



In The Supreme Court of Bermuda

**DIVORCE JURISDICTION**

**2012 No: 117**

**BETWEEN**

**JLB**

**Applicant**

**-and-**

**JEB**

**Respondent**

**RULING**

**(In Chambers)**

*Relocation*

Date of Hearing: 29<sup>th</sup> and 30<sup>th</sup> August, 2016 and 2<sup>nd</sup> September, 2016

Date of Ruling: 24<sup>th</sup> March 2017

Mr. J. Audley Quallo, as McKenzie Friend for the Applicant

Mrs. Karen Williams-Smith, Trott & Duncan Limited, for the Respondent father

**Introduction**

1. This is my judgment after the substantive hearing of consolidated applications of the mother and father.
2. The mother was without legal counsel in these proceedings. I am thankful for the legal submissions of Counsel on behalf of the father and the orderly assistance provided by Mr. Quallo, the mother's McKenzie Friend.

3. The mother wishes care & control of the two children of the family so that she may permanently relocate them to the United States of America ('the USA'). She also wishes this Court to decline further jurisdiction on any further matters relating to the custody of the children.
4. The mother's application is opposed by the father, who wishes the children to remain in his care and control whilst he resides in Bermuda pursuant to a work permit.
5. In determining this application, the Court had the benefit of affidavit and oral evidence of the parties. The mother filed three affidavits: the first on 14<sup>th</sup> September 2015, the second on 6<sup>th</sup> October 2015 and the third on 20<sup>th</sup> November 2015. The father filed three affidavits: the first on 8<sup>th</sup> September 2015, the second on 6<sup>th</sup> October 2015 and the third on 7<sup>th</sup> January 2016.
6. The Court also had the benefit of a very detailed Social Inquiry Report dated 18<sup>th</sup> August 2016. It was prepared by Mrs. Saunders, the Court Social Worker, who also gave oral evidence at the hearing.

### **Background**

7. The mother is a university educated professional possessing American nationality. She was born and raised in the USA with deep familial roots in Pennsylvania.
8. The father is an equally highly educated professional possessing American nationality. He was born and raised in the USA to Caribbean parents.
9. After some five years of marriage, the father in November 2007 moved to Bermuda to advance his career on a two year work permit. The mother joined him a few months later. After a short while, they built a circle of friends and in 2008 celebrated the birth of their first child in Bermuda.
10. The father's employment opportunity ended sooner than anticipated due to redundancy. The parties discussed returning to the USA. These discussions were shelved upon the mother securing employment on island. After many months of unemployment, the father commenced new employment. By this time, marital discord had besieged the marriage.
11. In 2012 the mother and father celebrated the birth of a second child. The mother moved out of the marital home with the young children and instructed service of divorce proceedings on the father.

12. Craving the support of her family, the mother travelled to the USA with the children in the summer of 2012. The father was aware of her travel. However, he soon became fearful that the mother would not return to Bermuda with the children and immediately instructed the commencement of proceedings pursuant to the Hague Convention on the Civil Aspects of International Child Abduction ('the Hague Convention') for the return of the child to Bermuda. The mother voluntarily returned to Bermuda with the children.
13. In or about September 2012 the father's employment ended prior to the expiry of his work permit.
14. Upon the grant of Decree Nisi in or about September 2012, the mother and father were granted interim joint custody of the children. The mother was granted interim care and control of the children with liberal access to the father. The mother and father were both prohibited from removing the children out of the jurisdiction without the consent of the other.
15. The mother and father commenced family therapy to devise a co-parenting plan ('the Co-parenting Plan'). In or about March 2014, the Co-parenting Plan was made an order of Court. The Co-parenting Plan acknowledged that the legal position of the parties in respect of the children and terms included:-
  - time spent with each parent;
  - rules for travel with the children outside of Bermuda;
  - rules for communication;
  - financial arrangements, and
  - contact with extended family.
16. Pursuant to the terms of the Co-parenting Plan, the mother made a request in July 2014 to travel with the children for the purpose of visiting family members in the USA. The details were agreed between the parties and a Consent and Undertaking form set out the dates to leave and to return to Bermuda.
17. However, the mother concealed from the father that she had resigned from her job, and packed up her apartment with the intention of permanently relocating to the USA with the children.
18. Whilst in the USA, the mother commenced "custody conciliation/mediation" proceedings to amend the custody arrangement of the children. The father in turn commenced Hague Convention proceedings in Bermuda alleging the mother's wrongful retention of the children in the USA and seeking the return of the children to Bermuda.

19. In the midst of this turbulence, the mother enrolled the children in nearby schools in her hometown. The father funded the school tuition and regularly visited the children in the USA. Whilst strained, the mother and father maintained regular email/skype contact. The father had no concerns regarding the quality of care provided to the children by the mother whilst in the USA.
20. The mother and father undertook mediation in the USA with a view to the father withdrawing his Hague Convention application. However, the father declined to withdraw his application for the return of the children to Bermuda.
21. After more than twelve months of protracted litigation, the US Court on 31<sup>st</sup> August 2015 determined that the children were habitually resident in Bermuda and that matters pertaining to their best interest must be determined by the Bermuda Court. Within 24 hours of the US Court ruling the mother released the children (3yrs & 6yrs) to the father at an agreed location. The U.S. Marshalls returned the children's passports to the father for immediate return to Bermuda.
22. By Order dated 17 September 2015 Hellman, J. of the Supreme Court of Bermuda ordered, *inter alia*, that the children were not to be removed from Bermuda until further order and that the parties continue to exercise joint custody & care and control of the children.
23. The mother, father and children are US citizens and do not possess an unrestricted right to reside in Bermuda.

#### **Current Circumstances**

24. At the time of the hearing the children were aged 7 years and 4 years. The children reside with the father in a one bedroom rented accommodation in Bermuda. They are enrolled in school and various extra-circular activities.
25. The children are attached to the father's work permit. The father's current work permit is due to expire in February 2017.
26. At the time of the hearing, it was unknown whether the father would secure permission to remain and work in Bermuda beyond February 2017. He is in a new relationship with a Bermudian female.
27. The mother now resides in the USA where she is employed commensurate with her professional qualifications. She commutes to Bermuda on a regular basis to be closer to the children pending the conclusion of these proceedings. The children have unrestricted access to her.

### **Applicable Legal Principle**

28. When determining an application to relocate a child permanently from the jurisdiction there is only one applicable legal principle and that is the welfare of the child. This is the Court's paramount consideration.

### **The Parties Positions and Evidence**

29. I have taken full account of the evidence and the submissions of Counsel on behalf of the father and the assistance of Mr. Quallo, the mother's McKenzie Friend. I propose only to summarize the submissions in this judgment.

#### The mother's position:

30. The mother's plan is to relocate the children 'home' to her family homestead in Erie Pennsylvania, USA. The focus of her case is that the initial move to Bermuda was intended to be temporary pursuant to the terms of the father's limited duration work permit.
31. The mother's reasons for relocating the children include their US citizenship, greater educational opportunity for the children and her own enhanced career prospects. In addition, the mother contends that her family support is rooted in the USA which includes the children's aging maternal grandmother.
32. The mother proposes that if the father remains in Bermuda beyond the expiration of his current work permit after the children relocate, the children should spend each summer school holiday with the father and alternate Christmas and spring school holidays with him. She proposes that either she or the paternal grandmother could accompany the children to Bermuda and the father could accompany the children on their return to the USA.
33. In the event that the father is no longer permitted to remain in Bermuda and he returns to a US metropolitan area, the mother is willing to relocate with the children to a nearby area so that she and the father may physically co-parent the children.
34. Mr. Quallo advanced the mother's position by contending that during the marriage and after parental separation, the mother was the primary caregiver of the children. Mr. Quallo succinctly explained that the current position in favour of the father was only granted pending the preparation of the Social Inquiry Report. Mr. Quallo stressed that an expedited Social Inquiry Report was first ordered by Wade-Miller, J on 9<sup>th</sup> October, 2015

and that regrettably it was produced more than one year after a further order of Hellman, J to expedite its preparation.

35. In respect of the mother's decision in the summer of 2014 to remove the children from Bermuda without the consent of the father, the mother said that once she resigned from her employment, she believed that the children, as US citizens, no longer had legal permission to reside in Bermuda as they were dependants on her work permit.
36. Under examination, the mother reflected "*I would have done things differently prior to relocating. I would have made an application before the court. The procedure we are doing now could have taken place then*".

The father's position:

37. The father's plan is to continue residing and working in Bermuda whilst raising the children. The major focus of his case is the mother's decision-making in the summer of 2014 to remove the children from Bermuda without his consent and her subsequent refusal to return the children to Bermuda until ordered by the US Court to do so in September 2015.
38. The father describes the mother's actions on the heel of signing the Co-parenting Plan, as deceitful and disrespectful.
39. Counsel on behalf of the father argued that the mother chose to resign from her job in the summer of 2014, as she was '*no longer happy in Bermuda with her former spouse by that time, her life, lack of family support...*'
40. Counsel described the mother as "*covert and sneaky*" and that when emotional, her decision-making is not in the best interests of the children. Mrs. Williams-Smith submitted that the mother's actions disregarded the Court Order prohibiting the removal of the children from Bermuda and the Co-parenting Plan.
41. Counsel argued that in determining this application, the Court must be satisfied of the three factors established in *Fisher v Fisher, Divorce Jurisdiction (1997:No.88) dated 15 November 2001* and *Re: T; C v C 2009 Bda LR 34*, namely :-
  - i. Whether the Applicant (the mother) was the primary caregiver who should be granted care and control?
  - ii. Whether her planned move abroad was reasonable in the sense of not being motivated by a desire to reduce paternal access to the child?

- iii. The likely impact of refusal of the application on the mother, assuming her to be the primary carer.

Mrs. Williams-Smith submitted that the father has been the primary caregiver of the children since 1<sup>st</sup> September 2015 when they were returned to Bermuda pursuant to a US Court Order and that *“this is a loving and caring father that has not been faulted in the Social Inquiry Report. His indiscretions were in 2012. This mother comes to court seeking reward.....she cannot get over the father’s past indiscretions. She is blinded to what is the paramount consideration”*.

42. The father’s reasons for opposing the mother’s application include his perception that the mother has a poor decision-making track record and that she has been less than transparent after the breakdown of the marriage. He contends that he is able to provide continuity of care and future stability for the children.
43. The father’s plan is to extend the term of his current work permit. In the event that he is successful in obtaining an extension and he is successful in his application for sole care and control of the children, he proposes that the mother travel to Bermuda to spend time with the children during her flexible annual leave. This he contends would afford them the opportunity to share parenting of the children.
44. In the event that an extended term is unsuccessful, he intends to seek permission to pursue alternative employment on island at least until the end of the 2016/2017 academic school year.
45. The father contends that if unable to legally remain in Bermuda beyond the end of the 2016/17 academic school year, it is his intention to return preferably to New York or Washington D.C. In this circumstance, he proposes a co-parenting plan mirroring that proposed by the mother.
46. Mrs. Williams-Smith submitted that the welfare of the children demands a care and control order in favour of the father and that in any event this court should deny the mother’s application to relocate the children to the USA pending confirmation of the father’s application to continue to reside and work in Bermuda.

#### **The Social Inquiry Report**

47. The Social Inquiry Report contains information from a number of sources in the USA and Bermuda. It sets out various factors the Court Social Worker considered relevant in formulating a recommendation that:-

- i. The mother's application to relocate the children to Erie, Pennsylvania should be refused "at this time";
- ii. The children should continue to reside in Bermuda with the father with ongoing social media access to the mother, and that the children be permitted to travel to the USA during school breaks to visit the mother, maternal grandmother and extended family, and
- iii. The mother and father participate in family mediation with Mrs. Miriam Shaya-King of the Mediation section of the Department of Child and Family Services regarding the ongoing developmental needs of the children.

48. Mrs. Saunders reports that the father is described as "a family man and excellent father" and has a family dispersed geographically. *"This coupled with the fact that his parents emigrated from the Caribbean to the United States, living and working in Bermuda is not an uncommon arrangement for Mr. Best. After almost nine years, he now regards this as home for him and the children"*.

49. The Court Social Worker goes on to report that *"Mrs. Best on the other hand comes from a town in the United States where her family history is rooted. She is reportedly very close to her mother and recognizing her age and recent health challenges has chosen to spend the rest of her mother's life either living with her or being very near to her. Having two older brothers who live about an eight hour drive in North Carolina and who visit fairly regularly along with a wider network of family who have children of similar age who live fairly close by the Erie area, it is home for her"*.

50. She reports that *"while continuing to reside in Bermuda affords the children the stability of what they already know, it may restrict their ability to build stronger relationships with their maternal family in Erie"*.

51. She identifies the mother's decision in the summer of 2014 as *"one area"* within which the mother demonstrated *"not so great decision making"* which was *"not necessarily in the best interest of the children nor appropriate"*.

52. In respect of the mother's current application before the Court, Mrs. Saunders reports that:-

*"..although she may have opportunities to live and work in Bermuda, she has many opportunities for senior level...positions in {the USA}. While she has made friends in Bermuda she chooses to return home where she and the children can live in closer*



*proximity to family and where the cost of living is more affordable and she perceives that the educational opportunities for the children are better and cost effective. Mrs. Best believes that...Pennsylvania is the best place for {the children} to reside as she perceives it to be their home and as they are United States citizens and her reasoning for relocation focuses on this with minimal consideration for their life experience in Bermuda... ”.*

53. During her oral evidence, Mrs. Saunders corrected her written report to confirm that the children do not have any biological social capital in Bermuda. Instead, she confirmed that in caring for the children, the father is supported by fraternity brothers, church family and peers through school and nursery. She also reported that the father’s biological family are reportedly located internationally in St. Lucia, San Francisco, Guatemala, London and New York.
54. In response to much questioning on the psychological/emotional bonding of the children to the father’s female partners, the Court Social Worker explained that ‘now-a-days’ the concept of family is not necessarily restricted to persons with biological connections. She further explained that children bond with persons who express genuine love and care for them. It was her understanding that the father’s friends were not transient in nature and all have expressed appropriate love for the children. Mrs. Saunders agreed that “*it was not ideal that there be multiple parental figures, as these were formative years of their emotional and psychological bonding*”.
55. Mrs. Saunders identifies that “*the unknown is that Mr. Best has a confirmed Work Permit with the Bermuda Government until February 2017 but has no confirmed plans beyond that time but is hopeful it will be renewed. At this time, there has been no discussion with regard to the opportunity of continued employment or extension of his work permit which is set to expire in February 2017.*”

#### **Guidance**

56. Counsel on behalf of the father and the mother’s McKenzie friend, referred the Court to various authorities. The guidance of the kind provided for in *Re K (Permanent Removal) [2013] Bda LR 66*, I found particularly useful in my understanding and application of the welfare principle.
57. Simmons, J in *Re K (Permanent Removal)* conducted a comprehensive analysis of the historic guidance of the English Court of Appeal in *Payne v Payne EWCA civ 166*, and the development in more recent decisions in *Re Y (Leave to remove from Jurisdiction) [2004] 2FLR 330* and *K v K [2011] EWCA Civ 793*.
58. Simmons, J said:-

[40] "In my judgment what these two authorities establish is that the decision to grant or refuse leave to remove the child from the jurisdiction comes down to the weight to be given to relevant factors in considering the welfare of the child. Disciplines or guidelines provided by authorities ought properly to be considered by a judge, however, a judge must be free to assess the facts and circumstances of the particular case without fixed and rigid disciplines, without presumptions and without mechanistic application of any guidance provided in the authorities."

59. In the context of my overall welfare analysis, I reject the rigid adherence to the three factors considered in *Fisher v Fisher* and in *Re:T; CvC*, as submitted by Counsel on behalf of the father.

### Analysis

60. I find that the Court Social Worker, made the following presumptions in favour of the father :-
- i. As the current primary care-giver of the children his plan to remain in Bermuda with the children in his care should be facilitated; and
  - ii. The terms of his work permit would be extended given the nature of his job.
61. However, the guidance from Simmons, J. is clear; there can be no presumption in assessing the welfare of children. Consequently, it would not be appropriate for me to attach too much weight to the report's recommendations.
62. On my analysis of the evidence, there are two options at this time for these young children: - (i) allowing the mother's application and permitting her to take the children to live in the USA, their country of citizenship with significantly reduced time with their father or (ii) refusing the mother's application and making a care and control order in favour of the father to live in Bermuda with significant reduced time with their mother.
63. I have considered the likely effect of any change in circumstances on the children. I accept that the mother and father deeply love and care for the children. Moreover, that they each possess the ability to care for the children psychologically and financially. I accept that the children are securely attached to both parents and that one parent does not offer better care than the other.
64. I have considered whether I should refuse the mother's application at this time, on the understanding that the father's position could be reconsidered at the conclusion of the children's academic school year on or about 30<sup>th</sup> June 2017. Such a position, Mrs.

*likely to function very well psychologically due to feeling supported and grounded on home territory. Accommodation and transportation are arranged and her mother will be an active support person for her and the children. She will also not have to worry about how her mother is doing as they will be residing together....”*

73. I have also considered the father’s motivation for opposing the mother’s application. I find that he does not have a secure future here or family support in caring for the children. Yet, the father is steadfast in his desire to remain in Bermuda. In my view this begs the question of whether the father’s opposition is motivated more by an ulterior self-focused motive than the paramountcy of the welfare of the children. This is a relevant factor in my assessment of the children’s welfare.
74. I have considered relevant the father’s proposal for the children to maintain a relationship with the mother should he be granted care and control of the children. I find that his proposal limits the children’s time spent with their mother in quantum and geographical location such that he proposes the majority to take place in Bermuda. I find that such a proposal would not permit the children to experience the mother’s life in the USA and only serves to alienate the children from their American roots.
75. I have also considered the mother’s proposal in the event she is granted care and control of the children and the father remains in Bermuda. I find her proposal for the children to maintain a relationship with the father reasonable in terms of quantum and geographical location, and it promotes the continuation of the children’s life experience in Bermuda.
76. I therefore reject Mrs. Williams-Submission that the mother’s motivation for this application is designed to hurt the father because she is unable to “get over” the breakdown of the marriage.
77. In my view, had the Court Social Worker put aside her presumptions, and objectively weighed the quality of the mother’s practical plan for the children and balanced it against the father’s plan, she would have come to another conclusion.

### **Decision**

78. I am of the opinion that the choice to have children necessarily involves sacrifices. One such sacrifice after parental separation must be a parent’s willingness to prioritise their children’s need to maintain a meaningful relationship with each parent over their own self-centred desires.
79. My judicial function is neither to reward nor punish parents for such desires. My function is to look at the case as a whole and weigh up all the relevant factors in light of the

Williams-Smith suggested, would give the father the opportunity to learn of his work permit status. I reject this course, since the children's welfare demands immediate stability and certainty.

65. The Court Social Worker is indeed correct when she states that "*divorce is a painful and devastating process which can leave persons quite vulnerable to making decisions that may not be best*". On the facts of this case, I find that the mother and father have similarly been vulnerable. Consequently, I reject the assertion by Mrs. Williams-Smith on behalf of the father that the mother alone demonstrates poor decision-making which negatively impacts the welfare of children.
66. I find the mother and father are equally responsible for putting the welfare of the children second to their own selfish desires. However, I do not attach much weight to such human frailty on the facts of this case.
67. Having observed the mother during her evidence, I am satisfied that she deeply regrets removing the children from Bermuda in the manner she did in the summer of 2014 and accepts that her actions negatively impacted the children and their relationship with the father. Moreover, having observed the father, I am satisfied that he is genuinely remorseful for the breakdown of the marriage.
68. There is no dispute that the father has provided very good care to the children since their return to Bermuda in September 2015 pending the conclusion of these proceedings. However, I do not attach much weight to this circumstance as the regrettable delay in these proceedings has created this current position.
69. I am satisfied that the mother and father were equally involved in the children's care prior to their removal from Bermuda in the summer of 2014 and give much weight to this circumstance.
70. I have carefully considered the mother's motivation to relocate the children to the USA. Although not evidenced independently, I attach much weight to the mother's evidence regarding her long-term career prospects in the USA compared with those available to her in Bermuda. She has demonstrated that she has secured such a prospect.
71. Further, I am satisfied that the USA provides greater access to cost effective educational opportunities for the children than Bermuda. The children are young in age and it is very important, in my view, to focus on the years ahead.
72. I have considered relevant and attach much weight to the mother's biological family support in the USA. I accept the Court Social Worker's evidence that "*Given that Mrs. Best desires to return to live where she was born, raised and to be with family, she is very*

guidance and determine the course that best meets the need to afford paramount consideration to the children's welfare.

80. On the facts before me, the father has no secure future in Bermuda. Realistically, his return to the USA is the only way these children will have both parents readily available to them. However, he chooses at this time to stay in Bermuda.
81. I am satisfied that the mother's immediate and long-term plan for the children is certain and secure. Her plan is not a step into the unknown. Consequently, I am satisfied to find that the children's welfare as a whole is best served by allowing them to leave the jurisdiction permanently with their mother.
82. I am of the opinion, that the USA is the one jurisdiction where these American children may reside without restriction. Such long-term freedom and security will afford the children emotional confidence and broad opportunity.
83. That said, the children must be afforded the opportunity, with the assistance of their parents, teachers and school counsellors, to say "good-bye" to their friends and social supports. Accordingly, the mother shall not remove the children from Bermuda prior to 31<sup>st</sup> July 2017.
84. In the meantime, the mother and father are strongly encouraged with the assistance of the Court Appointed Mediator, to seek agreement as early as possible on related matters including travel arrangements to the USA, transfer of the children's belongings and school registration. The mother shall be responsible for the children's travel costs to Erie, Pennsylvania.
85. For the avoidance of doubt, the children shall remain in the interim care and control of the father, with liberal physical access and telephone/ skype and such other forms of social media contact to the mother until 31<sup>st</sup> July 2017.
86. Thereafter, care and control of the children will transfer to the mother with generous access to the father including telephone/skype and such other forms of social media contact with the children, including staying access:
  - a. Annual School Summer holiday for eight (8) weeks in Bermuda or such other location that the father may determine. This shall commence June 2018;
  - b. Alternating annual Christmas holiday for two (2) weeks. This shall commence Christmas 2017 with the father;
  - c. Alternating Easter/Spring holiday. This shall commence 2018 with the mother;
  - d. Further or other access as may be agreed between the parties.

The mother and father shall bear the children's holiday travel costs on a 50/50 basis.

### **Jurisdiction**

87. I am satisfied having regard to all the circumstances of this case that it is in the best interests of the children that matters pertaining to their welfare be transferred to the courts of the USA.
88. The USA Courts would be better equipped to determine the children's ongoing best interests, in the American context, and be in the best position to make the necessary welfare inquiries regarding their long term best interests.
89. As a measure of protection to ensure compliance with this decision, I direct that the mother shall on or before 30<sup>th</sup> June 2017 register this Order with the relevant court in Pennsylvania, USA with a view to obtaining a mirror order.
90. The Registrar shall set this matter for mention on Thursday 6<sup>th</sup> July 2017 at 10:00 a.m. to confirm registration of the order herein and I shall hear from the parties as to costs and as to any further directions which may be required for the implementation of this judgment.

### **Afterword**

91. This difficult decision highlights that mediation and similar conflict resolution services ought to be made available within the context of court proceedings.

Dated this 24<sup>th</sup> day of March, 2017

  
  
Stoneham J