[2015] SC (Bda) 63 Div (19 August 2015)

In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2011: No. 24

BETWEEN:

L

Petitioner

-and-

L

Respondent

Date of Hearing: 22 July 2015

Date of Judgment: 19 August 2015

Marshall Diel & Myers – Adam Richards for the Petitioner (mother)
MacLellan & Associates – Jackie MacLellan for the Respondent (father)

RULING

The Parties

1. The parties in this matter are the mother (Petitioner) who is United States citizen, and the father (Respondent) who is a Bermudian.

2. The parties married in September 1995. They have two sons: G (born October 1997) and A [‘child A’, the subject of these proceedings] (born February 1999 in Bermuda).

3. In 2011 the mother filed her petition for the dissolution of the marriage. Decree Nisi was granted in March 2011 and made absolute in June 2011.

The Application

4. In these proceedings this Court is concerned with the welfare of a 16-year-old boy (‘child A’) who has been diagnosed with autism.

   Child A’s autism has been characterized as a severe disability that affects his day-to-day functioning. This is a developmental disorder that affects the brain’s normal development of social and communications skills. Consequently, he requires a significant level of care.

5. The issue before this Court is whether the proceedings regarding the care and control of child A should be stayed in Bermuda and transferred to the jurisdiction of Texas, USA. This is on the basis that Texas is a competent jurisdiction and the most appropriate forum to determine the dispute relating to child A’s custody.

   Central to this matter the Court must make a determination as to child A’s habitual residence.

6. In a summons dated 9 June 2015 the mother sought the following relief:

   > *That all current and future proceedings in relation to the welfare of [child A], to include his custody, and care and control shall be transferred to be heard and determined by the Courts of Harris County, Texas which is the appropriate and most convenient forum.*
   >
   > *That the Respondent shall pay the costs of this application.*

7. The matter came before the Court on 22 July 2015.

8. Although there are outstanding applications – such as the mother’s 11 May 2015 application, and the father’s subsequent applications, to vary the original 30 July 2012

consent order regarding child A – the Court will not dispose of these or any further applications regarding this matter until the question of jurisdiction has been resolved and this decision is completed and circulated.

All outstanding issues will be dealt with in Chambers on 20 August 2015.

Background: the original consent order

9. On 30 July 2012 the parties entered a consent order which i*nter alia* granted: both parties joint custody of their two children; the mother permission to remove child A from Bermuda for the sole purpose of enrolment in a special school 'School A' in Houston, Texas in time for the start of the 2012/2013 school year; that the mother have care and control of child A when he was in Texas.

10. The Order envisioned that child A would attend school in Texas: he would live with his mother but return to his father during holiday periods.

Petitioner's (mother's) submission

11. The mother notes in her written submission that under the 30 July 2012 order the father was to have care and control of child A at all times when the child was in Bermuda for holidays. The Order provided that child A would be with his father:

    a) for two weeks over the Christmas and New Year

    b) during the March and Easter School break

    c) during the summer holidays from 5 July until the last week of August.

12. From this, Mr Richards (Counsel for the mother) maintains:

    > *Accordingly it can be seen that [child A] has primarily resided with the [mother] in Texas for approaching 3 years and the [mother] continues to be his primary carer. [Child A] resides with his father in Bermuda for approximately 3 months of the year (25% of the time).*

Proceedings since the 30 July 2012 order, and mother's relationship with the father

13. The mother states that since the 30 July 2012 consent order there have been a significant number of proceedings and that these are largely due to the father's failure to comply with court orders; his refusal to communicate with the mother; and his reluctance to act in a manner which is in the child's best interest. She gave examples of some of these events in her written submission.

14. Mr Richards submits:

> *The [mother] has formed the view that the [father] will continue to take steps to make it impossible for [child A] to thrive in Texas, especially whilst the court proceedings remain in Bermuda. The [father] knows fully well that he can refuse to engage with the [mother] and refuse to agree over even minor issues regarding schooling/therapeutic needs of [child A] as the [mother] will be required to bring matters back before the Supreme Court of Bermuda for a decision. When the [mother] took active steps to manage the [father's] ability to control the proceedings in this manner, the [father] simply renewed his application for care and control. The [father's] position is reactionary and the application is made to spite the [mother]. If the [father] was really concerned for [child A's] care he would have pursued the application in the summer of 2014. The [mother] states that this is little more than the [father's] continued controlling behaviour which stymies [child A's] development. The court is referred to the extensive history in this matter and will be familiar with the conduct of the [father].*

<u>Transfer of proceedings to Texas</u>

15. Mr Richards submits that in order for the proceeding to be transferred, the Court will need to order that the proceedings in Bermuda, in so far as they relate to the issue of custody, care and control of child A, be stayed.

16. He then refers the Court to Schedule 1 section 8(2) of the Matrimonial Causes Act (MCA) 1974:

> *(2) In considering the balance of fairness and convenience for the purposes of paragraph (1)(b), the court shall have regard to all factors appearing to be relevant, including the convenience of witnesses and any delay or expense which may result from the proceedings being stayed, or not being stayed.*

17. Mr Richards continues:

> *In the case of <u>K.S. v G.S. [2010] SC (Bda) 53 Div</u> Justice Simmons held that in an application for a stay of proceedings and transfer of divorce proceedings, the applicable principles were to be derived from the House of Lords case of <u>Spiliada Maritime Corp v Cansulex</u> [1986] 3 All ER 843.*

18. Mr Richards stressed *inter alia* that in *Spiliada Maritime Corp v Cansulex* [supra] the House of Lords held that where proceedings were continuing in one jurisdiction, a party could apply to the court to exercise its discretion to stay proceedings on the ground of *forum non conveniens*.

He asserts that under *Spiliada*:

> *The burden is on the applicant to satisfy the court that there was another forum having jurisdiction which was the "appropriate forum" for the action. What constitutes an appropriate forum is determined by consideration of*

where the case could be tried more suitably for the interests of all the parties and for the ends of justice. In this context, the court had to look for connecting factors pointing to another forum. The Court is looking for the most natural forum ...

If the court concluded that there was no forum more appropriate for trial of the action, it would normally refuse a stay. If it concluded that there was, it would normally grant a stay, unless the plaintiff showed that there were special circumstances by reason of which justice required that a stay should nevertheless not be granted.

19. Applying *Spiliada* to the facts Mr Richards submits that Texas is a forum with competent jurisdiction for this matter because child A resides in Texas:

In light of the fact that [child A] has been resident in Texas for almost 3 years, the Texas Courts have jurisdiction over [child A]. The Bermuda Order has already been registered in Texas for the purposes of enforcement and recognition.

The Court is referred to the short letter provided by Counsel in Texas which confirms that given the length of time [child A] has resided in Texas, the fact that he attends school in Texas and that the evidence regarding his care, the services available and his personal relationships is located in Texas that he has "significant connections" with Texas and therefore that Texas "would be able to exercise jurisdiction".

20. Mr Richards argues that Texas is an appropriate forum because:

(a) [child A] has resided primarily in Texas for almost 3 years pursuant to the court order. [child A] is habitually resident in Texas ... and ordinarily the court where the child is habitually resident will be the most suitable to hear the case.

(b) The success of [child A's] schooling is a central factor in this case. The most appropriate forum to determine what schooling is available to [child A] and whether he is thriving in that environment is the local court where he attends school.

(c) The Texas court is in a far better position to hear evidence from those experts involved in [child A's] care. It would be impractical and almost impossible for a social worker in Bermuda to interview all of the people involved in [child A's] life for the social inquiry report. Moreover, the court could not practically hear evidence from all of the important people in [child A's] lives. The Texas court could far more readily gather information and hear testimony from the various experts and support workers. [the mother] confirms that these are significant given [child A's] difficulties ...

(d) There is already evidence before the Court that Bermuda "will not be able to meet [child A's] needs" from an educational standpoint. The question is whether Texas is doing any better and the evidence in this regard is all in Texas.

(e) Despite 7 months elapsing in the previous proceedings the Court Social Worker advised that she had not had sufficient time to investigate fully schooling abroad. It is submitted by [the mother] that if Bermuda retains jurisdiction then the court is going to be similarly hampered in gathering information about schooling options, available services, etc. The reality is that the Court Social Worker will need to investigate matters remotely which will be of far less assistance.

(f) The Texas Courts are familiar with the differences and services offered in the public and private education systems.

(g) Texas is obliged to educate [child A] until he is 22 years of age (whereas Bermuda ends at 18 years) and as such the best way to manage that and ensure [child A] receives the services that Texas has available is to allow the local courts to consider these issues.

(h) [The father] is realistically the only witness from Bermuda who would need to give evidence in proceedings in Texas. Texas is a modern court with facilities to provide evidence and be represented via electronic means/telephone.

(i) [The father] is not prejudiced in any way. His position will be that the time in Texas has not worked. The people on the ground in Texas will be in a far greater position to advise if this is correct. If he can show that [child A] is not thriving in Texas, there is no reason to think that the Texas courts will not transfer residence of [child A] back to [the father].

(j) Bermuda is an expensive jurisdiction. It is highly likely that the costs of litigation, including the costs of legal fees and the production of welfare reports will be less expensive in Texas.

21. Mr Richards sums up by arguing:

When applying the <u>Spiliada</u> principles to the facts of this case, [the mother] submits that the fact that [child A] resides in Texas must be the overriding consideration when assessing whether to transfer the proceedings to Texas. It is trite law to say that ordinarily cases are heard in the local court where the child resides. The reasons are obvious. For the avoidance of doubt [the mother] highlights the availability of the evidence and specifically the convenience to the relevant witnesses as being a significant and influential factor. As previously stated, when considering [child A's] best interests it is important that the individuals who are assessing his welfare are familiar with the environment in which he spends the majority of his time, which is in Texas. [child A] is habitually resident in Texas and the court where he is resident should be the court to determine his custody arrangements. Indeed, in most cases where the child is not habitually resident in the country, there would be no jurisdiction to make any application in relation to that child. The position in Bermuda is no different especially when one considers the provisions of the Children Act 1998.

22. Mr Richards refers the Court to the Children Act 1998, s. 36L regarding jurisdiction.

The Act provides *inter alia* that Bermuda has jurisdiction where the child is habitually resident in Bermuda at the commencement of the application, or is physically present in Bermuda at the commencement of the application for the order and satisfies other criteria outlined under section 36L(1).

He cites 36L(2):

> *(2) A child is habitually resident in the place where he resided—*
> *(a) with both parents;*
> *(b) where the parents are living separate and apart, with one parent under a separation agreement or with the consent or implied consent of the other or under a court order; or*
> *(c) with a person other than a parent on a permanent basis for a significant period of time,*
> *whichever last occurred* [emphasis added by Mr Richards]

23. Mr Richards then refers to *S v S* (Access to child Abroad: Jurisdiction) [2011] SC (Bda) 33 App (22 July 2011) where Kawaley J (as he then was) considered what constituted 'habitual residence' and the proper meaning of 'at the commencement of the application for the order':

> *[the case] considered for the first time in Bermuda when the Family Court has jurisdiction to regulate a parent's access rights in respect of a child lawfully residing with the custodial parent overseas. The Appellant mother, who resided in the United Kingdom with the 10 year old child, was appealing the decision of the Family Court dated which held that the Bermuda 'continues to enjoy jurisdiction over access based on the original order made when the child resided in Bermuda where he was born.'*
>
> *Counsel for the Mother submitted that the Court lacked jurisdiction over the matter having regard to section 36L of the CA 1998 on the basis that '(1) the Family Court's jurisdiction is based upon the habitual residence of the child in Bermuda at the date when the relevant application before the court is made and (2) since the child in the present case was no longer habitually resident in Bermuda, by operation of law the Court's jurisdiction had lapsed.' This submission was rejected by the Magistrates Court but accepted on appeal.*
>
> *...*
>
> *Kawaley J ... held that jurisdiction depends on the child being in habitual residence in Bermuda on the date when the "relevant application for the relevant order is made, not the date of the commencement of the proceedings as a whole."*

24. Mr Richards asserts:

> *[the mother] states that [child A] is habitually resident in Texas. Applying the definition provided in the Children Act, [child A] lives with his mother in circumstances where the parents have separated pursuant to a court order. The definition does not require consideration of the terminology used (i.e. care and control) but an assessment of where in real terms [child A] resides.*

25. Mr Richards cites *Re LC (children)* [2014] UKSC 1, [2014] 1 FLR 1486:

> *Where a child of any age went lawfully to reside with a parent in a state in which that parent was habitually resident, it would be highly unusual for the child not to acquire habitual residence there too.*

He submits:

> *... where the mother is habitually resident in Texas; and where [child A] resides with her for [three quarters] of the year; and in circumstances where his schooling, educational and therapeutic support is all in Texas that the Court can safely determine that he is habitually resident in Texas.*

26. Mr Richards argues that the proceedings regarding child A's welfare should not be heard in Bermuda:

> *... Texas is not only an alternative competent jurisdiction but also one which is more convenient to Bermuda at this time. [child A] has been habitually resident in Texas for almost 3 years. He attends school in Texas and has established a life which is now being subject to scrutiny by [the father's] application.*
>
> *When considering what best promotes [child A's] welfare, it is both inconvenient and illogical for the proceedings to be heard in Bermuda because those assessing his welfare and progress are highly unlikely to be familiar with the school [child A] attends in Texas and his day-to-day life overseas. The majority of people involved with [child A] – specifically those dealing with his autism and his relationship with his mother on a consistent basis – reside in Texas. It is much more appropriate (and potentially considerably cheaper) for experts in Texas to carry out an assessment of [child A's] welfare and the suitability of his schooling. Furthermore, it is also logical that the Judge ruling on the matter in Texas is likely to be more familiar with [child A's] life and primary place of residence. This will help ensure that [child A's] welfare remains the paramount consideration and that a decision is not made based on inaccurate or incomplete observation or awareness.*

27. Mr Richards further argues that the mother is at a disadvantage when she disagrees with the father because she does not live in Bermuda but the proceedings are heard in Bermuda:

> *... as matters presently stand, whenever [the mother] cannot agree matters with [the father] (which is the normal position given the high-conflict nature of the proceedings) she is required to issue proceedings in a country*

thousands of miles from where she resides which is not convenient or appropriate. Moreover, it gives [the father] power to control [the mother] and her dealings with [child A] such that [child A] misses out on opportunities available to him.

It would be more convenient for the proceedings to be transferred to Texas as this would assist [child A] and [the mother] to continue their lives without major interruption, i.e. [the mother] would not need to manage [child A's] day to day life and try to address legal proceedings in a county where she does not reside which would impact on her ability to care for [child A]. The Court is reminded that routine is highly important for autistic individuals and disruption of said routines can cause significant distress. Routines allow for order, structure and predictability in an individual's life, which help reduce anxiety, and this is particularly important for people with autism. Indeed, for the sake of convenience and in the interest of [child A's] welfare, it is much more appropriate for jurisdiction to be transferred overseas.

28. Mr Richards submits that given all these reasons 'the court is requested to stay the proceedings in Bermuda and declare that Texas is the more appropriate jurisdiction to address issues of Custody and Care and Control [of child A]'.

Respondent's (father's) submission

29. Mrs MacLellan, Counsel for the father, submits that the 30 July 2012 consent order:

was made as a result of the mother's application for leave to remove [child A] for the specific purpose of obtaining education at [School A] in Texas for the sole purpose of continuing his education in a setting that best met his learning challenges ... [The social worker] Mrs Charles commented that at this point in time [child A] required the intensity of a full time program in order to give him a chance to thrive in an independent but supervised living environment.

She continues:

It is unfortunate that the intention that [child A] go to [School A] for three years and that this was the basis for the permission for [child A] to go to Texas did not make it to the wording in the Consent Order which was an error in drafting.

30. Mrs MacLellan argues that child A's home is Bermuda and that his absence for schooling should be treated the same as if he were abroad for boarding school.

... the intent and the effect of the Court Order was that the reality of [child A] attending a school in Texas is equivalent to any other child who resides in Bermuda who goes abroad for boarding school and returns home each holiday including his brother [G].

31. Mrs MacLellan maintains:

> *It is clear ... from the letter ... from the principal of [School A] that [School A's] goal was to work with students until they have reached a target behaviour criteria acceptable to the school district that they are enrolled in. Once the student meets the target criteria then the student is supported in transition back to their home school. [The principal] confirms in the said letter that [child A] has met that criteria for entry to public school. ... now that [child A] has completed his program at [School A], according to the Order of the 30th July 2012, [child A] should return to live in Bermuda ... The mother wishes for [child A] to move to public school in Texas and to have the right to make unilateral decisions about [child A's] education going forwards and she quite rightly brought her application to the Supreme Court of Bermuda [because] ... Bermuda has jurisdiction to deal with this issue and Texas does not. It was only as an afterthought that the mother has brought the application to have the jurisdiction of all matters relating to [child A] moved to Texas.*

32. Regarding child A's education, Mrs MacLellan continues:

> *Of further note is that the Principal of [School A] confirmed to the father that both Bermuda and Texas follow the Unique Curriculum and that either Bermuda or Texas would be fine for [child A] at this point.*

<u>Transfer of proceedings: habitual residence</u>

33. Mrs MacLellan argues:

> *There is no question that [child A's] habitual residence is Bermuda and that the Court in Bermuda has jurisdiction to determine the matters relating to [child A]. This is accepted by the mother, given her current application to this Court. It is clear that the intent of the Order was that [child A] only be permitted to move to Texas to attend ... school*

She asserts that given the mother's current application to this Court, Bermuda's jurisdiction is accepted by the mother.

She continues:

> *It is clear that the sole reason for [child A] going to Texas was to pursue a three-year program at [School A]. There was therefore no permanence to the move. Bermuda is the most appropriate jurisdiction to determine matters relating to [child A].*

34. Mrs MacLellan cites Lady Hale in *A (Children) (AP)* [2013] UKSC 60 on the various threads that help determine habitual residence:

> *54. …*
>
> *i) All are agreed that habitual residence is a question of fact and not a legal concept such as domicile. There is no legal rule akin to that whereby a child automatically takes the domicile of his parents.*
>
> *ii) It was the purpose of the 1986 Act to adopt a concept which was the same as that adopted in the Hague and European Conventions. The Regulation must also be interpreted consistently with those Conventions.*
>
> *iii) The test adopted by the European Court is "the place which reflects some degree of integration by the child in a social and family environment" in the country concerned. This depends upon numerous factors, including the reasons for the family's stay in the country in question.*
>
> *iv) It is now unlikely that that test would produce any different results from that hitherto adopted in the English courts under the 1986 Act and the Hague child Abduction Convention.*
>
> *v) In my view, the test adopted by the European Court is preferable to that earlier adopted by the English courts, being focussed on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors. The test derived from R v Barnet London Borough Council, ex p Shah should be abandoned when deciding the habitual residence of a child.*
>
> *vi) The social and family environment of an infant or young child is shared with those (whether parents or others) upon whom he is dependent. Hence it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned.*
>
> *vii) The essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce.*
>
> *…*
>
> *55. So which approach accords most closely with the factual situation of the child – an approach which holds that presence is a necessary pre-cursor to residence and thus to habitual residence or an approach which focuses on the relationship between the child and his primary carer? In my view, it is the former. It is one thing to say that a child's integration in the place where he is at present depends upon the degree of integration of his primary carer. It is another thing to say that he can be integrated in a place to which his primary carer has never taken him. It is one thing to say that a person can remain habitually resident in a country from which he is temporarily absent. It is another thing to say that a person can acquire a habitual residence without ever setting foot in a country. It is one thing to say that a child is integrated in the family environment of his primary carer and siblings. It is another thing to*

say that he is also integrated into the social environment of a country where he has never been.

<u>Transfer of proceedings: *forum (non) conveniens*</u>

35. Mrs MacLellan submits that there is no reason to transfer proceedings to Texas:

> *Bermuda is the appropriate jurisdiction to make decisions in connection with [child A]. The Court in Bermuda is intimately aware of [child A's] relationship with both parents. There is ample evidence in Bermuda as to [child A's] progress prior to living for Texas.*

36. Mrs MacLellan notes that during his time in Bermuda, child A received extensive professional assistance with his special needs; that the purpose of sending child A to School A has been met; and that, according to the principal of School A, the child is now able to return to public school.

    She also noted that the public school system in Texas is based on the same curriculum as the Bermuda-based programme for children with special needs.

37. Mrs MacLellan submits that the mother is relying on the principle of *forum non conveniens* by asserting that Texas is the most appropriate forum for dealing with issues in relation to child A's education/living:

> *The common law jurisdiction to stay proceedings in favour of another, more appropriate, jurisdiction and on the grounds of <u>forum conveniens</u> was confirmed by the House of Lords decision in <u>Spiliada</u> [supra] where the <u>forum conveniens</u> doctrine was described as 'not a question of convenience, but of the suitability or appropriateness of the relevant jurisdiction'.*

She stresses:

> *When weighing up what is the appropriate forum, the court needs consider, inter alia:*
> *i. the nature o f the dispute;*
> *ii. the location of evidence that would be disclosable in the litigation;*
> *iii. the location o f witnesses;*
> *iv. relevance of local knowledge;*
> *v. expert evidence that is likely to be required and the expense that is likely to be incurred;*
> *vi. grounds under which the jurisdiction of the Court is sought to be invoked;*
> *vii. the location of the litigants;*
> *viii. the relative relevance of Bermuda law and whether the law of another place has a closer connection to the disputes;*
> *ix. the nature of the relief sought;*
> *x. whether proceedings have already been commenced m another jurisdiction.*
>
> *Having given due weigh[t] to all of the considerations the Court will assess whether justice is likely to be done in the foreign jurisdiction.*

38. Mrs MacLellan argues:

> *Texas is not the more appropriate forum to determine the issues in relation to [child A]. The Texas court has no knowledge of [child A's] history and the history of his relationship with both parents. That court will base all decisions without any reference to [child A's] Bermuda life and family and the educational services available to him here in Bermuda. Further, the father would be completely cut out of the picture in relation to [child A] as the mother would have sole decision making power of [child A].*

39. Mrs MacLellan asserts that substantial injustice would incur to child A, his father and his brother as the mother has – through her actions – shown that she considers it her sole responsibility to make decisions in connection with child A:

> *[The mother] made arrangements to move [child A] from [School A] to [School B] without advising the father until two months prior to [child A] being required to attend there. Further [child A] was expelled from [School B] some two months after he started school there. The mother re-enrolled [child A] into [School A] without informing the father until after the fact. It took the father numerous attempts to find out the reasons for [child A] being expelled from [School B]. Further the mother's sworn evidence is that she intends to enroll [child A] into an institutionalized setting in due course.*
>
> *…*
>
> *The mother has not complied with the Order providing the father with the developmental educational progress of the child nor consulting him. It transpires that the mother has had meetings and [has] come out with an independent educational program and a transitional program with [School A] school without any consultation with the father. The principal of [School A] said that it would have been very helpful to have the father's input in coming up with this transitional plan. Further the mother has failed to provide these plans because presumably these plans could be implemented in Bermuda as the exact same curriculum is relied upon here.*

40. Regarding the welfare of child A, Mrs MacLellan submits:

> *The schools refuse to speak to the father presumably at the instruction of the mother. Further the mother took steps to register the Orders in Texas and took this as authority that Texas law applied and that she has sole authority to make decisions in relation to [child A] despite the Bermuda order being clear that both mother and father were to make decisions jointly.*

She continues:

> *Moreover, the father has provided evidence that in his opinion [child A] has regressed in his abilities since leaving Bermuda as set out in his Affidavit sworn on 28th August 2014.*
>
> *It is clear in these circumstances that the father would be deprived of any fairness or equitability in the proceedings and would be detrimentally*

impacted. It is evident that the father would be unduly burdened all around by having to sustain an action in Texas.

41. Mrs MacLellan argues:

> *Given all of these factors and in light of the evidence that [child A] is regressing in his abilities, it is imperative that Bermuda retain jurisdiction to assess [child A's] needs and to compare his current abilities to his abilities prior to his leaving. In light of these regressions it would be more appropriate for [child A] to return to live with his father and attend the Bermuda program rather than the unknown Texas program where he is living with his mother and is not flourishing.*

She asserts that with regard to information about child A's time in Texas:

> *… it is very simple for Bermuda to obtain the relevant information in relation to the Texas' school system and [School A] and to assess [child A's] progress since he left Bermuda as the experts are very familiar with [child A] here in Bermuda. On the other hand Texas will not take any consideration of the options for [child A] in Bermuda or his relationship with the father. In light of the mother's behavioural history, it is highly likely that if the Texas' Court takes jurisdiction the father will be cut out completely from [child A's] life.*

42. Mrs MacLellan concludes:

> *… Bermuda is [child A's] habitual residence, it has jurisdiction and is the more appropriate forum for determining matters in relation to [child A] as Bermuda will ensure that both parents' views are considered in relation to [child A's] needs.*

The Court

43. The Court has considered all the points made by both Counsels. Counsel highlighted several authorities; the Court does not propose to list all of them, except to say they all provided valuable guidance.

<u>Cases considered by the Court</u>

44. Aside from the Children Act 1998, the Court has had regard to several cases including: *Re J. (A Minor)* (Abduction: Custody Rights) [1990] 2 AC 562; *KS v GS* [2010] SC (Bda) 53 Div; *Spiliada Maritime Corp v Cansulex* [1986] 3 All ER 843; *S v S* (Access to child Abroad: Jurisdiction) [2011] SC (Bda) 33 App (22 July 2011); *A (Children)* (AP) [2013] UKSC 60; *M v M* (stay of Proceedings: Return of Children) [2006] EWHC 1159 (Fam) 1 FLR; and *Re LC (children)* [2014] UKSC 1, [2014] 1 FLR 1486.

The Law: habitual residence

45. The Court accepts the finding in *Re J. (A Minor)* (Abduction: Custody Rights) [supra]: habitual residence is not a matter of law; habitual residence is a question of fact to be decided in light of all the circumstances before the Court.

46. Under the welfare principle (Children Act, s. 6) the Court must consider give paramount consideration to the welfare of the child in administering and interpreting the Act. In this context the Court has applied the relevant principles from the Children Act 1998, s. 36L on jurisdiction (as raised by Counsel for the mother) to the facts of the case at bar.

47. The Children Act 1998, s. 36L outlines the law on jurisdiction in proceedings regarding the welfare of a child:

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

unless there has been acquiescence or undue delay in commencing due process by the person from whom the child is removed or withheld.

48. Kawaley J (as he then was) in *S v S* (Access to child Abroad: Jurisdiction) [supra], with reference to the Children Act, s. 36L(1)(a), determined that the timeline for habitual residence began 'on the date when the relevant application for the relevant order is made, not the date of the commencement of the proceedings as a whole'.

    In the present case the relevant order is the 30 July 2012 consent order – on which date the child was living in Bermuda. This order granted the mother permission to enrol child A in a specialist school in Texas. It did not grant the mother sole custody of child A, nor did it grant her permission to permanently remove child A from Bermuda to Texas.

    Also, there is no evidence before the Court as to whether the boy lived in a boarding school setting at School A, or whether he lived with his mother on a day-to-day basis.

49. With regard to the Children Act, s. 36L(2) – where the child is determined to be habitually resident in his place of residence with both parents, with one parent given the consent of the other parent, or with someone else (for a significant period of time) 'whichever last occurred' – although child A has spent most of the past three years outside of Bermuda (in Texas), this was for the purposes of his education not primarily for his relocation, and as such the Court does not find that he is 'habitually resident' in Texas.

50. Even if child A were found to be 'habitually resident' in Texas under the Children Act, s. 36L(2), by applying the criteria under s. 36L(1)(b) the Court is satisfied that – *inter alia* – the child is physically present in Bermuda; substantial evidence concerning the welfare of the child is available in Bermuda or can be sought from Texas and be made available for use in proceedings here in Bermuda; the child who was born here, and spent the first twelve years of his life here, has a real and substantial connection with Bermuda especially with regard to his brother and members of his father's extended family; and that on balance it is appropriate that jurisdiction in the proceeding regarding his welfare should be exercised in Bermuda.

51. With regard to the Children Act, s. 36L(3) the 30 July 2012 consent order granted permission for the removal of child A to Texas. This was agreed to by both parties therefore s. 36L(3) does not apply in this case.

52. □□□□□el for the mother cites Lord Wilson in *Re LC (children)* [supra] to support the mother's view that the child is a habitual resident of Texas:

    3□□□Where a child of any age goes lawfully to reside with a parent in a state in which that parent is habitually resident, it will no doubt be highly unusual for that child not to acquire habitual residence there too. The same may be said of a situation in which, perhaps after living with a member of the wider family, a child goes to reside there with both parents.

However, Wilson LJ continued:

> *[37 continued] But in highly unusual cases there must be room for a different conclusion; and the requirement of some integration creates room for it perfectly ...*

Regarding integration, Wilson LJ found:

> *1□□... it is clear that the test for determining whether a child was habitually resident in a place is whether there was some degree of integration by her (or him) in a social and family environment there ...*

53. In accordance with *Re LC (children)* [supra] and determining integration, the Court is not satisfied – based on the evidence before it – that child A enjoys a more integrated social and family environment in Texas than he does in Bermuda.

54. In *Re LC (children)* [supra] Wilson LJ also referred to the adolescent child's state of mind and asked:

> *... may the court, in making that determination [of habitual residence] in relation to an adolescent child who has resided, particularly if only for a short time, in a place under the care of one of her parents, have regard to her own state of mind during her period of residence there in relation to the nature and quality of that residence? ...*

One of questions that lingers unanswered is what is child A's capacity. In an interview before the 30 July 2012 order, child A expressed a preference to be with his father and brother in Bermuda. However, the Court finds that – based on the evidence before it – it cannot determine child A's state of mind with regard to his stay in Texas.

The Law: *forum non conveniens*

55. In *Spiliada* [supra], Goff LJ summarised how the principle of *forum non conveniens* is applied in cases of stay of proceedings.

Accordingly, in *KS v GS* [supra], Simmons J held that in accordance with *Spiliada*:

> *12. ... The basic principle [of forum non conveniens] is that a stay will only be granted where the court is satisfied that an available forum of competent jurisdiction is the appropriate forum to try the action for the interest of all the parties and the ends of justice.*

Texas may be an available forum but the Court does not agree that it is the most appropriate forum to hear proceedings regarding the welfare of child A.

56. Jurisdiction must be exercised for the child's future welfare. In exercising jurisdiction the Court has sought to apply the well-known words of Lord Eldon LC in *Wellesley v Duke of Beaufort* [1827] 2 Russ 1 (as cited by Munby P in *Re M (Children)* [2015] EWHC 1433 (Fam)):

> *It has always been the principle of this Court not to risk the incurring of damage to children which it cannot repair, but rather to prevent the damage being done!*

Concluding remarks

57. In this Court's view, the central factor is child A. Child A was born in Bermuda and spent almost 13 years of his life in Bermuda before leaving to attend school in Texas.

    The child is diagnosed with autism. By a consent order of the Bermuda Supreme Court it was ordered that he travel to Texas to receive the focused education his Bermuda professionals had recommended. This was the condition under which he left Bermuda to attend School A in Texas.

    In a 6 April 2015 letter, the principal of School A stated that the school 'work[s] with students until they have reached a targeted behavior criteria acceptable to the school district they are enrolled in. … [child A] has met that criteria for entry to public school'.

58. Now that the specified purpose for the child's absence from Bermuda is coming to an end the mother seeks to transfer proceedings to another jurisdiction (Texas).

59. Where two parents have parental responsibility for a child, one parent cannot unilaterally change the child's habitual residence. The Court finds support for this from Lady Hale in *A (Children)* [supra].

    In the case at bar, the parents complied with the terms of the 30 July 2012 consent order, and the mother cannot now assert that the time spent in Texas pursuant to the Order constitutes child A's being habitually resident in Texas.

60. Child A has a real connection with Bermuda which should not be severed. The 30 July 2012 order was for child A to attend a specified school (School A) and thereafter return to Bermuda or, in the Court's view, at the very least a further assessment be provided.

61. Subsequent to circulating an earlier draft of this ruling, Mr Richards (Counsel for the mother) expressed the concern that the 30 July 2012 consent order does not refer to child A attending school in Texas for a specified period of three years.

    The Court has taken into account Mr Richards' concerns but notes the following in regard to the 30 July 2012 consent order:

    i. The school (referred to in this ruling as 'School A') is named on page 1 of the Order with reference to a Special Needs Trust to pay child A's fees for that school.

ii. The Order (at paragraph 1) states that the parties have joint custody of child A and his brother G. This implies that his stay in Texas – albeit not explicitly stated – was not intended to be indefinite.

iii. For practical reasons – given that the mother lived in Texas and the father lived in Bermuda – the mother was granted care and control of child A 'during all periods of time when [child A] is in Texas' and the father granted 'care and control of [child A] at times when he is in Bermuda' (paragraph 3 of the Order).

iv. The mother was not granted leave to relocate child A to Texas. She was 'granted leave to remove [child A] from Bermuda for the sole purpose of enrollment in [School A] located in Houston Texas in time for the commencement of the 2012/2013 academic year.' (paragraph 4 of the Order).

v. A three-year period was mentioned in paragraph 10 with regard to child A's and his brother's holidays: 'The two children of the family shall spend all school vacations in Bermuda for the next three years or unless there is agreement between the parents otherwise…'

vi. Although the Order (paragraph 10) and the schedule attached to the Order refer to child A returning to Bermuda for school holidays for a three-year period, the Order made no further reference to child A's care and control after that three-year period (or presumably the expected end of his programme at School A). At the very least it would be expected that a further assessment regarding the child's welfare would be necessary.

Further:

vii. That a fixed three-year period was not included in the paragraph referring to child A's schooling in Texas is 'an error of drafting' but the other paragraphs of the Order – in particular the reference to school holidays over three years – should suffice to show that a fixed period rather than an indefinite stay in Texas was intended.

The Court also notes a letter from School A's principal, dated 6 April 2015, clearly states that she believes child A has met the criteria for transition to public school which suggests that his programme at School A has indeed come to an end.

62. The acrimony between the father and the mother continues. Although the Court accepts that this is an unsatisfactory state of affairs, the answer is not to sever either parent's connection with child A.

Adequate safeguards should be put in place so that the hostility between the parents is minimized, and adequate provision must be made for contact with child A.

63. A court can impose stringent conditions on a parent so that they abide by its order, for example, providing that a parent's rights be forfeited in the event that there is non-compliance with the court's order.

64. There is no guarantee that the father's rights in so far as they would affect child A would be protected in Texas. In so far as the mother's rights regarding the child in Bermuda are concerned, the Court is satisfied that her rights are protected.

65. For the above reasons the Court concludes that the mother's application for the Bermuda Courts to cede jurisdiction to Texas fails.

66. The mother has not met her burden of proof that staying the Bermuda proceedings is in the best interest of child A. The mother's application is therefore refused.

67. Each party is to bear their own cost of these proceedings.

Dated ___ day of August 2015

____

Justice Norma Wade-Miller
Puisne Judge