In The Supreme Court of Bermuda

DIVORCE JURISDICTION
2022: No. 96

BETWEEN:

R

Petitioner

-and-

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Respondent

Before:	**Hon. Alexandra Wheatley, Acting Justice**
Appearances:	**Aura Cassidy of Wakefield Quin, for the Respondent**
	The Petitioner, In Person with Mormay Piper as a MacKenzie Friend
Dates of Hearing:	**20 April 2023**
Date of Ruling:	**21 April 2023**

RULING

Application for Stay of Proceedings; Prohibition of Child Leaving Bermuda; Application for Sole Care and Control by the Father; Habitual Residence; Jurisdiction; Forum convenies

WHEATLEY, ACTING JUSTICE

INTRODUCTORY

1. This application stems from divorce proceedings commenced by the Petitioner (hereinafter referred to as the **Father**) who then filed an ex-parte application on 6 March 2023 (**the Father's Application**) to prevent the child of the family who is now 9 years old (hereinafter referred to as **A**) from leaving the jurisdiction, joint custody, care and control of A and in the alternative defined access with A which would become a mirror order in the Ontario Courts. By Order made by Justice Stoneham on 9 March 2023, *inter alia*, A was prohibited from leaving the jurisdiction, a Social Inquiry Report was ordered to be completed on an expedited basis at it relates to A's welfare both in Bermuda and Canada.

2. The Respondent (herein after referred to as the **Mother**) from the first *inter partes* appearance of the Father's Application, the Mother contested that Bermuda was the appropriate jurisdiction to determine issues in relation to the marriage and in relation to A. Albeit, the Mother did not make a formal application to stay the proceedings in Bermuda, given the Overriding Objective and the nature of the application, it was imperative that this preliminary issue be determined expeditiously.

3. The Mother is Canadian and the Father is Bermudian. A lived in Canada until December 2022 and is a Canadian citizen. In accordance with the Bermuda Immigration and Protection Act 1956 (**the Immigration Act**), a Commonwealth citizen and the child of a Bermudian father born overseas, is deemed to have Bermuda status on her birth. This was initially contested by the Mother on the basis that the child had not been habitually resident in Bermuda; however, upon reading Section 18 (3) (b) of the Immigration Act, it was clear that the only requirement regarding domicile related to the parent who is Bermudian and not the child.

4. The parties were married on 25 March 2014; however, the relationship deteriorated in March 2017, the basis of which is disputed between the parties. A has only ever resided in Ontario, Canada with the Mother with the Father visiting A in Canada as well as A travelling to Bermuda with the Mother for access. Therefore, A has been registered in the Canadian school system since she was of school age and never attended school in Bermuda.

THE MOTHER'S POSITION

5. The Mother avers that although she has frequently travelled to Bermuda for the last six years, the Father has never restricted her ability to return to Canada with A until now. She believes this is linked to the Mother filing matrimonial proceedings in Canada. The Mother has asserted, inter alia, that as proceedings were commenced in Canada first, Canada is the appropriate jurisdiction in relation to both matters of the parties' marriage as well as regarding A.

6. Ms Cassidy for the Mother relied on various sections of the Children Act 1998 (the Children Act) to aver that the Bermuda courts do not have jurisdiction to make orders in relation to A. Section 36L of the Children Act states as follows:

> "***Jurisdiction***
> *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."

7. Therefore, Ms Cassidy submitted that the Court can be satisfied not to exercise jurisdiction under Section 36L on the following grounds:

i. The Mother and A are both currently in Bermuda as visitors.

ii. A is not habitually resident in Bermuda, but rather is habitually resident in Canada.

iii. The Mother and A have maintained their direct ties to Ontario Canada, specifically long-term permanent accommodation, family ties, employment for the Mother and schooling for the child;

iv. The Mother has always maintained the position that both she and the child will be returning to Canada where they permanently reside;

v. Whilst the child is physically present in Bermuda, there is not substantial evidence concerning her welfare available in Bermuda;

vi. There is an active application for the child's custody and access before the Superior Court of Ontario, Canada where A habitually resides, albeit this is disputed by the Father as the position is that he has not been served with any

divorce proceedings or any proceedings in relation to A regarding his access to her;

vii. A does not have a real or substantial connection to Bermuda; and

viii. Bermuda is not the jurisdiction on the balance of convenience for jurisdiction to be exercised in relation to A.

8. The Mother also asserts that A is being wrongfully retained in Bermuda under Section 36O (a) and (b) of the Children Act and that the Father has used ex-parte proceedings to unilaterally block the child's ability to return home to her country of origin and to return to in person learning at school.

9. Further, Ms Cassidy submitted that when determining whether or not to declare or decline jurisdiction, the Court must first determine what the usual or habitual residence of a child is. She relied on the UK cases of *In the Matter of B (A Child)* [2016] UKSC 4 and *Re A (Abduction: Habitual Residence)* [1998] 1 FLR 49. Both of these cases involved the alleged abduction of a child where one parent had applied to the Court for the return of the child.

10. In *Re A*, a father made an application under the Hague Convention in Greece on the basis the mother had unlawfully removed the child from Greece which breeched his rights of custody. The facts were that the Mother had relocated to the UK in 1995 when she discovered she was pregnant in order to be close to her family. The intention was to return to reside in Greece; however, after the birth in 1996, the mother had second thoughts about returning to Greece and after many months of acrimonious discussions with the father and the mother's refusal to return, the father made an application for the return of the child. It was established that in such a case the court must first determine the habitual residence of the child in order to consider making an order for the return of a child. Ms Cassidy alleges that the Father has breached Article 3 of the Hague Convention; i.e. that he has breached the Mother's custodial rights by wrongfully retaining the child of the family from leaving Bermuda to return to her country of habitual residence. Ms Cassidy also relied on the case of *Re H (Minors) (Abduction: Custody Rights)* [1991] A.C. 476 wherein it was determined that removal and

retention to be mutually exclusive concepts. Lord Brandon of Oakbrook stated as follows at 500B:

> "*For the purposes of the Convention, removal occurs when a child, which has previously been in the State of its habitual residence, is taken away across the frontier of that State; whereas retention occurs where a child, which has previously been for a limited period of time outside the State of its habitual residence, is not returned to that State on the expiry of such limited period.*"

11. Ms Cassidy on behalf of the Mother therefore submitted that the following orders be made by this court:

    (a) Decline to exercise jurisdiction under Section 36L of the Children Act 1998 and further order that the Father's Application be dated (Section 36L(d)) subject to the condition that the Application presently before the Superior Court of Canada proceed expeditiously;

    (b) Find that A has been wrongfully retained in Bermuda (Section 36O (a) of the Children Act) and in contravention of the International Child Abduction Act 1998;

    (c) Revoke the Order of 9 March and subsequent ordered restricting the travel for A and that A be required to return immediately to Canada (Section 36O (e) of the Children Act) at the expense of the Father;

    (d) That the Father be ordered to pay the Mother costs of these proceedings.

THE FATHER'S POSITION

12. The Father's Application prohibiting A from leaving Bermuda for the following reasons were set out in his affidavit evidence:

    i. The Mother and A arrived in Bermuda on 19 December 2022, but the Father was not advised, nor offered any access until 8 January 2023.

ii. The Mother's Canadian Counsel e-mailed the Father to resolve maintenance, but did not make any proposals for access.

iii. The Mother traveled to Bermuda on 9 occasions in 2022, but only brought A once and the Father's access was limited to this one occasion.

iv. When the Father was exercising access with A on 6 March 2023, the Mother abruptly collected A as the Father advised her that he would be applying to the Bermuda courts to resolve access. The Mother advised the Father that he would have access the on Friday, 10 March 2023, but then purchased airline tickets the following day, 7 March 2023, with a view of sending A back to Canada to live with her maternal grandmother on 9 March 2023. The Father was not advised of this nor asked for his views and as such concluded the Mother's actions were to deliberately frustrate his access with A as well as from the jurisdiction of this court.

13. The Father raised concerns for the welfare of A about her current care arrangements. The concerns stem from his view that the Mother lives a chaotic lifestyle and exercises poor decision making which has impacted A and provided the following examples:

i. Who cared for A when the Mother was frequently visiting Bermuda last year?

ii. Why did A not travel with her Mother to visit with her Father on the all of the occasions the Mother travelled to Bermuda?

iii. The recent drug raid on the Mother's partners' house in Bermuda, which has been ignored in the Mother's evidence. It must be noted that it was accepted during the hearing by Ms Cassidy that the Bermuda Police had executed a Search Warrant on the home.

iv. The Court Social Worker advised the Father that there was an ongoing investigation into the family which had not been disclosed by the Mother.

v. The Mother's lack of planning as it pertains to A when she made the decision to bring her to Bermuda in December 2022 for the purpose of the Mother giving birth to her second child (with her current partner). The Mother has confirmed that she did not have a date to return to Canada as she was waiting for her baby to be issued a Bermuda passport in order to travel. A and the Mother have currently be allowed to stay in Bermuda by the Department of Immigration until 19 June 2023 (6 months from when she arrived in Bermuda). A was enrolled in online schooling from January to March 2023, but the Mother cancelled this when she purchased A's ticket to return to Canada on 7 March 2023. The Mother has confirmed the intention was for A to return to in-person schooling and reside with her maternal grandmother. It was confirmed that A would be moving to a new school if this occurred and the Father raised concerns regarding his lack of knowledge of where A would be residing, who would be caring for her, etc.

vi. The rushed and clandestine way A was to be removed from Bermuda which would have meant that A would have attended four different educational establishments in one year as well as the Father's access not being resolved and further frustrated.

vii. The Father has genuine fears that the Mother will not return to Canada and it is her plan to leave A with her maternal grandmother permanently, or that because the Mother will travelling back and forth to Bermuda frequently, that A will continue to live with her maternal grandmother. The basis for which the Father says the Mother will be travelling even more frequently from Canada to Bermuda is due to the Mother having a child with her partner who is Bermudian (and therefore this child is also deemed to have Bermuda status), who resides in Bermuda and who is unable to travel to Canada due to being on the stop list for his criminal convictions.

14. The Father submitted[1] that Schedule 1 of the Matrimonial Causes Act 1974 (**the MCA**) provides statutory guidance for the approach the court is to take when one party applies to stay divorce proceedings in favour of a foreign jurisdiction. Section 8 of Schedule 1 of the MCA refers to an application being made before the "*beginning of the trial or first trial*". Section 8(2) confirms that the court shall consider the balance of fairness and convenience and in doing so shall have regard to all of the factors appearing to be relevant, including the convenience of witnesses and any delay or expenses which may result from the proceedings being stayed.

15. There are divorce proceedings issued in each jurisdiction; however, the Father asserts that neither has been properly served and neither is in a greater state of readiness to proceed than the other. He submitted that even if the divorce proceedings move forward in Canada, the court would still have jurisdiction under the Minors Act 1950 in Bermuda as A is a Bermudian child presently in Bermuda.

15. The Father submitted that even if the divorce proceedings move forward in Canada, the principle of *forum non conveniens* is still the applicable test to determine the most appropriate forum for dealing with care and control of A. The Father submitted that the Mother's submissions on the law are inaccurate as the Supreme Court has no jurisdiction in relation to Section 36O of the Children Act. The Father relied on the Chief Justice's decision in the Supreme Court case of *B v Y* [2020] SC (Bda) 36 Civ (28 August 2020) to substantiate this position.

16. In *B v Y*, the father sought an order from the Supreme Court to return the child to Bermuda and that the mother be prohibited thereafter from removing the child without his consent or leave of the court. An *ex parte* order was made seeking the relief being sought by the father, the following an *inter partes* hearing, Chief Justice Hargun set aside the ex parte order. Chief Justice Hargun addressed the Supreme Court's ability to make decisions under the Children Act. He stated as follows:

[1] Prior to the Father commencing to act In Person, his former attorney, Adam Richards of Marshall Diel & Myers Limited, provided written submissions on behalf of the Father which he used to present his position to the Court.

"*19. The term "court" is defined in section 2 as meaning "the Family Court and, where the context requires, includes the Magistrates' Court and the Supreme Court".*

20. Section 12 provides that "The jurisdiction conferred upon the court by or under this Act shall be exercised by a Special Court established under section 12 of the Magistrates Act 1948 [title 8 item 15], and a Special Court when sitting to exercise such jurisdiction shall be known as the Family Court."

21. As noted above, section 2 provides that "court" means the Family Court and, where the context requires may include the Supreme Court. Where a particular provision intends to confer jurisdiction on the Supreme Court it does so in express terms. Thus:

(a) Section 18 provides that "Any child or other person aggrieved by any order made under this Act may appeal from the order to the Supreme Court…"

(b) Section 18E provides that "Any person having an interest may apply to the Supreme Court (in this Part referred to as the "court") for a declaration that the male person is recognised in law to be the father of a child or that the female person is the mother of a child."

(c) Section 34 (5), dealing with orders pending appeals in cases about care or supervision orders, provides that where an appeal is made against any decision of the court under section 34; or any application is made to the Supreme Court in connection with the proposed appeal against that decision, "the Supreme Court may extend the period for which the order in question is to have effect, but not so as to extended beyond the end of the appeal period."

22. In light of the clear language used in the Act, it seems to me that the term "court" referred to in section 36O is the Family Court. It must follow that the Supreme Court does not have any power to make any order under the provisions contained in section 36O.

23. I note that this decision is in accord with the decision arrived at by Hellman J. In A v B [2012] SC 22 and the decision by Kawaley J. (as he then was) in W v M [2009] SC (Bda) 18 Civ where he accepted a submission "that Part IVB of the Children Act 1998 … only applies to applications before the Family Court". Kawaley J. Expresses his reasoning at paragraph 5 of the judgment as follows:

> *""The normal rule is that the 'jurisdiction conferred upon the Court by or under this Act shall be exercised by a Special Court established under section 12 of the Magistrates Act 1948 known as the Family Court': section 13 Children Act 1998. As the respondent's counsel pointed out, where the draftsman intends a provision to apply to the Supreme Court, the reference is explicit (e.g. applications for a declaration of parentage, section 18E). In any event, the applicant seeks*

relief from this Court under section 36.1D of the 1998 Act, which section is found in Part IV. Section 36. 1C (1) provides that a 'Court may, on application, order a person to provide support for his or her dependants and determine the amount of the support'. And section 36.1A crucially provides:

" in this Part–

"Court" means the Family Court…'"

24. *Mr Wilson, for the Applicant, argues that the reference to the Supreme Court in sections 18, 18E and 34(5) are illustrations of instances where a party has to use the Supreme Court. He argues that in all other instances the proper analysis is, having regard to the fact that the Supreme Court is a superior court, it can deal with all matters which can be dealt with by the Magistrates' Court. I regret I am unable to accept this analysis or the conclusion. It seems to me that having regard to the clear terms of the definition of "court" in the Act, references to "court" in section 36O can only be referred to the Family Court. It follows that the Supreme Court has no power to make any order under section 36O and had no power under that section to grant the ex parte Order dated 7 August 2020.*" [Emphasis added]

17. The Father relied on the case of *K.S. v G.S.* [2010] SC (Bda) 53 Div, where 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 *Spiliada Maritime Corp v Cansulex* [1986] 3 All ER 843.

18. In *Spiliada Maritime Corp v Cansulex*, the House of Lords laid down fundamental principles with respect to the doctrine of *forum non conveniens*:

i. The burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay. The burden is therefore on the Mother.

ii. If the Court is satisfied that there is another available forum which is clearly more appropriate the burden of proof will shift to the claimant to show why the proceedings should nevertheless be heard in [Bermuda].

iii. The burden on the Mother is to show that there is another forum which is clearly or distinctly more appropriate than the Bermuda forum. Factors such as whether the claimant would be entitled to institute proceedings in the foreign Court. It is

irrelevant whether the claimant would be able to fund the action in the foreign forum.

iv. The Court may consider the factors point to the natural forum such as: convenience, expense, the law governing the transaction, where the parties reside or carry on business, or whether the proceedings are part of a larger dispute which would be damaged if fragmented.

19. The decision in *Spiliada* described the doctrine as 'not a question of convenience, but of the suitability or appropriateness of the relevant jurisdiction' and more than an issue of 'mere practical convenience'.

20. Therefore, the Father submitted that when weighing up what is the appropriate forum, the court needs consider, *inter alia*:

i. the nature of the dispute;
ii. the location of the evidence that would be disclosable in the litigation;
iii. the location of 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 in another jurisdiction.

21. The Father submitted that having given due weight to all of the considerations the Court will assess whether justice is likely to be done in the foreign jurisdiction.

22. In addition, the Father relied on two private law, children decisions from the UK namely, *Re S (Residence Order: Forum Conveniens)* [1995] 1 FLR and *M v M (Stay of Proceedings: Return of Children)* [2005] EWHC 1159 (Fam) which both established the principle of *forum conveniens* stays in children cases. Both *Re S* and *M v M* characterize non-statutory stays in children's cases as an exercise of any superior court's inherent jurisdiction. Therefore, taking into consideration that in both *Spiliada and Re S,* in *M v M* the relevant principles for a *forum conveniens* stay in children cases were stated to be:

> (a) the burden is on the applicant to establish that the stay is 'appropriate';
>
> (b) the applicant must show not only that [Bermuda] is not the natural or appropriate forum but also that the other jurisdiction is 'clearly the more appropriate forum';
>
> (c) in assessing the appropriateness of each forum, the court must discern the forum with which the case has 'the more real and substantial connection' in terms of convenience, expense and availability of witnesses;
>
> (e) if the court were to conclude the other forum was clearly more appropriate it should grant a stay unless 'other more potent factors' were to drive the opposite result; and
>
> (f) in the exercise to be conducted at (d), the welfare of the child is an important, but not a paramount, consideration.

23. When looking at each of the factors in *Spiliada* the Father submitted the following facts are applicable to consider when determining whether Bermuda or Canada is the appropriate jurisdiction. Each factor is addressed individually below.

i. <u>the nature of the dispute;</u>

24. The dispute concerns the welfare of A and in particular the suitability of the decision to send A back to Canada to live with her maternal grandmother, especially given that both of her parents

are here. This will involve A moving house and attending a 3rd school in just seven months with a proposed further change to occur if and when the mother returns to Canada.

25. Given the dispute, a decision to stay the Bermuda proceedings would effectively end the dispute as A would be returned without Bermuda conducting a proper investigation and determining whether such a course is in A's best interests.

ii. the location of the evidence that would be disclosable in the litigation;

26. The Court would be required to look at the Father's home in Bermuda and the Mother's current circumstances and plans, all of which are in Bermuda. It is accepted that the court would need to consider the position in Canada as well.

iii. the location of witnesses;

27. All of the witnesses are here in Bermuda. It should be noted that on the other hand, the Mother avers that all of the relevant witnesses are in Canada which include but are not limited to, her maternal grandmother, teachers, doctors[2] and neighbours.

iv. relevance of local knowledge;

28. Given that both parents are present here and, at its best, the Mother intends to return frequently, the position on the ground in Bermuda is of critical importance.

v. expert evidence that is likely to be required and the expense that is likely to be incurred;

29. A social inquiry report has already been ordered. It will be ready before the Mother is currently required to leave on 19 June 2023. There is no cost to the parties.

[2] It was confirmed during the hearing that A has no major medical concerns.

vi. grounds under which the jurisdiction of the Court is sought to be invoked;

30. Unknown, the Mother made no formal application for a stay of these proceedings and the grounds have not been pleaded. The Mother caries the burden of proof.

vii. the location of the litigants;

31. All litigants are in Bermuda

viii. the nature of the relief sought;

32. Although the Father seeks to resolve the longer term situation, and seeks for care and control to be transferred to him, the initial and urgent dispute relates to the very real and obvious risks should A be permitted to return to Canada when both her parents are present in Bermuda.

33. The dispute plainly needs to be resolved here so the court in Bermuda can be satisfied that the welfare of A will not be jeopardized should she return to Canada.

ix. whether proceedings have already been commenced in another jurisdiction.

34. There are divorce proceedings in Canada which have not been properly served.

35. To summarize the Father's submissions in light of the above, the question that must be determined is: Can the Respondent Mother show, as is required, not only that Bermuda is not the natural or appropriate forum but also that the other jurisdiction is 'clearly the more appropriate forum'? The Father submitted that the Mother does not come close to overcoming that burden.

36. In assessing the appropriateness of each forum, the court must discern the forum with which the case has 'the more real and substantial connection' in terms of convenience, expense and availability of witnesses.

37. In addition, the Father submits that the Mother has acceded to the jurisdiction given her actions since the Father's Application commenced. He notes that the parties have filed affidavit evidence. The court has ordered a social inquiry report and a hearing will take place before the mother's immigration position expires.

38. Further, he says that all of the witnesses and litigants as well as A are here. There is real concern of returning A to Canada where she will be cared for by a non-parent, in a place which is not home and where she will be required to attend another new school. The Father asserts this is a critical decision and one which the court has a duty to consider where the case involves a Bermudian child presently in Bermuda. The Court should be very slow to stay its own proceedings without being satisfied that the removal of A from its jurisdiction is in her best interests. Therefore, the Father submits that the Mother's application for a stay of these proceedings should be refused.

ANALYSIS AND CONCLUSION

39. Having considered the statute and case law cited above, I do not accept that the concept of habitual residence of A is the determining factor as to whether these proceedings should be stayed. The concept of habitual residence outlined in the cases provided by Ms Cassidy specifically apply to child abduction cases under the Hague Convention as well as other statute which is not applicable to this matter.

40. Furthermore, if I were to accept that this Court has jurisdiction to make orders under Section 36O, there is clear provision in Section 36L for the Courts to have jurisdiction in cases despite it being the case that the child subject to the application is not habitually resident in Bermuda (see Section 36L (1) (b)). For the avoidance of doubt, it cannot be disputed that the facts of this case are that A's habitual residence is in Canada.

41. The applicable legal principle in determining whether Bermuda is the most appropriate jurisdiction or whether Canada is that of *forum conveniens* as confirmed in *K.S. v G.S.*. I accept the submissions of the Father as to why he says Bermuda is the most appropriate jurisdiction and reject the Mother's submissions as to why she says Canada is the most appropriate jurisdiction.

42. Therefore, I accept that Bermuda is the most appropriate jurisdiction to address all matters in relation to the welfare of A. Accordingly, the previous orders made within these proceedings shall remain in effect and this matter shall proceed to final determination.

Dated this 21st day of April 2023

ACTING JUSTICE ALEXANDRA WHEATLEY