



In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2015: CIVIL APPEAL NO: 1

RE: C (VARIATION OF ACCESS ORDER)

REASONS FOR DECISION

(In Court)¹

Date of Decision: February 19, 2015

Date of Reasons: March 6, 2015

The Appellant appeared in person

Ms. Nicole Smith-Bean, Charter Chambers Bermuda Ltd, for the Respondent

Background

1. In or about April 2012, the Appellant (“the Mother”) applied for a maintenance and access order from the Family Court in respect of the child (C) in proceedings commenced against the Respondent (“the Father”). On or about June 25, 2012, the Family Court (Wor. Nicole Stoneham and Panel) granted liberal access to the Father (“the Access Order”).
2. Access proved to be problematic. In or about January 2013, the Father applied to vary the Access Order. The Summons was first heard on February 5, 2013 and adjourned to March 12, 2013. On March 12, 2013 the Department of Court Services advised that the parties wished no further Court intervention because, by the Father’s own account, things were “working well”. By letter dated October 21, 2013, the Father’s attorneys wrote the Family Court seeking defined access to the child. For reasons which do not appear from the record, the application was not listed for hearing before July 1, 2014.
3. On July 16, 2014, the Family Court (Wor. Nicole Stoneham and Panel) gave the following directions (“the Directions Order”):

- (1) The parents were to submit to mediation with a mediator appointed by the Department of Child and Family Services;

¹ The Judgment was circulated without a formal hearing for handing down.

- (2) The mediator was to address the Access Order and the issue of communication and to report to the Court;
 - (3) The matter was adjourned to August 11, 2014.
4. The matter was heard on September 30, 2014 when the Family Court (Wor. Nicole Stoneham) directed that the July 16, 2014 Order be complied with. The Mother did not appear on that date so it is unclear if the Panel that was previously seized of the matter was even aware that in the meantime, a completely different panel chaired by an Acting Magistrate had made the following Order on August 11, 2014:

“1. The father shall have access with the child every Wednesday after work until Thursday morning and on alternating weekends...”

5. On August 13, 2014, the Mother appealed against this surprising summary variation of an access order which was being carefully considered by another Panel on the aptly formulated ground that the August 11, 2014 Variation Order was premature. On August 6, 2014, the appointed mediator had provided a ‘Summary Report’ to the Family Court which:

- (1) made no recommendations on access;
- (2) reported that the Father had withdrawn from the mediation process before the first joint session with the Mother had taken place; and
- (3) recommended that the Father receive intensive individual counselling and anger management counselling, implicitly before the access arrangements were changed.

6. I say this decision was surprising appreciating that, as occurred at the end of the hearing of the present appeal, the parties may have agreed some form of variation to the existing access arrangements without this being recorded in the record. It seems very doubtful that this occurred, however, because the Mother very promptly appealed the decision. It is true that the Father was already entitled to generous access, but the substantive status quo appears to have been that he was not enjoying access at all due to poor parental communication. The variation of the Access Order which was ordered was, in all the circumstances, momentous and no written reasons were recorded for the decision.

7. Even had the parties agreed to a variation of the Access Order, a new Family Court Panel which does not have any or any recent experience of dealing with a contentious access should ordinarily be very slow to award overnight access over the objections of the custodial parent in circumstances where:

- (1) the Panel with primary carriage of the matter has ordered mediation which has failed and a report on access which has yet to be produced; and

- (2) the Department of Child and Family Services mediator has recommended counselling and anger management for the non-custodial parent which has yet to take place;
- (3) there is no independent support for a finding that the best interests of the child would be served by affording immediate overnight access notwithstanding the matters listed in (1) and (2) hereof.

The disposition of the appeal

8. I found that the Family Court Panel, which had not previously (or recently) dealt with the matter, erred in law by purporting to finally vary the Access Order on August 11, 2014, otherwise than by consent, in circumstances where the recommendations on access which the Directions Order had contemplated had not been received. The variation, moreover, provided for overnight access against a background of problematic access and concerns expressed by the Mother. Moreover, there was no suggestion that any representative of the Department was in Court to assist the Court by supporting the proposed disposition of the matter.
9. I accordingly set aside the August 11, 2014 Order (Wor. Jacqueline MacLellan and Panel) and ordered that “*the matter of defined access shall be remitted to the family Court for determination.*”

Interim access granted by this Court

10. After I indicated to the parties that I proposed to allow the appeal, the Respondent’s counsel made a plea for an interim order permitting immediate access for the Father before the Family Court reassumed control of the matter. The Mother explained that she had always been open to the Father having access to the child and eager for him to do so; overnight access was her only concern. She consented to an Order for interim defined daytime access on Saturdays and Sundays.
11. The reasons for this interim access order was to permit the Father to enjoy immediate access on consensual terms acknowledging the Mother’s concerns, between the date of the hearing of the appeal and the earliest date when the parties could appear again before the Family Court, which would (pursuant to the substantive disposition of the appeal) reassume full carriage of the access matter altogether, without having its discretion fettered in any way by the interim access Order granted by this Court.

Dated this 6th day of March, 2015 _____

IAN R.C. KAWALEY CJ