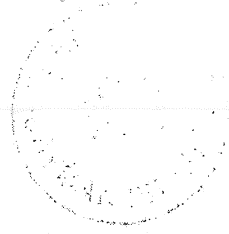


15-7-13



IN THE GRAND COURT OF THE CAYMAN ISLANDS

FAMILY DIVISION

CAUSE NO. FAM 0004 OF 2013

BETWEEN MW

PETITIONER/CROSS-RESPONDENT

AND FW

RESPONDENT/CROSS-PETITIONER

IN CHAMBERS

BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE

THE 15TH DAY OF JULY 2013

APPEARANCES: Ms. Stacy Parke of Brooks & Brooks for the Petitioner
Mrs. Karin Thompson for the Respondent

DECISION

1. While divorce is always a difficult and traumatic experience for the parties themselves, its impact upon and consequences for a young child of the marriage can be even more devastating.
2. The likelihood of that happening can however be greatly reduced where the parties are able to continue to relate to each other with the welfare of the child as their primary concern and objective.
3. It is a fortunate circumstance that the present parties, though regrettably themselves a young couple caught up in the throes of divorce, are nonetheless disposed towards a mature and co-operative approach to the resolution of the difficulties that confront them, especially as those relate to the welfare of their 5-year-old daughter, CW.
4. But it seems that even with their best intentions, agreement on the terms of a residence order which would be in the best interests of CW remains beyond their

grasp. This, as it has been presented to me, is the issue on which they most need a decision from the Court.

5. Both parties accept the need for there to be shared parental responsibility and an order in those terms and one indeed in keeping with section 4(1) of the Children Law, will be made. This case presents no circumstances as could justify the consideration of the making of any other order for parental responsibility and their attorneys have explained to the parties what an order for shared parental responsibility would mean.
6. The order required now is that contemplated by section 10 – a residence order – that which settles the arrangements to be made as to the person with whom the child is to reside.
7. There is no presumption that the child must reside with one parent or the other; such as that as the child – here because she is a 5-year-old girl – must reside with her mother. Her tender age and gender may be important considerations strongly supporting a more suitable arrangement for residence with her mother but they are not conclusive. Ultimately, what will generally be in her best interests will be determinative of the arrangements to be made. This remains the guiding principle for the courts as much before the advent of the Children Law as after: see for instance *Stephenson v Stephenson and Johnson* 1980-83 CILR 93 and *D v D (Shared Residence Order)* [2001]1 FLR 495 where the English Court of Appeal reaffirmed the importance of judicial discretion in the application of the principle in these terms:

“(i) It is not necessary to show that exceptional circumstances exist before a shared residence order may be granted. Nor is it probably

necessary to show a positive benefit that the order is in the interest of the child in accordance with section 1 of the Children Act 1989.

(ii) While guidance from the Court of appeal should be valuable to first instance judges in setting out the principles to be followed, it should not inhibit them from making the right decision on the individual facts of each case, where the judge exercises his discretion and decides what is best for the children in that particular case."

8. It follows that I am to be most discerning as to the likely effect the arrangements proposed will have upon the child, having regard not only to the circumstances of the parties her parents, but also her unique and apparent personal characteristics.
9. CW's mother seeks an order that she resides with her with provisions allowing for CW's regular visits and stay overs on alternate week-ends with her father.
10. He seeks an order in effect for shared residence such that apart from her stays over with him on alternate weekends, CW would also stay over with him on two of the five week nights each week during the school term.
11. On holidays, he would seek that she spends fully one-half of her time out of school with him and the other half with her mother.
12. Mother, for her part, would agree liberal access for Father during school terms (to allow for after school activities with Father, home work supervision at Mother's home by him, and settling into sleep and so on) but would not agree to shared residence. Nor would she agree to one-half school holidays being spent with Father unless he undertakes to be on leave and so to spending that time with CW, rather than

leaving her in the care of his family members (her paternal grandmother and cousins in particular) while he goes to work.

13. A primary concern of Mother about shared residence at this stage in her life, is that CW is a very sensitive child and emotionally attached to her. Especially given the emotional impact of her parent's divorce, Mother's concern is that CW now more than ever needs stability in her life. Disruption of her routine and the emotional sense of security she gets from being with her mother especially at nights should be avoided as much as possible, says Mother.
14. CW is the subject of a note from her teacher which I find to be helpful because it conveys what I may regard as an objective insight into her personality, her emotional temperament in particular:

"...there is a characteristic part of CW which could be very delicate depending on situations. When that sensitive part is tampered with, she becomes fearful, nervous, withdrawn and non-responsive. She is a delicate little flower which must be nourished consistently in an affectionate manner. Her environment must be a stable and peaceful one, in order to be productive at all times."

15. This image of CW is consistent with that sought to be conveyed by Mother in her affidavit evidence where she says that it would be upsetting for CW to be kept away from her routinely and any more than is necessary at this stage of her life. She asserts that CW remains very emotionally dependent on her in ways that could never be substituted by her Father.
16. It is a concern that I accept even while I acknowledge and accept that Father is a capable parent and one whom Mother acknowledges as being caring and dependable.

17. My approach to this matter is to err, if err I must, on the side of caution. The circumstances of this case involve the parties still living together under the same roof although they are legally divorced. Father will soon be moving out to a second jointly owned matrimonial property (the subject also of this ruling) but that has not yet happened. The upshot then is that there is no post-separation experience of the parties living apart and providing shared residence for CW in separate homes upon which I can draw for determination of the issue now. Staying over with Father in a separate home will be a novel and disruptive experience for CW. It is one the impact of which I am satisfied should be minimalized. In sum, in arriving at my decision I have had regard to the various issues set for consideration by the “welfare checklist” set by section 3(3) of the Children Law (2012 Revision).
18. The order will therefore be one, not strictly speaking for shared residence, but one of residence with Mother but that also allows for the most ample access and contact between Father and CW, very much in keeping with that which Mother already acknowledges should be allowed to happen. There will also be liberty to the parties to apply for the order to be reviewed as CW grows up.
19. The parties regrettably were also unable finally to agree the terms of financial support for CW, the question of whether there would be shared residence not having been resolved until now. However, during the course of the arguments it became apparent with the very helpful input of their attorneys, that they were not very far apart on this score either.
20. Father would offer one-half the costs of CW’s school fees and extra-curricular activities, as well as one-half the live-in Nanny’s salary but nothing for daily

maintenance, as he proposed that those would be shared evenly between himself and Mother with an expected order for shared residence.

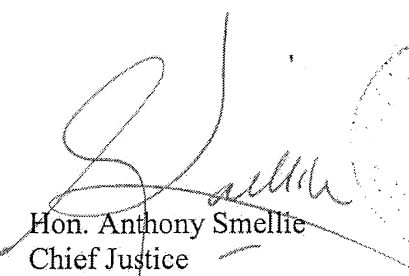
21. In the absence of such order he would however propose to pay \$1,376 per month being maintenance/school fees - \$1,176 and CW's miscellaneous expenses - \$200).
22. Based on Mother's evidence, the dedicated costs of providing for CW came to \$1,952 per month; that is: Nanny's salary - \$980; extra-curricular activities - \$538; school fees - \$434. Adding to that a reasonable sum for groceries of say \$550 per month, a total of \$2,500 is indicated.
23. Given that the parties will have comparable incomes and expenses, Father's offer of \$1,376 per month (or roughly just over one-half) is therefore reasonable.
24. He will also continue to be able to provide health coverage for CW as a perquisite of his employment.
25. With the issue of financial contribution for CW thus resolved, the division of matrimonial property is also readily resolved as a matter of the agreement of the parties.
26. As mentioned above, the parties own two apartments. It is agreed that Mother will retain one and Father the other and that they will each assume the respective charge obligations owed to the banks.
27. As only one of the two - Apartment A - (that which Father will keep) - has significant equity value, it is also agreed that Father will raise a further loan against that property so as to make a payment equal to one-half its equity value to Mother. This represents a sum of \$42,000 approximately and will be applied by Mother to reduce the very large loan that is secured against the other property, Apartment B. This is the

apartment that she will keep and where she will continue to provide a home for CW as her primary residence.

28. With all the foregoing in mind, the order settling the arrangements to be made as to the person with whom CW will live is as follows. It is largely in keeping with the proposals as set out by her attorney on behalf of Mother but with important adjustments to allow the most ample access for and contact with Father:

- (i) Residence Order with Mother;
- (ii) Father to take CW to school each morning;
- (iii) CW to spend time with her Father each Wednesday after school until 7 pm and to be collected from school each Wednesday;
- (iv) Every alternate weekend CW to be collected from school on Friday and be with her Father until Monday at 5 pm after school when Mother to collect her;
- (v) CW to spend every alternate public holiday with her father;
- (vi) There is to be the sharing of CW's birthdays in manner to be agreed between the parties;
- (vii) Father to have CW all day on Father's day and Mother on Mother's day each year;
- (viii) CW will spend alternate Christmas Day and Boxing day each year between the parties;
- (ix) Father to be at liberty to travel with CW for the purpose of vacation, with three weeks notice given to Mother and copies of the child's travel itinerary. Matching provisions apply in relation to travel with Mother.

- (x) During overseas vacation access the parties shall provide the relevant contact information and details of travel to the other parent at least one week prior to travel.
- (xi) CW to reside equally between the parties during summer holidays provided that Father will take leave to be with her when she resides with him.
- (xii) During Christmas and Easter school holidays, stay over access shall apply as during school term but the parties are to agree on such other terms for stay over access with Father as may be deemed suitable.
- (xiii) During school term, Father to have such other access after school as may be agreed between the parties to allow for his involvement in CW's extra-curricular activities, her home work and her settling in at nights.
- (xiv) Liberty to apply.


Hon. Anthony Smellie
Chief Justice

July 15, 2013