



# In The Supreme Court of Bermuda

## DIVORCE JURISDICTION

2022: No. 96

**BETWEEN:**

**R**

**Applicant father**

**-and-**

**O**

**Respondent mother**

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**Before:**                    **The Hon. Justice Stoneham**

**Appearances:**        **The Applicant father appeared in-person with a  
McKenzie friend**  
**Ms. Cassidy of Wakefield Quin Limited, appeared on  
behalf of the Respondent mother**

**Date of Hearing:**        **12 June 2023**

**Date of Judgment:**    **15 June 2023**

**REASONS**  
**(in Chambers)**

*The Court's overriding objective - litigants in person - 'defined access' – 'best interests of child' - costs*

**STONEHAM J**

**INTRODUCTION**

1. These proceedings concern a nine (9) year old girl, who will be referred to as 'A' in this judgment. Her parents have an apparent inability to cooperate in her best interests her.
  
2. By Summons dated and filed into court on 8 March 2023, the Father instructed Marshall Diel & Myers Limited, Barristers & Attorneys to seek an order in the follow terms:-
  - i) The Mother and her agents be prohibited from taking or sending out of Bermuda the child, namely, 'A';
  - ii) That the Father and Mother be granted joint custody of 'A';
  - iii) That the Father be granted care and control of 'A';
  - iv) In the alternative, the Father shall be granted defined access to 'A';
  - v) That any order for access be registered in the Courts of Ontario as a mirror order;
  - vi) Such other orders as the court may consider just and appropriate;
  - vii) That the costs of the application be provided for.

## **Brief Background**

3. A's father is Bermudian ('the Father') and her mother is Canadian ('the Mother'). In 2014, A's parents married and resided in Canada, where 'A' was born. However, her father's residency status in Canada only permitted him to remain in Canada for a period of up to six months at a time, necessitating that he travel back and forth to Bermuda to reset his status in Canada. After a while, this travel back and forth, took a toll on 'A's parent's marriage and her father returned to Bermuda for good.
4. From then, A's father would attempt video calls with her and periodically visit her in Canada. These visits with her father were subsequently complicated by the imposition of travel restrictions during the Global Covid-19 pandemic. In October 2020 'A's Father petitioned for divorce.
5. In or about January 2022, A's father learned via social media and friends that 'A's mother frequently visited Bermuda often leaving 'A' behind in Canada. Unsurprisingly, A's father had concerns regarding who was caring for her during her mother's visits to Bermuda.
6. In January 2023, the Father became aware that 'A' was in Bermuda with her mother, and had been on island since December 2022. Unsurprisingly, this circumstance upset 'A's father who longed to spend time with his daughter. Parental tensions increased which then negatively impacted opportunity for A and her father to enjoy time together.
7. Upon learning from third parties that 'A's mother, who had recently given birth in Bermuda, was making arrangements for 'A' to return to Canada whilst she and her new-born infant remained in Bermuda, her father instructed Marshall, Diel & Myers Limited, Barristers & Attorneys. Marshall Diel & Myers Limited filed an urgent *Ex Parte* (without notice to the Mother) application and obtained an interim order, *inter alia*, prohibiting the Mother and her agents from taking or sending 'A' out of Bermuda.

8. Subsequently, on the 17 March 2023, Ms. Cassidy of Wakefield Quinn Bermuda Limited appeared on behalf of the Mother. Mr. Adam Richards, of Marshall Diel & Myers Limited, appeared on behalf of the Father. The Court made various orders including for 'A's mother and father to file affidavit evidence, the preparation of an expedited Social Inquiry Report regards A's welfare both in Bermuda and Canada and for A to enjoy time with her father each Saturday from 9:00 a.m. to Sunday 6:00 pm.
9. Thereabouts, the Mother applied, *inter alia*, to have these proceedings concerning 'A's welfare stayed in Bermuda and for legal arguments to be made on whether Bermuda or Canada is the most appropriate jurisdiction to address matters in relation to 'A's Welfare.
10. On 20 April 2023, the Mother's application was heard, and the Court determined that Bermuda is, indeed, the most appropriate jurisdiction. By Order dated 21 April 2023, a Litigation Guardian was appointed to assist this court in its determination of the Father's Summons dated 8 March 2023 which was listed for a one day hearing before me today 12 June 2023.

### **The Hearing**

11. At the outset of the hearing the Father immediately indicated that he appeared in person with a McKenzie Friend as he could no longer afford legal representation. Ms. Cassidy, on behalf of the Mother vigorously objected to the Father's McKenzie Friend, but the Court permitted her attendance and gave directions on the role of McKenzie Friend's in proceedings. Such directions included that the McKenzie friend may take notes and quietly give advice to the Father during the hearing.
12. The Father respectfully requested the Court to read his early morning email communication to the Court. The Court obliged and at the same time provided Ms. Cassidy with a copy. In this three (3) page email, the Father described the

frustrations he suffered trying to maintain contact with his daughter. He said, among other things, that “*due to {the Mother’s} continuous travel and our inability to communicate effectively, it is extremely hard to keep any consistent contact with my daughter*”.

13. The Father set out the concerns which prompted him to commence these proceedings. He also highlighted the positive aspects; “*Seeing ‘A’ so often*” pursuant to the Court’s interim access order “*has been the best feeling a father could ask for*”. However, his sadness and disappointment in the information contained within, and omitted from, the Social Inquiry Report and the Litigation Guardian’s report, was palpable. The Father concluded by stating:-

*“While it is still my hope that one day my relationship with my daughter will be stronger, due to the circumstances, I am aware that might not be today. While I want the best for my daughter, I also want her to be happy...And as unfortunate as it may be, I think it’s best for now if the respondent and I do not share care, control, and custody, so that we can avoid ‘A’ being further damaged by being put in the middle. I reached out to the respondent’s lawyer to try and start the discussion surrounding terms, but I’ve had no feedback on my terms....”*

14. The Father’s proposed terms included that the Mother have “*full care, control, and custody* and that “*I am not seeking defined access from the court, as I do not want anything forced upon the respondent or ‘A’*”.
15. The Court explained that in all proceedings concerning the upbringing of children, the Court must apply the principle that the welfare of the child is paramount. In ordinary words, the Court explained that in court proceedings the best interests of the child are more important than the wishes and wants of that child’s parents.
16. In keeping with the Court’s overriding objective to ensure that the parties are on equal footing and most importantly regards the best interests of ‘A’, the Court focused the hearing and invited the Court Appointed Social Worker and Litigation

Guardian to give evidence and to be examined on the contents of their reports dated 30 May 2023 and 11 May 2023 respectively.

17. During her evidence, Ms. Woods, the Court Appointed Social Worker confirmed that when interviewed, A was very clear about wanting access to her father. Whether such access should be child driven, as suggested by Ms. Cassidy, Ms. Sousa, the Litigation Guardian replied:-

*“It is not appropriate, given her developmental age... At 9 years old, it would be more comfortable for a child to know what to expect. Defined access is much easier on everyone. If ‘A’ is asked who she wants to spend Christmas with this year, it’s too much for a child to make such a decision. It would be a burden for the child. At this stage, it would continue to put her in the middle...It’s also about her identity; spending time with her dad and about ...getting to know Bermuda. This environment – family traditions...an opportunity to develop the other half of her genes”.*

18. In her report, the Litigation Guardian described her interviews with ‘A’ and commendably conveyed ‘A’s 9 year old voice into these proceedings:-

**Page 1** [Paragraph 2] – *“Despite her initial apprehension, {A} quickly relaxed and was happy to colour and draw during the conversation. ...She said she has been attending school virtually since coming to Bermuda. When asked to complete a heart-shaped picture entitled “I love...” ‘A’ drew herself and her mother, and added the names of her Daddy and Nana (paternal grandmother, Teta (maternal grandmother), and baby sister...”*

*“She clearly stated that she loves both her parents and wants to be able to spend time with each of them. When asked what she thought ‘time with each of them’ should look like, she said she thought “equal time” would be fair but travelling back and forth to*

*Bermuda every other week, or every other month, would be difficult and wouldn't make sense. She stated that she knew her father would like her to live with him and go to school in Bermuda and added*

**Page 2** [Paragraphs 1 & 2] - *"I would love to wear a uniform and shiny shoes, but I don't want to stay in Bermuda without my mommy. The aforementioned statement speaks to 'A's attachment to her mother, who has been her primary caregiver since her father's return to Bermuda when she was approximately three years old. This by no means indicates that she doesn't have an attachment to her father, but likely indicates a reliance on the relationship with her mother for her day-to-day safety and security needs..."*

[Paragraph 3] - *"'A' explained that recently, she has regularly been spending time with her father on the weekends. She reports enjoying being at her father's home and feeling happy and comfortable there. She also stated that she would like to spend more time with her father. When this writer asked if she thought spending school holidays with her father was a good idea she said she would like that".*

19. The welfare principle is patently woven throughout the evidence of the Litigation Guardian as well as the evidence of Ms. Woods, the Court Appointed Social Worker. Consequently, this court embraces their evidence. There is no doubt whatsoever that their participation in this case helped the Father and Mother to understand that unless there is a significant risk of harm to a child, parents should not be deprived of exercising their rights and responsibilities in caring for their children.
20. Happily the parties agreed during the hearing, and the Court approved, that 'A's best interests demand that she have the opportunity to develop a strong relationship with each of her parents notwithstanding each reside in different

jurisdictions and, that a defined access arrangement would best support her relationship with her father.

#### The Parties Agreement

21. During the hearing, the parties agreed, *among others*, that the Mother shall have sole care and control and custody with authority to make all decisions pertaining to 'A's general wellbeing including medical decisions, educational and religious training. Further they agreed that for so long as 'A' remains in Bermuda following this hearing and on all other occasions that she visits the island with her mother (whose new partner resides in Bermuda), the Father shall continue to enjoy weekend access from Saturday 10:00 am until Sunday 6:00pm.
22. With the assistance of the Court, the Parties agreed alternating Christmas access with 'A' spending Christmas 2023 in Bermuda with her father and annual summer access in Bermuda commencing on or about 1<sup>st</sup> July 2024 and concluding each year immediately following the Bermuda Cup Match holiday.
23. Bearing in mind the parties' historic inability to communicate and the obvious emotional toll of these proceedings on the parties, the Court considered that it would be in the best interest of 'A' to order the Mother to register this agreement order and obtain a mirror order from a court in Ontario, Canada within 60 days hereof.
24. The specific terms of the parties' agreement, as approved by this Court, are embodied in a Consent Order dated 12 June 2024. This consent order includes the Father's voluntary contribution of \$300 per month to the Mother for the benefit of 'A' via direct payment into the Collecting Office of the Magistrates' Court. The Collecting Office shall forward the sum to the Mother's bank account overseas.



### Costs of Proceedings

25. Ms. Cassidy on behalf of the Mother argued that costs of these proceedings should be awarded against the Father on an indemnity basis. In other words, the Father should be penalised for commencing these proceedings with an order that he pay the Mother's legal fees.
26. The Father commenced these proceedings because he had concerns regarding the welfare of his daughter. In my judgment, his concerns were valid. Moreover, ten (10) days prior to the commencement of this listed hearing, the Father responded to Ms. Cassidy's email dated Thursday June 1, 2023 at 3:02 p.m. on whether a resolution could be reached without proceeding to a full court hearing.
27. In his email reply dated Friday June 2 2023 at 9:58 a.m., the Father said, "*No need to meet or discuss. This is my position and terms to avoid trial:*
1. *The divorce is finalized here in Bermuda first and foremost. The application has already been filed...*
  2. *{The Mother} can have full care, control and custody*
  3. *I am currently not asking for any access*
  4. *I will pay \$300 per month child maintenance until {'A'} is 18.*
  5. *Both parties agree to pay their own legal costs. Any additional costs to be split evenly*
28. On Friday 2 June 2023 at 7:01 p.m., Ms. Cassidy replied "*with your indication given, you will need to file a Notice of Withdrawal or Discontinuance for the child proceedings. We will have a draft document available for you in the morning on Monday to review and sign*". Such suggestion is misguided.
29. On Thursday 8 June 2023, (4 days prior to the hearing) the Father via email to Ms. Cassidy said, among other things, "*I haven't heard anything, nor have you prepared any draft proposed consent order.*" Ms. Cassidy replied to the

Father's email on Monday 12 June, 2023 at 8:49 a.m. (90 mins prior to the commencement of the hearing) without attaching a draft consent order setting out matters agreed.

30. Rule 1 A/3 of the Rules of the Supreme Court provides that parties are required to help the court to further the overriding objective, which includes taking into account the need to allot resources to other cases. In other words, parties must not waste the court's time. In my view, the issues regarding the custody, care and control, and A's return to Canada could have been resolved via consent order without the need of coming before the Court. As events unfolded, the Court had the opportunity to clarify that all reports confirmed that defined access with the Father is in A's best interests.
31. In exercise of my discretion in all the circumstances, given such conduct in relation to the litigation of this case, I am satisfied that each party shall be responsible for their own legal costs.

**DATED this 15<sup>th</sup> day of June 2023**



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**JUSTICE STONEHAM**