



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2022: No. 391

BETWEEN:

Father

Applicant

-and-

Mother

Respondent

Before: **Hon. Alexandra Wheatley, Acting Justice**

Appearances: **Simone Smith-Bean of Smith Bean & Co Ltd, for the Applicant**

Nicole Cavanagh of MJM Limited, for the Respondent

Date of Hearing: **28 August 2024**

Date of Ruling: **30 September 2024**

REASONS

Application to Prevent Removal of Child from the Jurisdiction;

Ex-Parte Application Heard On Notice; Welfare of Child Paramount Consideration;

Interim Access Orders

WHEATLEY, ACTING JUSTICE

INTRODUCTION

1. This is a case surrounding a three-year-old child (hereinafter referred to as **B**). These proceedings commenced when B was just one year old. The Respondent (hereinafter referred to as the **Mother**) is a Bermudian, but has been residing in Canada since she was nine years old, i.e. approximately 18 years. B was born in Canada and resided there with the Mother until July 2023. The Father is a Bermudian who prior to 2023 had limited access with B. The parties have had a high conflict relationship and there have been allegations of domestic abuse. Since this matter commenced in December 2022, there have been a number of interlocutory applications determined as it relates to B's access with the Father.
2. On 27 August 2024, the Father filed an urgent application which was requested to be heard *ex-parte* and seeking, *inter alia*, the Mother be prohibited from removing B from Bermuda, that B's passports be surrendered to Smith Bean & Co to be held until agreement or court order, and that he be granted interim care and control until further order of the court (**Father's Prohibition Application**).
3. After hearing counsel for both parties, I confirmed that I was denying the Father's Prohibition Application. I advised counsel that I was not satisfied that there is a risk of the Mother removing the child from the jurisdiction and not returning the child in an attempt to prohibit access or to not comply with the orders of this Court. I also directed that this application be consolidated with the parties' other competing applications wherein directions were given on 23 August 2024, save for that I provided counsel for the Father additional time to file his responding affidavit until 13 September 2024 and the Mother to submit her affidavit in reply by 27 September 2024. Finally, having been asked for direction from counsel as it related to access, I confirmed that the Father's access would revert in accordance with the terms set out in the January 2023 Consent Order.
4. After rendering my decision to the parties, the Acting Registrar advised counsel that I would be providing my written reasons for the Ruling. These are my reasons.

CHRONOLOGY OF PROCEEDINGS

5. Both parties at the commencement of these proceedings were unrepresented, litigants in person. This matter was commenced by way of Summons dated 15 December 2022 (**Originating Application**) in which the Father asked the Court for the Mother to be prohibited from leaving Bermuda with the child.
6. The Originating Application was heard on an *ex-parte* basis on 22 December 2022 with only the Father attending the hearing. There is a handwritten note on the file addressed to the Judge from an administrative assistant asking that the matter be listed. On this same document the Judge wrote a response indicating various dates of availability to list the matter which included 22 December 2022. There is no written correspondence on the file

showing how the Father was advised to attend court on 22 December 2022 for the *ex-parte* hearing.

7. The order made in this hearing (***Ex-Parte Order***), *inter alia*, prohibited the child from being removed from the jurisdiction and listed the matter for an “*on notice hearing*” on 9 January 2023. The Originating Application was subsequently issued by the Court with a return date of 9 January 2023.
8. On 9 January 2023, the Judge made an order which is defined as a “Consent Order” (**January 2023 Consent Order**). The January 2023 Consent Order set out a comprehensive access schedule on the premise that the Mother was returning to Canada with the child. No return date was given as it was deemed to have brought the application to an end. The Mother has subsequently indicated in affidavit evidence that without legal representation she felt pressured into agreeing the defined access schedule that was being proposed despite believing it was not in B’s best interest.
9. The travel restrictions put in place by the *Ex-Parte Order* were removed in the January 2023 Consent Order in accordance with paragraph 21 which confirmed the Mother had the leave of the Court to remove B from the jurisdiction.
10. It is noted that in the January 2023 Consent Order, there is a provision which states as follows:

“Non-Compliance

23. *In the event of non-compliance with any term of this order, each party shall be responsible for notifying this court of the same, by letter to the Registrar, to avoid delay.”*

11. The matter was heard next on 12 January 2023. No application was made by the Father with a supporting affidavit for the matter to be listed on this date. Likewise, there is no correspondence on the court file, i.e. a letter to the Registrar, to show any request for this matter to be relisted and the reasoning for the request. The order made by the Judge on 12 January 2023 (**January 2023 Order**), states in the preamble, *inter alia*:

“WHEREAS the father complained to this court that the mother refused to comply with paragraphs 5 & 6 of the [January 2023 Consent Order].”

12. It remains unclear how “*the Court*” was advised of the “*complaint*” made by the Father or how the parties were informed that they were required to attend Court on this date.
13. The next action on the court file is not until the Mother filed an application on 9 October 2023 at 11:16 a.m., *inter alia*, seeking that the Father return the child’s passport to her in order that she can return to Canada with the child in accordance with the January 2023 Consent Order (**Mother’s October 2023 Application**). On this same date, the Father filed

an application at 4:07 p.m. requesting that the court address matters of “*custody/shared custody*”, “*travel restrictions*” and “*child access*”¹ (**Father’s October 2023 Application**).

14. The order made by the Judge on this date (**12 October 2023 Order**) stated as follows regarding the relief being sought by the respective parties:

“UPON HEARING the Father, in person on Oath, on his application dated 9 October 2023 seeking:-

- i. Custody or shared custody of the Child, and*
- ii. Care and control of the Child.*

AND UPON HEARING the Mother, in person on Oath, on her application dated 9 October 2023 seeking an order that:-

- i. The Father shall immediately hand over the Child’s passport.”*

15. Welfare concerns were raised as the parties advised the Court that there had been an altercation between themselves on 3 or 4 October 2023 in front of B. There were allegations made by the Father that the Mother was intoxicated which resulted in her supposedly being arrested and the Mother had alleged that the Father had physically assaulted her. The Mother later described the assault by the Father as being “*knocked unconscious*” in her affidavit sworn on 26 July 2024.
16. Consequently, the 12 October 2023 Order directed that there be an expedited welfare report to be submitted by 19 October 2023 to address “*i. any significant harm suffered by the Child and the parent(s) with whom the Child is living as a consequence of the matters raised in paragraph 1 above in Bermuda, and ii. any significant harm which the Child is at risk of suffering*”. The matter had been listed for mention on 19 October 2023 at 12 p.m. in relation to the welfare report. Additionally, the matter was listed for mention on 23 November 2023 at 12 p.m. as an expedited Social Inquiry Report was ordered to be completed regarding “[B’s] circumstances in Bermuda and Canada”. The Court Appointed Social Worker was required to be in attendance on 23 November 2023.
17. A Welfare Report was filed on 19 October 2023 (**Welfare Report**) which was completed and provided to the parties one hour prior to the start of the hearing. During the hearing, based on the transcript thereof², it appears that the Mother attempted to make submissions to the Court, generally but also in relation to the Welfare Report, and she was refused to be heard. On this date, the Judge accepted the recommendations set out in the Welfare Report without any of its content being tested and without hearing from either party, and changed access of B to be with each parent on an alternating weekly basis.

¹ As the Father was acting in person it appears as if the documents which he filed on 9 October 2023 being an “Affidavit” and “Summons” respectively, the content of the Affidavit should have been what the Summons stated and the Summons should have stated what the Affidavit did.

² The transcripts of the hearings held on 19 October 2023, 9 January 2023 and 12 January 2023 can be found in the Mother’s Second Affidavit sworn on 24 June 2024 from paragraph 46 through to 49, in Exhibit “JE-2” at pages 1 to 38, and in Exhibit “JE-3” of the Mother’s Third Affidavit sworn on 26 July 2024 at pages 6 to 84.

18. At paragraph 4 of the 12 October 2023 Order, the Judge ordered that the Father surrender B's passport to the Supreme Court where it was to be retained until further order of the court.
19. On 28 March 2024, the Mother filed two applications with the court. One of the applications (**Mother's Care and Control Application**) sought, *inter alia*, that the Mother have sole care and control of B, that B's passport be returned to her, and that upon her and B's return to Canada the January 2023 Consent Order shall guide the Father's access with B moving forward. The second application was made on 24 June 2024 (**Recusal Application**), seeking that the Judge recuse herself from having conduct of this case on the basis that "*a reasonably informed and fair-minded observer would find that there is a real risk of bias*" if she were to continue to have conduct of this matter. The first return date for both applications was 27 June 2024 at which time directions were given. The hearing of the Recusal Application was subsequently set down and heard on 9 July 2024.
20. The Recusal Application was heard on 9 July 2024 and the decision reserved at the end of the hearing; however, the Judge has been out of the office to address a private matter since 12 July 2024, and as such a decision was not rendered prior to her departure. Given the date that the Judge would be returning to the office is unknown at this time, the matter was reassigned.
21. Thereafter, this matter was listed before me on 23 August 2024 which was the first return date of the Mother's application seeking the following relief:
 1. *The passport of the Child, [B], currently held by the Supreme Court, be immediately released to the Respondent mother;*
 2. *The Original Birth Certificate of the Child, [B], currently held by the Applicant, be immediately returned to the Respondent mother.*
 3. *The proceedings under case number Civil Jurisdiction 2022 : No 391 be stayed pending the Respondent's return to her home in Canada with the Child, where she will issue proceedings for a child arrangements order in Halifax, Nova Scotia, which is the proper forum for proceedings relating to the Child.*
 4. *That the Respondent mother be granted leave to amend paragraph 2 of her Summons on 11 April 2024 to read "the Respondent mother shall have sole custody of the Child".*
 5. *The Applicant shall be responsible for costs.*
22. Initially, I was of the view that only directions would be given at the appearance on 23 August 2024; however, having thoroughly reviewed the file and hearing from counsel, it was evident that there was no basis for which the court should retain B's passport, neither

could I find any basis for which a power of arrest being attached to the 12 October 2023 Order and the 19 October 2023 Order.

23. At the conclusion of the August 2024 Hearing, I gave an *ex-tempore* ruling wherein, *inter alia*, confirmed that I had serious concerns in relation to the orders that had been made thus far in these proceedings and therefore, concerned for the welfare of B. I noted the Court's jurisdiction to vary its own orders, particularly as it relates to child matters. I ordered that the child's passport be released immediately to the Mother as I found no basis on which the court should be retaining it. Given the Father's confirmation during the midst of this hearing that he had obtained Bermudian Status for the child without the knowledge or consent of the Mother, I ordered that he immediately disclose to the Mother a copy of the application he made for the child to the Department of Immigration along with any decisions communicated to him.

ISSUES

24. There was no need for counsel to address the Court regarding the law as both counsel are fully aware that the Court derives its jurisdiction pursuant to section 12 of the Minors Act 1950 (**the Act**) to grant orders in relation to access as the court may think fit. In making its decision, the court must have "*regard to the welfare of the minor and to the conduct and to the wishes or representations of either parent*". Section 6 of the Act provides that the court must "*regard the welfare of the minor as the first and paramount consideration*".
25. Having regard to the welfare principle, the history of the proceedings to date as well as after hearing counsel of the parties, there are several issues and concerns I have identified (which have been verified by review of the court record) that led to my decision:
- i) A third party, the Father's grandmother, played an integral role in participating during the proceedings such as giving evidence during the hearings and generally participating throughout on behalf of and in addition to the Father. This was allowed on each occasion prior to the Mother obtaining legal counsel.
 - ii) It does not appear that the Mother, a litigant in person, was encouraged or advised at any point during any of the court appearances (since the commencement of this matter) to obtain independent legal advice despite the number of questions she was posing to the Court³.
 - iii) At no point has there been a hearing where parties have been allowed to provide any of his or her own evidence in relation to the content of the Welfare Report, the Family Preservation Team Report dated 5 May 2024 and the Social Inquiry Report. Likewise, the parties were also not given an opportunity to submit

³ The transcripts of the hearings held on 19 October 2023, 9 January 2023 and 12 January 2023 can be found in the Mother's Second Affidavit sworn on 24 June 2024 from paragraph 46 through to 49, in Exhibit "JE-2" at pages 1 to 38, and in Exhibit "JE-3" of the Mother's Third Affidavit sworn on 26 July 2024 at pages 6 to 84.

affidavit evidence, and no opportunity was given for the evidence to be tested through a fact-finding hearing.

In the 12 October 2023 Order, the Judge explicitly set out what she says were “*Undisputed Facts*” and stated, “*Given the above issues are undisputed, the Court has decided that a fact-finding hearing is not needed.*”. It is unclear whether the contents of the 12 October 2023 Order were ever put to or explained to the parties, but from review of the transcripts it does not appear that this was done. Therefore, it is highly unlikely that either party would have a legal understanding of the concepts and consequences of findings being made regarding “*undisputed facts*” or the concept or consequence of a “*fact finding hearing*”.

- iv) Week on, week off care was ordered in circumstances where a child of just two years of age and who had been primarily cared for by the Mother in Canada for more than B’s first year of life, without hearing from the Mother or the Father. Portions of the transcripts from the hearing held on 19 October 2023, shows the Court’s refusal to hear the Mother ⁴:

“[JUSTICE]...it’s not a hearing. The court is guided by the professionals, the social workers who do the social work. The court applies the law and our joint focus is to safeguard [B]. Okay?”

[MOTHER]: May I ask a question?

...

[MOTHER]: Are you saying I will not get a chance to speak today for my son?

...

[JUSTICE]: Officer, come in here, please. I’m growing old and short of patience and when I say stop talking, please stop talking. Stop. Yeah? Just stop. I’ve told you what the purpose is. Recommendations have been made. No, I don’t want to hear you...”

The granting of interim access orders was addressed in the UK case of *Re D (Contact: Interim Order)* [1995] 1 FLR. This is a case where an interim access order was made in a lower court and appealed. The appeal was successful, and, in his judgment, Justice Wall provided guidance as to the circumstances in which the court should make interim access orders. At pages 504 and 505 Wall J gave the following guidance:

“How do interim orders fit into this framework?”

Interim orders present courts with particular difficulties. By their very nature, they are unlikely to be made with a full understanding of all the facts, and equally there will not normally have been full

⁴ The Mother’s Second Affidavit sworn on 24 June 2024 from paragraph 46 through to 49.

evidence given, with cross-examination as to all the relevant issues. It follows, in my judgment, that interim orders for contact (whether in public law or private law proceedings) need to be approached with a degree of caution.

There are, broadly speaking, two categories of case involving contact in private family law proceedings. The first is where the principle of contact is accepted by both parties as being in the interests of the child, and the issue is the quantum or nature of the contact to be enjoyed. Into this category, as an obvious example, falls the mother who is unwilling to allow the father of her child to have him or her stay overnight, or who takes the view that the father should only see the child once a month rather than once a fortnight.

Where the principle of contact is not in issue, interim orders pending a final determination of the question raised can often be made quite properly without detailed investigation or the court hearing oral evidence. This can be done either by seeking the lowest common denominator which is acceptable to the parties, or by imposing an interim regime which in no way prejudices the final outcome...

...

Where the principle of contact itself is in issue, the test remains the welfare test under s 1 of the Act applied to the facts of the case, but the fact that the principle of contact is in issue itself becomes a factor in the case which must be considered in the welfare equation. In addition, there is the obvious danger in some cases that unless made as part of a coherent strategy for the child, and unless planned and implemented with great care, an interim order will be seen as prejudging the very issue of which the court is seized, namely: should this child see the estranged parent at all?

It follows, in my judgment, that whilst interim orders for contact can be made in such cases on the papers and without hearing oral evidence, the greatest care must be taken before such an order is made to ensure: (a) that on the facts as they currently present themselves it is truly in the interests of the child in question; and (b) (where this consideration is relevant) that the order does not prejudice the issue. [Emphasis added]

- v) B's Canadian passport was ordered to be retained by the Courts⁵ on its own motion in circumstances where the Court had not imposed any travel restrictions for B. The travel restrictions were removed almost nine months prior in accordance with paragraph 21 of the January 2023 Consent Order.

⁵ Paragraph 4 of the 12 October 2023 Order.

- vi) Despite the Judge having the before her an application by the Father on both 12 and 19 October 2023 for “*travel restrictions*” to be put in place and finding the need for a welfare report to be completed, no order was made prohibiting the Mother to remove B from the jurisdiction.
- vii) The mention date set for 23 November 2023 at 12 p.m.⁶ did not proceed. There is no correspondence on the file to indicate whether there was any communication made with the parties regarding the matter not proceeding. Similarly, there is no indication on the court file as to why the matter was not heard on 23 November 2023.

Notwithstanding this, there does not appear to have been any efforts made to have this matter listed before the Court when this appearance did not occur. This matter was subsequently only listed before the Court due to the filing of the Mother’s Relocation Application and the Mother’s Recusal Application.

- viii) A Power of Arrest was attached both the 12 October 2023 Order and the 19 October 2023 Order which largely sets out an access/care schedule is extremely out of the norm. Moreover, the Court made this provision on its own motion rather than it being requested by either party and no reasons were given. The parties were not provided with an opportunity to oppose such a provision.
- ix) B was ordered to attend nursery school. There is no legal requirement for a child under the primary school age (five years old) to attend nursery school. There is a great deal of controversy surrounding B attending nursery school which need to be fully ventilated before the Court.
- x) Serious allegations of domestic abuse have been made and do not appear to have been fully investigated by the Court Appointed Social Worker (CASW), the Investigation Team, the Family Preservation Team or the Court. For example, the Mother alleges that on 3 October 2023 she contacted the police as the Father had hit her in the head and knocked her unconscious⁷. It was as a direct result of the Mother’s assault complaint to the police on this date which ultimately led to the Welfare Report being ordered by the Court. There is no mention of the assault in the Welfare Report and no attempts appear to have been made to make contact with sources that the Mother informed the social workers would corroborate her allegations of domestic abuse.
- xi) Having obtained counsel, the Mother has provided extensive affidavit evidence challenging not only the contents of the Welfare Report and the Social Inquiry Report, but has made very serious and concerning allegations against the social workers who were the writers of the respective reports. For example, at paragraphs 145 to 150 of the Mother’s Third Affidavit, she sets out her

⁶ Paragraph 5 of the 12 October 2023 Order.

⁷ Paragraphs 45 and 170 of the Mother’s Third Affidavit.

experience with making allegations of child abuse against the Father to the police. The investigating officer after taking her statement gave her assurance that the complaint would be pursued. Subsequently, the Mother was contacted by the same officer days later who informed her that after speaking with the social workers the investigation would not be pursued due to the social workers informing the police that they did not want their assistance. The Mother was also told the social workers informed the officer that the investigation had already been concluded after speaking with all the parties. The Mother's evidence is that she was never once contacted by the social worker regarding the complaint she made of child abuse to the police, and the Mother says that as a direct result of the social worker's interference with the police, an investigation was never pursued.

xii) Findings were made that there has been domestic violence between the parties (putting aside whoever was the instigator and/or perpetrator), the Court Appointed Social Worker and the Investigation Team still recommended the parties to attend mediation to resolve parenting issues. This is in direct contradiction of modern litigation practices which acknowledge that in cases where there is domestic violence, parties should not be put in a position to be forced to mediate/negotiate with his or her abuser. For example, in the UK when parties are divorced there is a statutory requirement for the parties to complete a mediation process in relation to finances or any child issues prior to an application being brought before the Court. An explicit exemption for participating in the mediation process is when there are allegations of domestic violence.

26. For the avoidance of doubt, the list at paragraph 25 above is not meant to be exhaustive, but rather to illustrate the serious nature of the concerns which, *inter alia*, led to my decision to refuse the Father's Prohibition Application (as well as which led to my decision on 23 August 2024). There is a plethora of further examples which raise grievous concerns regarding the history of these proceedings, but also as to the conduct of the social workers assigned to this case. It is therefore essential that all the evidence in this matter is thoroughly tested through cross-examination as it may be appropriate for this Court to recommend that internal investigations to be conducted by the Director of the Department of Child & Family Services regarding the conduct of the social workers.

DATED this 30th day of September 2024



ACTING JUSTICE ALEXANDRA WHEATLEY