



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2023: No. 52

IN THE MATTER OF SECTIONS 12 AND 22 OF THE MINORS ACT 1950

AND IN THE MATTER OF A AND B (the “Minors”)

B E T W E E N:

Mother

Applicant

-and-

Father

Respondent

JUDGMENT

Before: Hon. Jeffrey Elkinson, Assistant Justice

Appearances: Applicant in Person
Respondent represented by Richards Limited, Ms. Katie Richards

Date of Hearing: 27 September 2024

Date of Judgment: 7 October 2024

Judgment of Elkinson, AJ

1. The Applicant and the Respondent are non-married parents of two children, a boy and a girl, both aged 7 at the time of this hearing. The Respondent now seeks an order for shared care and control. The Applicant and the Respondent do not live together and the evidence of the Applicant, which is not contested by the Respondent, is that in fact they have never lived together.
2. The Respondent was represented by Miss Katie Richards of Richards Limited and the Applicant appeared in person together with Miss Kelly Hunt who applied at the outset of the hearing on 27th September 2023 to be a McKenzie Friend, which application was granted. However, in the course of the hearing, at the start of the cross examination of the Applicant, Miss Hunt abruptly left the court without comment or explanation and did not reappear.
3. The application is made under the Minors Act 1950. Section 12 provides that the court upon the application may make such orders as it may think fit in relation to the guardianship, custody or maintenance of the minor and the right of access thereto and the control and management of any property of the minor, having regard to the welfare of the minor and to the conduct and to the wishes or representations of either parent or of any guardian or of any person having the actual charge of the minor.
4. The primary issue in this hearing as between the Mother and the Father is the care and control of the children. Under section 6 of the Minors Act 1950, it is required that the court should have regard to the welfare of the minor as the first and paramount consideration and shall not consider the claims of either the Mother or the Father to be superior.
5. Section 36C of the Children Act 1998 states that both the Mother and Father “*are joint guardians of the child and are equally entitled to custody of the child*”

including *“the right to care and control of the child and the right to direct the education and moral and religious training of the child.”*

6. The unfortunate circumstances in which the children of these two battling parents find themselves is that the parents are unable and I find on the part of the Mother unwilling to be reasonable and cooperative with each other to agree the amount of custody and access and the timing of it, together with minimising the amount of unpleasantness that has historically occurred on transitions and handovers.
7. In respect of the Mother, her unwillingness can be seen in the light of the verbal and physical abuse which she suffered, accepted by the Father as having occurred, when they were in a close relationship. As regards this abuse which she suffered, the court is left with the task of ascertaining whether that should debar the Father from having shared care and control of the children. The Mother has made other allegations against Respondent. She says that he encourages the children to lie and omit details of their time with him and she feels that their formative years of development can potentially be impacted by his inconsistent involvement and practices of dishonesty. She feels that he “gaslights” her and creates scenarios so that when they encounter one another in public it appears to others that she is behaving badly. She also raised the fact that he has driven the children when he has been drinking alcohol.
8. The history of this matter in the court system starts in early 2023. It commenced with an application by the Father, now the Respondent in these Supreme Court proceedings, being made in the Magistrates' Family Court on 6th March 2023. Both parties were represented by counsel and they ended up with what was stated to be an order on consent affirming joint custody of the two children. The Magistrate made an order which also appointed a litigation guardian “to speak to the voice of the children as it relates to the Father's application to have one week on and one week off access arrangements.”

9. The arrangement as ordered at that time on 6th March 2023 included that the Father would collect at the end of school on a Friday and drop off at the school on Monday morning in alternate weeks going forward.
10. This Order was appealed by the Mother on 13th March 2023 and on the same day she issued an Originating Summons which commenced these proceedings and sought an order in respect of access and child maintenance. Ultimately the Mother entered into an agreed order with the Father and discontinued the Appeal from the Magistrates' court. This provided for access "on a without prejudice basis" and gave the access which had been in the Magistrates' Order.
11. In the affidavit sworn by the Mother in the Magistrates' Court of 23rd February 2023 she set out the history of the relationship and that the Father in the previous five years had made a limited financial contribution. She has two children from a previous relationship and they are late teenagers. He has a daughter from a previous relationship. The Mother recited a history of irregular contact between the Father and the children born of their relationship.
12. The first Social Inquiry Report was provided on 24th August 2023 and shortly thereafter on 31st August 2023 the Father issued an application for joint custody which was to incorporate an order that any decisions relating to the children's medical, education and religious denomination should be made jointly between the Applicant and the Respondent. Further, that the Applicant and the Respondent should have an obligation to inform the other of any matters of welfare, including any medical or dental appointments, including injuries when the children are in their care. He further sought shared care and control of the children, alternating on a weekly basis, with handovers on Mondays, at school or such other prearranged location in time if the children are not in school and that there should be agreement about extra-curricular and sporting activities of the children prior to them being enrolled in any such extracurricular or sporting activities. The Father's application also sought specificity. As regards what would happen if the Applicant or Respondent were unable to care for the children during their designated time and in

respect of permissions when the children were being taken out of Bermuda for travel. The Respondent also wanted to have defined how the public holidays and school holidays would be shared between them.

13. The Mother subsequently filed an application on 28th November 2023 to suspend access to the Father and that there be an update by way of an Addendum to the Social Inquiry Report based on events which occurred at the Father's home in early November 2023. This has been detailed by the Mother as an arson attack on the Father's car which was parked nearby or adjacent to the apartment where he and the children were then living, also adjacent to where the grandmother, the Mother of the Father also lived. The Mother posits that this put the children's life at risk and that the incident was extremely traumatising for them. The Mother also stated that the Father did not advise the Mother of what occurred and felt that the Father minimised the incident. It was as a consequence of this that the Mother pre-empted the Father and collected the children from school on 4th November 2023 in breach of the arrangements set out in a previous order of 18th April 2023 in respect of access arrangements. It was also around this time of access that the Mother learnt that the daughter had slept naked in the bed where her brother and the Father were also sleeping.

THE PRESENT POSITION

14. The present arrangement is and has been for the last 18 months that the Father enjoys overnight access on an alternating weekly basis each month. Access on holidays and birthdays has been problematic save for an order that this court made prior to the Christmas holidays in 2023. What is being sought at this time by the Father is that he have care and control of the children for one week and then in the alternate week the Applicant would have such care and control. Application has also been made by the Father for the court to deal with the sharing of public holidays, special events, drop-offs and travel overseas.

15. The basis for this application, as regards proposed sharing of public holidays, special events, drop-offs and travel overseas, together with the immediate order for shared care on an alternate weekly basis, it was submitted by counsel for the Respondent, was to:
- (a) Limit handovers and thereby limit disputes between the Applicant and the Respondent.
 - (b) allow the children to feel comfortable in their transitions and provide time to settle with each parent and their differing home environments
 - (c) ensure the handovers to take place on Friday mornings would allow the weekend for periods of readjustment and
 - (d) prevent further court applications and hearings which in turn should reduce the stress between the parties.
16. The submission on behalf of the Respondent Father was that it had long been accepted that children have better outcomes where both parents are involved and that this arrangement would reinforce the equal duties and responsibilities of each of the parents. It was submitted that the increase is not a significant shift and that on a mathematical calculation given that the Father already enjoyed substantive overnight access on an alternating weekly basis each month, this would mean that six nights per month were being added to the schedule. In respect of the proposals for public holidays, Christmas and birthdays, it was submitted that due to the Mother's obstructive position on access and unwillingness to share significant events and such holidays, that the proposed arrangements needed to be put in place. Mother did not wish for any of this to occur and submitted that it was more appropriate that as regards the present access that some of it be supervised, particularly where it involved overnight.
17. This brings into play what has been set out in the Social Inquiry Reports, effectively three of them if one counts the Addendum, and the arrangements which had been recommended by Mr. Sijan Caisey, social worker. He has set his recommendations in the various reports which were before the court. He had been suggesting in his

written reports that access should increase gradually over time, that there should be one to two day increments every three to six months. He had previously thought that the application for joint care and control should be adjourned with special consideration to what he was proposing. One of his recommendations was that the parents should explore therapeutic services to assist with managing their co-parenting interpersonal relationships. He had also recommended that the parents should give liberal social media access, within reason, to the children. These recommendations had appeared in the first Social Inquiry Report of Mr. Caisey of 24th August 2023 and had been his position up to the time of this hearing. However, he expressed revised views under cross-examination.

18. In his cross-examination, he was challenged by the Applicant Mother as to his credentials and she questioned the validity of his report given that she posited that he had only spent 35 minutes interviewing the children. She challenged him on some of the incidents which she felt should have been given more weight. She raised the issue of the daughter then aged 6 sleeping unclothed in the bed alongside the brother of the same age who was wearing clothes and that the Father was on the bed also. She also raised the issue of the vehicle owned by the Father which she said had been set on fire by unknown people and which had burned adjacent to the Father's apartment where the children had been asleep and he had not been there despite initially lying that he had been. Mr. Caisey accepted that these were instances to cause concern and alarm but he informed the court that he had sent these issues to an investigation team which is a part of the Department of Child and Family Services and he had given to the Applicant the emergency kids' line number. He confirmed that it had been determined that these matters did not meet their criteria for child abuse.
19. In response to Miss Richards for the Respondent Father, he informed the court that this was the longest case in which he had ever been involved having first interviewed the Mother in August 2023. He had provided three reports and he had no child protection concerns which would have led him to say that there should have been a

reduction in access. He confirmed that he had read the affidavits and taken into account the allegations of violence and abuse in his recommendations and further to having interviewed and subsequently observed the children. He had also interviewed the parents, the teachers and a mutual friend of the parents.

20. In response to the question from counsel for the Respondent, he confirmed that he had no child protection concerns for a reduction in access. He expressed that the interactions between the parents on the handovers on the present access arrangements were a source of conflict. He believed that the less interactions the parents had the better as, despite recommendations, they do not pay heed to the importance of reducing the friction between themselves in order to alleviate tension for the children.
21. His report recites that there may be potential behavioural concerns and challenges for the children arising due to the ongoing conflict between the parents. That the state of the co-parenting relationship would negatively impact the children if not mitigated and that the ongoing conflictual relationship between the parents resulted in the children having to navigate the dynamics of their parents' relationship. The report also cited that with no end to the conflict insight, that Mr Caisey was not confident that an amicable solution will be attained via court proceedings. In fact, he said, it is possible that the court proceedings may only serve to exacerbate the already critical co-parenting relationship. He noted that the parents remain in a space devoid from open communication and that they are unable to resolve the most minor disagreements without outside intervention.
22. The report set out that the ongoing division, hostility and tension between the parents will undoubtedly, swiftly and negatively impact the children and their well-being without therapeutic intervention. The children had attended a local psychologist who reports that both children engaged well in sessions with her but they would not say a word about what happens in their home environment: - *“there was very little shared about their Mother's household and nothing shared about their Father's*

household". This was in contrast to the fact that the children were very talkative and would share about school, extracurricular activity and each other. When it came to a discussion about their home environment this would cause both children to shut down and they presented as stressed, looking at the floor, visibly uncomfortable and would ignore the question. The psychologist reported that these were the only children she had ever worked with that did not talk about their home environment. She too met the parents and highlighted the importance of reducing friction between them to alleviate tension for the children.

23. Mr. Caisey agreed with Miss Richards, in response to her suggestion that given the passage of time and the fact that the court proceedings were increasing tension, that it may be better for the children not to have the gradual increase in access which he had originally contemplated as that may cause more damage to them. Mr. Caisey said he had been hopeful that his original proposals, the staggered approach to increased access, would have been implemented earlier but now the proposal of one week on one week off would limit transitions for the children and give them a better opportunity to readjust into each household and be beneficial for them. In effect, this was a better course to take.
24. The evidence of Mr. Caisey and the responses to his cross-examination questions from Ms. Richards supported the approach which had been suggested by counsel for the Respondent as regards the shared access and the access for holidays. There was no support from Mr Caisey for the Mother's suggestion as regards limiting the present access.
25. I have considered all the issues which the parents have with each other but I have not set them all out in this judgment. It is evident from the demeanour of the Applicant and what is said about her in the Social Inquiry Report, her questioning of the social worker and her responses to counsel on cross examination, that she has an active dislike for the Respondent and anyone connected to him, his parenting style and his involvement in her life.

26. As regards the evidence of the Father and the cross-examination of him by the Applicant, he considered that he has not been given adequate time to spend bonding with his children and that it was unfair that the Applicant would not approve of him using any of his familial supports, in particular his Mother and godparents to assist in pick-ups and drop-offs. He considered that he had been left out of important decisions regarding the children and gave the example of them being baptized into a particular religion without consultation with him. He highlighted difficulties of him choosing clothes for the children then Applicant turning up at the school and changing the clothes that he had chosen. This extended even to him not being given the proper sports clothing for the children after they had been passed over to him for his turn to look after them and the boy having to change in the open at the sports field. Despite there being a court order as regards when and how children should be taken overseas, Applicant disregarded the order.
27. As regards the Respondent, it is clear from his answers on cross examination that he has many flaws and has made many serious mis-judgments. He accepted that he had been violent and abusive to the Applicant and messaging texts record further abuse to the Applicant expressed in foul language, exhibited to the affidavits of the Applicant. He accepted that he had driven the children when he has been drinking alcohol but was adamant that he was never over the legal limit. He has financially extended himself as regards accommodation as when it was previously criticized that he was living in a one bedroom apartment he subsequently located a 2 bedroom apartment, albeit at a greatly increased rent.
28. The positive that one is left with in reading the Social Inquiry Reports and what is said by third parties to Mr. Caisey and Mr Caisey's observations of the Father, is that he is a good parent and appears to want to be truly involved in the lives of these children.
29. It has to be said that equally applies to the Mother and there is no question that the Applicant is a good parent also and that while the children are a common denominator for them both, as between Mother and Father there is no positive

relationship and the common denominator of the children just serves as a focal point for the animosity between them.

DISPOSITION

30. The discretion entrusted to this court is considerable. The exercise of it is assisted greatly by the hard and difficult work undertaken by the Department of Child and Family Services (“DCFS”) and that work is reported in the Social Inquiry Reports which they have prepared. I have considered what Mr Caisey has had to say in his reports and in his oral evidence to the court. I can see no reason why I should depart from his recommendations given what I have read in the evidence from the parties and what he has said in cross-examination. The fact is the Father has had the opportunity over a period of nearly 18 months to look after the children overnight and has shown that he is able to clothe, feed and get them to and from school. Mr Caisey and the other teams which he involves at DCFS, despite the concerns and issues raised by the Mother, the violence and abuse which she has suffered and all the other issues which she has raised which he confirmed he was aware of, have had no concerns in respect of the children suffering abuse. None of the other allegations made against the Father have deterred Mr Caisey from expressing views in favour of the Father having access and custody which he sees as best for the children in the present circumstances. The social worker is the eyes and ears on the ground for the court and the evidence, which I accept, is that the Father can take care of these children. The Applicant in her cross-examination of Mr Caisey focused on a 35 minute period which she put to Mr. Caisey was all that he had spent with the children. He disagreed with that and said that while he may have only spent 35 minutes directly talking to them he did observe them on various occasions and then he interacted with teachers and others about their behaviour and disposition.
31. I found Mr. Caisey a most helpful witness and he responded to the questions of both parties with a calm demeanour. None of the questions raised by the Applicant on cross-examination altered his view in respect of the Father having custody and

access and that it should be extended now to alternate weeks. He considered that none of the advice given to the Mother and Father about seeking therapeutic assistance for the issues between them has been taken and as a consequence there has been no improvement in the situation as regards handovers of the children and what the children were observing when the Mother and Father interacted, which, on the whole, appears to be an exercise in unpleasantness.

32. The court is left to determine what is in the best interests of these children and is guided by its statutory duty and the legal authorities which counsel for the Respondent referred the court to in her submissions.
33. When it comes to the conflict between the parties, it is evident to me that it is in the best interests of the children that they do not witness conflict in the handovers and all the other issues which have arisen. I accept Mr Caisey's evidence that the less interactions the parents have with each other the better it is for the children.
34. I have considered the domestic abuse allegations but these are historic and, as noted by me above, the Father has had access to the children for over a year and a half. The parents do not live together. I do not accept that at this time the history, albeit comparatively recent, of the abuse and violence now come into consideration in respect of the issue of access. This would only be considered by me if "necessary" and "relevant to the determination of the child welfare issues that are before the court." I do not think they are necessary and relevant at this time. Mr Caisey has been fully aware of these issues and did not consider that they impacted his recommendations and, for the reasons which I have given, I do not think they create a bar to the Father having the access contemplated by this judgment.
35. The inability of parents to cooperate does not preclude the making of an order that the children should live with both parents if this would be, in all other respects, the right order. In **Re R (residence: shared care: children's views) [2006] 1 FLR 491**, Thorpe LJ held in relation to a shared residence order *that "for the judge to dismiss*

what was an important option on the basis that the parents had the potential for continuing emotional conflict is not good enough”.

In this instance, they will be living separately and the co-operation of the parents while still being necessary and highly desirable, is being assisted, hopefully, by an order of the court limiting interaction between the parents and the provision of a definitive schedule of timing and with clear specificity as to the amount of access.

36. In **A v A (shared residence) A v A (children) [2004] 1 FLR 119**, the English Court of Appeal took the approach that a shared residence order could encourage parental cooperation, preventing one party from seeking to take control and reinforcing their equal duties and responsibilities.
37. A shared order may be appropriate where parents are incapable of working in harmony because it avoids the risk that a sole residence order is misinterpreted as enabling control by one parent when co-operation is required (**Re L (Relocation: Second Appeal) [2018] 2018] 2 FLR 608**).
38. For the reasons set out in this judgment, I find that it is appropriate the Father have the shared access of one week on and one week off and the timing of that is in the Schedule inserted into this Order.
39. As regards the Father’s list of people who may collect and drop-off the children, I can see no reason to limit this as the Mother has effectively done, limiting pick-up and drop-off to just the Father. I order that the Father should compile a list of 4 persons and it should include his Mother and any relative or trusted person whom he selects. If the Applicant has a specific objection, the objection to this needs to be made in writing and Application to the court to remove that person or add another can be dealt with by the court on the papers.
40. In relation to the sharing of public holidays and special events, drop-offs and travel overseas, the Respondent’s counsel put forward a schedule relating to how sharing

for these occasions shall take place and it is in substance adopted by the court as part of the Order being made in this Application in the form below:-

SCHEDULE

SHARING OF PUBLIC HOLIDAYS, SPECIAL EVENTS, DROP OFFS AND TRAVEL OVERSEAS

- A. "Usual access" shall be defined as the current court ordered access, which is one week on and week off, in particular starting on Friday, 11 October 2024 at the end of school the parent who has not had the children shall pick up the children and then they shall be dropped off by that parent the following Friday morning at the beginning of school and then alternating between the parents every week subject to the sharing of public holidays, special events, drop-offs and travel overseas as specified in this schedule.

- B. The "usual access" arrangements shall be suspended and the following arrangements for public holidays and Christmas/New Year/birthdays shall be replaced.

- C. The "usual access" arrangements shall recommence as normal after the suspension.

- D. In the event that the children are not in school and it is not a public holiday, the children shall be dropped off and collected from camp, or another designated location of the Mother's choice, with no less than 48 hours' notice, unless there is an emergency change of arrangements.

- E. When pick up or drop off occurs on a Public Holiday, Christmas or New Year, this shall be at the Aquarium car park.

F. If the Father's access falls when school is out and he is able to care for the children, he shall collect the children at 9.00 am and not 3.30 when school would end.

G. If the return of the children falls on a usual access day, the usual access routine shall continue i.e. if the children are due to be with the Father for Easter Sunday and that Sunday is his usual access, he does not need to return them to the Mother at 8.00 pm Sunday. They would stay with him until Monday at school.

For the years of 2024 and 2025, they are listed below and subsequent years will follow the same alternating pattern

PUBLIC HOLIDAYS

The parties shall rotate the Bermuda public holidays.

1. Remembrance Day 11 November 2024 with Mother and 2025 with Father
2. Bermuda Day: 2025 with Father and 2026 with Mother
3. National Heroes Day (June): 2025 with Mother and 2026 with Father
4. Labour Day (September): 2025 with Father and 2026 with Mother

EASTER

The parties shall alternate Good Friday and Easter Sunday from 9.00 am to 8.00 pm. One parent shall have Good Friday, and the other parent shall have Easter Sunday.

1. For 2025, Good Friday with Mother and Easter Sunday with Father
2. For 2026, Good Friday with Father and Easter Sunday with Mother

CUP MATCH

The children will be with one parent for 1 day each over Cup Match each year.

1. 2025 the children shall be with the Mother on Thursday and with the Father on Friday
2. 2026 the children shall be with the Father on Thursday and with the Mother on Friday.
3. Pick up shall be 9.00 am and return shall be 9.00 am the following day.

CHRISTMAS AND NEW YEAR

General

The parties shall rotate Christmas as follows:-

1. From 12.00 noon Christmas Eve to 12.00 noon Christmas day
2. 12.00 noon Christmas day to 5.00 pm 26th December
3. Thereafter, the usual access to continue

2024 (2023 Father had 10.00 am to 3.00 pm Christmas day)

4. From 12.00 noon Christmas Eve to 12.00 noon Christmas day with the Mother
5. 12.00 noon Christmas day to 5.00 pm 26th December with the Father
6. Thereafter, the usual access to continue

2025

7. From 12.00 noon Christmas Eve to 12.00 noon Christmas day with the Father
8. 12.00 noon Christmas day to 5.00 pm 26th December with the Mother
9. Thereafter, the usual access to continue

In relation to the New Year:-

The parties shall alternate New Year's Eve from 12.00 noon on 31 December to 12.00 Noon on 1st January.

10. For 2024, they shall be with the Father (they were with the Mother for 2023)
11. For 2025, they shall be with the Mother

BIRTHDAYS

The children's birthdays are on 10 January.

Generally, they will be in school.

The parents will alternate their birthdays, with the Father having them in 2025.

If their birthday does not fall on Father's usual access, he will have them from 3.30 until 8.00 pm. If they are not in school, and the Father is not working, he will have them from 9.00 am until 8.00 pm.

In 2026, they will be with their Mother, either from school or all day (same times as above), even if their birthday falls on the Father's usual access.

TRAVEL OVERSEAS

The Mother and the Father shall be permitted to take the children overseas during their usual access times on the condition that no less than 4 weeks prior they have given notice to the other parent and provided a full travel itinerary including flight details and hotel details and a contact telephone number. The Mother shall retain the children's passports and ensure that they are kept valid for travel at all times and shall ensure Father has access to them for the purpose of any travel arrangements and in any event deliver them to the Father no less than 7 days before his intended travel.

INDIRECT COMMUNICATION ACCESS

The children shall be given unrestricted access to call/face time or in any other way contact the other parent by electronic means when they are not in that other parent's care.

FIRST RIGHT OF REFUSAL

If the Mother travels, she will ask the Father first if he wishes to take on the care of the children. The same applies to the Father if he wishes to travel.

41. As regards costs, my present view is that there should be no order as to costs and each side should bear their own costs. If either of the parties wish to be heard on this, they may apply to the court within 7 days of delivery of this judgment, failing which this will be my order.

42. I would note that the Applicant was without an attorney as she was unable to continue paying the costs associated with that legal representation and the court was informed of a \$60,000 bill which was outstanding to those attorneys. Respondent had legal representation and the court was informed that he had to borrow money in

order to pay for those services. I refer to this to point out another serious consequence of parents not being able to co-operate; in addition to all the emotional stress which goes with shared parenting, there is the added stress of paying large legal bills which can and in this case have caused the parents to go into debt, creating a destructive spiral for their respective well-being. These are parents who have responsibility for two very young children and the parents ideally should not need a Supreme Court decision and legal professionals to work out how to share parenting duties. I would encourage the parents to find a suitable mediator, whether family, friend or professional who can help them. Whilst this court has made an order which is legally binding on them, subsequently they can always come to their own agreement, with or without the assistance of a mediator, to vary it to their mutual satisfaction and in the best interests of their children.

Dated 7 October 2024



HON. JEFFREY ELKINSON
ASSISTANT JUSTICE