the Registrar to be heard as to costs, there shall be no order as to the costs of the present appeal.

Dated this 15th day of November, _____

IAN RC KAWALEY CJ