In The Supreme Court of Bermuda

CIVIL JURISDICTION

2024: No. 8

BETWEEN:

Father

Applicant

-and-

Mother

Respondent

Before:	**Hon. Alexandra Wheatley, Acting Justice**
Appearances:	**Georgia Marshall of Marshall Diel & Myers Limited, for the Respondent** **The Applicant, In Person**
Dates of Hearing:	**4 September 2024**
Date of Ruling:	**10 September 2024**

RULING

Application for Shared Care and Control by the Father; Interim Access; The Minors Act 1950; Welfare of Child Paramount Consideration; UK Welfare Checklist

WHEATLEY, ACTING JUSTICE

INTRODUCTION

1. The Father of the 5-year old child (hereinafter referred to as **Z**) in this case filed an originating application on 12 January 2024 (**the Father's Application**), *inter alia*, seeking the following relief:

    i. Joint custody of the child who was born on 16 September 2018 (hereinafter referred to as Z).

    ii. Shared care and control of Z alternating on a weekly basis with handovers on Mondays.

    iii. Z be prohibited from being removed from Bermuda until further order.

    iv. An immediate resumption of access, with interim access taking place on alternate weekends from Friday after school to Monday at school and alternate Thursdays from school until 8:00 p.m.

2. On 14 March 2024 the Mother filed her own application (**the Mother's Application**) in relation to Z asking for sole custody and sole care and control as well as leave to remove Z from Bermuda to reside with her in the UK.

3. During these proceedings, the parties have up until now been able to agree the terms of the Father's interim access to Z by way of consent orders. Below is a summary of those agreed terms:

    i. Consent Order dated 22 February 2024 (**the First Interim Access Agreement**)

        a) With effect from 25 February 2024, each Sunday from 10:00 a.m. to 6:00 p.m.
        b) Handovers by the Father's mother and Z's godparent at Shelly Bay Park.

ii. Consent Order dated 15 April 2024 (**the Second Interim Access Agreement**)

a) With effect from 12 April 2024, alternating weekends by the Father collecting Z from school on Fridays and returning her to school the following Monday.

iii. Consent Order dated 2 July 2024 (**the Third Interim Access Agreement**)

a) With effect from 3 July 2024, alternate Wednesdays by the Father collecting from camp and returning Z the following Monday.
This arrangement shall expire on 10 September 2024.
b) Provisions for access over the Cup Match and Labour Day holidays were also set out.

4. This application is for an interim provision for access as the current interim position ends on 10 September 2024 which is when the child will commence primary school after the summer holidays.

5. On 15 April 2024, by way of Consent Order, the portion of the Mother's Application requesting leave to remove Z from Bermuda was adjourned *sine die* with liberty to restore. It is confirmed in the Mother's Affidavit that she was not able to proceed with that portion of her application at that time.

6. Subsequently on 13 August 2024, the Mother filed her application to reinstate the leave portion of her application. The first return date was set down for on 23 August 2024, at which time the Father's Application was also listed for further directions in relation to the Father's Application. The Father wished for his substantive application to be determined as soon as possible. Directions were given for further affidavit evidence as well as an update of the SIR specifically as it relates to the leave to remove issue by 31 October 2024 with the final hearing of the consolidated applications to be listed in November 2024.

7. The Father filed two affidavits in these proceedings which were sworn on 14 March 2024 (**the Father's First Affidavit**) and on 24 June 2024 (**the Father's Second Affidavit**) respectively.

8. The Mother swore an affidavit on 29 April 2024 in which she responded to the Father's First Affidavit (**the Mother's Affidavit**), as well as set out her evidence relating to her application dated 24 March 2024 (**the Mother's Leave Application**) seeking, inter alia, for leave to remove Z from the jurisdiction to reside with her in the UK as well as sole custody and sole care and control of Z. Both parties also filed written submissions they relied on for the interim access hearing.

9. The Court Appointed Social Worker produced a report on 17 May 2024 (**the SIR**) which had been prepared for the purpose of considering the Father's application for shared care and control on a week-on-week-off basis as well as the Mother's application seeking leave to remove the child from Bermuda to reside with her in the UK.

PARTIES' POSITIONS

10. The Father is seeking for an interim order that the parties have shared care and control on a week on week off basis from Monday to Monday. In the alternative, he is asking that the Third Interim Access Agreement continue, i.e. alternating weekly access from Wednesdays to Mondays.

11. The Mother believes that it would not be in the Z's best interest to remain with the Father on an alternating weekend basis in accordance with the Second Interim Access Agreement. In the Mother's Affidavit, she disputes the level of involvement which the Father says he has had in Z's life since she was born and asserts that he has not been a consistent figure in Z's life. It is also her position that she has always intended to return to reside in the UK and that her leave to remove Z from the jurisdiction is not yet determined. A summary of the Mother's concerns of Z whilst she is in her Father's care are as follows:

    a. She does not believe that the Father is capable of properly caring for Z during the school term such as, grooming her hair, ensuring she has been washed and dropping Z to school on time.

    b. The Father has behaved aggressively and threateningly towards her current partner.

c. Z sharing a room with the Father's girlfriend's child who has developmental challenges and behavioural challenges which she says are being mirrored by Z.

12. The Mother has proposed the following interim access arrangement until such time as her Leave to Remove Application is determined:

a. With effect from 13 September 2024, alternate weekends from Friday after school, returning her to school the following Monday.

b. With effect from 19 September 2024, each Thursday where the Father does not have weekend access, he shall collect Z from school and return her to the agreed meeting place by 7:00 p.m.

13. It is the Father's position that he is more than capable of caring for Z during school terms and disputes the Mother's allegation that he is not apt to do so. As it relates to her partner, the Father noted that it is the partner who has been charged with a criminal offence regarding his aggressive and threatening behaviour towards him. He also denies the assertion that Z is mirroring his partner's child and suggests it is likely her mirroring her one year old steo-brother.

14. One must also look at what recommendations were made in the SIR. Those recommendations are as follows:

1. *Joint custody should be reaffirmed.*
2. *The child should enjoy an incremental increase in access with her father until the shared care and control arrangement is obtained between the parents.*

   **The period of incremental access should not exceed 6 months.*

   **Alterations to the access may be agreed upon by consent or in mediation (see Rec. 7).*
3. *Transitions between household should be at a mutually agreed public setting.*

   **It is advised that the parents create a listing of mutually agreed individuals who may assist in transitions.*

4. *The parents should engage in individual counselling to address communication and coparenting challenges as well as any lingering fears, concerns, and/or general anxiety.*
5. *The Parents should attend Co-Parenting classes.*
6. *Upon successful completion of a co-parenting curriculum, and engagement in individual counselling, the parents should attend Mediation to address modifications to Access, Custodial matters/decisions, public holidays/special events, etc.*
7. *The Patents should individually engage with the various service providers involved in in [Z]'s development, such as doctors/pediatricians, therapists/counsellors, Nursery/Preschool, etc.*

15. In addition, Ms Saunders made a number of assessments at pages 11 and 12 of the SIR. Below are relevant excerpts from this section:

"*Custody*

While both parents have indicated that there are significant coparenting and communication difficulties, and that unilateral custodial decisions have been made, it is not been shown that either parent has presented a threat to the best interest or well-being of the child. The information gathered does, however, raise concern that the state of the coparenting relationship may quickly and negatively impact [Z] if not mitigated.

Access

Both parents have shared they want the best for their daughter, but it's apparent that they fail to see or appreciate the other's perspective on how to accomplish this mutual goal best. [Z] as identified that she wishes to spend "more time with daddy" and could clearly identify the imbalance of time she currently spends with her parents.

By all accounts, [Z] appears to be happy, intelligent, energetic child. No further child protection referrals have been noted...

Care & Control

Regarding care and control, both parents in the respective households appear to have all the necessities required to care for [Z]. The main challenge appears to stem from

several years of diminishing positive communication and increasing tension between the parents and their supports…

<u>Removal from jurisdiction</u>
This office cannot justify making recommendations permitting the child to be removed from the jurisdiction. By all accounts, she is equally thriving socially and academically."

16. The Father, in his submissions, highlighted that the SIR specifically found there were no concerns at either his or the Mother's house which would impact Z's welfare and that both he and the Mother were deemed to be in a position to provide adequate care for Z. The Mother says the SIR does not address her application to relocate with Z and that she wishes to challenge it at the final hearing. Consequently, she says the court cannot rely on the SIR.

17. It was also submitted by the Mother that the Father is seeking to effectively gain joint care and control now "*in order to gain an advantage at the final hearing of this matter and seek to establish a new status quo. This is prejudicial and contrary to my right to a fair hearing of the substantive application*".

THE LAW

18. This court derives its jurisdiction pursuant to section 12 of the Minors Act 1950 (**the Act**), the Court has the power 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*".

19. In the UK, there is also a statutory obligation set out in section 1 of the UK Children Act 1989 (**the UK Act**) for the child's welfare to be "*the court's paramount consideration*". Section 1 (3) of the UK Act provides a 'welfare checklist' requiring the court to consider those factors in deciding with the minor's welfare being paramount. Section 1(3) of the UK Children Act 1989 (the UK Act) provides as follows:

"*In the circumstances mentioned in subsection (4), a court shall have regard in particular to:*

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);

(b) his physical, emotional and educational needs;

(c) the likely effect on him of any change in his circumstances;

(d) his age, sex, background and any characteristics of his which the court considers relevant;

(e) any harm which he has suffered or is at risk of suffering;

(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;

(g) the range of powers available to the court under this Act in the proceedings in question."

20. Whilst Mrs Marshall accepted that Bermuda does not have a comparable statutory provision for the welfare checklist, she submitted that it is a useful tool that applied in the UK cases from which Bermuda can take guidance from.

21. Mrs Marshall directed the court to the UK case of *Re D (Contact: Interim Order)* [1995] 1 FLR which is a case where an interim order was made in a lower court and appealed. The appeal was successful, and, in his judgment, Justice Wall highlighted the importance of judges providing clear explanations of how it reached its decision by referencing the welfare checklist as well as circumstances in which the court should make interim access orders. At page 503, Wall J addressed the "welfare checklist" as follows:

"*The welfare checklist*

In my judgment, it is unacceptable for any court to make a bland statement that it has 'considered all aspects of the welfare checklist' without further particularisation unless, elsewhere in the course of its judgment or reasons, it has, in considering the evidence or in making findings, dealt in detail with the relevant aspects of the checklist, thereby demonstrating that is has applied its mind to the relevant factors: see Re H (A Minor) (Care Proceedings: Child's Wishes) [1993] 1 FLR 440.

The checklist is of course, what it says it is: it is a checklist. In London Borough of Southwark v B [1993] 2 FLR 559 at p 573, Waite LJ said:

> *'The colloquial description "checklist" describes the function of s 1 (3) with complete accuracy. It is an aid m'moir designed to ensure that none of the factors potentially relevant for a court considering its child welfare generally in the circumstances of each particular case is left out of account. In most instances, the use of the s 1(3) checklist is compulsory..."*

Justices are thus obliged to apply the checklist in every case to which it applies, and in my judgment they are well advised to go through in their reasons, in the format for justices reasons referred to by Douglas Brown J in R v Oxfordshire County Council (Secure Accommodation Order) [1992] Fam 150 at pp 160 – 161, sub nom, Oxfordshire County Council v R [1992] 1 FLR 648 at p 657, so that the parties in this court can clearly see those aspects to which they have given weight and those in which they thought either did not apply or to which they have given less weight." [Emphasis added]

22. Additionally, Mrs Marshall submitted that *Re D* also supports the principle that a court should be slow to grant an interim access order which would effectively provide the Father with access over and above what he is seeking as his interim position; i.e. alternating weekend access. As such, it was asserted that the final determination of the substantive joint care and control application as well as the leave to remove Z from Bermuda would be prejudiced. At page 504 wherein 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 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..." [Emphasis added]

23. It was asserted by Mrs Marshall that the "*lowest common denominator*" in this case is the interim access relief that the Father set out in his application; i.e. alternate weekends from Friday after school to Monday at school with Thursdays from school until 8:00 p.m. during the weeks there is no weekend access. As such, the Mother's position is that as school is commencing on 10 September 2024, access should revert back to the interim schedule that the Father was seeking in his application and which he was exercising prior to the summer holidays. Mrs Marshall emphasized that it would be wrong, in accordance with *Re D* to effectively provide the Father with the substantive relief he is seeking; i.e. shared care and control on an alternate weekly schedule; at this interim stage. This is because the evidence has not been tested which means that the Mother's concerns raised in her evidence have not fully been investigated.

ANALYSIS

24. It has been confirmed in previous Bermuda cases that the "welfare checklist" is a useful tool to assist that courts in making determinations. The elements are addressed individually below:

Welfare checklist

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)

Z has expressed wishes are expressed in the SIR at pages 2 to 4 and it was specifically noted in the SIR that Z wishes to "*spend more time with Daddy*".

(b) his physical, emotional and educational needs

The Mother is alleging that some of Z's physical needs are not met by the Father during periods when she is in care which have been allegedly reported to her by Z. See paragraph 11 above. It is noted that despite, these allegations, the Mother agreed for weekly, alternating access for the past 2 ½ months from Wednesdays to Mondays. The SIR notes that both parents have the ability and resources to properly care for Z.

(c) the likely effect on him of any change in his circumstances

Z has enjoyed access with her Father now since February 2024. In particular, the last two months of the summer, Z has been with her Father alternating weeks. There would be no change to Z's circumstances if the alternating weekly schedule continues. At this point, tt is unclear whether there would be a negative impact on Z if access was reduced to alternating weekend access with her Father, but this is a risk.

(d) his age, sex, background and any characteristics of his which the court considers relevant

As Z is just 5 (almost 6) years of age, there will be less weight put on what she expresses her wishes to be in relation to spending time with either her Father or her Mother compared to say if she was over 10 years old.

(e) any harm which he has suffered or is at risk of suffering

There have been no allegations made by the Mother that Z has suffered or is at risk of suffering any harm.

(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs

There is no suggestion by either parent that the other parent is incapable of meeting Z's needs.

(g) the range of powers available to the court under this Act in the proceedings in question.

There is a wide discretion available to the Court.

25. As it relates to the case of *Re D*, although it is accepted that *Re D* is helpful in setting out the parameters in which a court should or should not make interim access orders, I do not agree that it assists the Mother in supporting her position that an interim access order outside of parameters of access provided for in the Second Interim Access Agreement should not be made in this matter. Justice Wall was clear in *Re D* that should be considered:

> "*The obvious question which justices should ask themselves when interim contact is proposed is a very simple one: 'is it in the interests of the child in the particular circumstances of this case for there to be an order for interim contact to his father pending a full investigation and a final hearing?'*" [Emphasis added]

26. *Re D* also specifically distinguished the making of interim access orders where the principle of contact with the child was disputed compared to those instances where the quantity of contact with the child was to be determined. In my view, *Re D* is clear that in cases where the issue in question was the amount of contact, an order for interim contact could rarely be made without a detailed investigation of the evidence; i.e. through cross-examination of the parties and a social inquiry report.

27. The facts of *Re D* can be distinguished with this matter as follows:

    a. The father had not had contact with the child for two years prior to his application for interim access;

    b. The mother's position was that there should be no contact with the father, as the mother's allegation was that the child was fearful of the father due to his criminal and violent past; and

    c. No social inquiry report had been completed at the time the interim order was made.

28. In this matter, not only had an SIR been completed, on three separate occasions the parties were able to reach an agreement regarding the Father's access with Z since February 2024. The latter two months of which has been alternating, weekly access from Wednesdays to

Mondays. The SIR has recommended joint care and control on an incremental increase of access over a period of six months until there is a weekly handover each, say, Monday. The SIR also rejected that a recommendation could be given for the Mother to obtain leave to remove Z from Bermuda to reside with her in the UK.

CONCLUSION

29. Having taken into consideration all the elements above, I then must ask myself, is it in the interests of Z in the circumstances of this case, for there to be an order for interim contact to the Father pending a full investigation and a final hearing? In my view, the only answer to this question is, Yes. In the event that the I were to resolve any disputed points in favour of the Mother, I am of the view that it would still be in Z's best interest to not only have contact with her Father, but also for that the contact be meaningful. I see no reason why the Father's access to Z should be reduced as I do not accept this would be making Z's welfare the paramount consideration.

30. Therefore, I confirm that the Father shall continue to have interim access with Z in accordance with the Third Interim Access Agreement with the necessary amendments as it relates to Z now attending school. Any breaks from school such as half term shall be shared equally between the parties unless otherwise agreed and the details of which will be left with the parties to agree. This interim access shall remain in place until the final determination of the Father's Application and the Mother's Application.

31. Costs will be reserved and determined at the final hearing.

Dated this 10th day of September 2024

ACTING JUSTICE ALEXANDRA WHEATLEY