10-04-08

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CIVIL APPEAL NO 1 of 2008
Grand Court 366/05

IN THE MATTER OF THE Guardianship and Custody of Children Law (1996 Revision)
AND
IN THE MATTER of the Minor Child C

BETWEEN:

A

Appellant

AND

R

Respondent

BEFORE: THE Rt. HON. MR. JUSTICE ZACCA, PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
The HON. MR. JUSTICE MOTTLEY, J.A.

In the presence of William Helfrecht instructed by Zena Merren of Appleby for the Appellant and David McGrath of Samson & McGrath for the Respondent.

Heard: 1st April, 2008. Judgment: 10th April, 2008.
Reasons delivered: 14th August, 2008.

FORTE, J.A.

On the 10th day of April 2008 having heard the arguments of counsel for both parties, we dismissed the appeal, and affirmed the order of the Court below. We promised then, to put our reasons in writing. This we now do.

The appeal is from the "orders and directions" of Foster, J., which *inter alia* refused an application by the appellant to take her child C permanently out of this jurisdiction. The orders and directions in more detail, are as follows:

"Orders and Directions"

I refuse the Mother's applications in her summons dated 3 August 2007 for sole custody of C and for leave to take C out of the jurisdiction to live with her permanently in Ontario, Canada.

I direct that C shall move to reside with the Father who shall have care and control of C with effect from the next period of residential access by the Father following this judgment unless the parties otherwise agree, having regard to C's best interests in light of the Mother's likely date of departure from Cayman.

As far as access by the Mother once she has left Cayman is concerned, I have already indicated in general terms what I consider to be appropriate. During any time that C is in the care and control of the Father and the Mother has not left Cayman she should have regular access to C. The details of all such access should be discussed and hopefully agreed between the parties and their attorneys. I further direct that the Father shall at all times do all he reasonably can to encourage and assist C to maintain as close a relationship with the Mother as is practicable in the

circumstances, including through frequent communications by telephone, email and letters and by the regular provision to the Mother of information about C and all aspects of his education, health and general welfare as well as through frequent access.

I also direct that this matter shall be brought back before the court by the Father for review of all these arrangements and of C's welfare generally in 2 years time in any event.

I make no order in relation to the costs of and incidental to the Mother's applications and the hearing thereof.

I recognise that there are issues consequential upon these orders which will require to be determined, I hope by agreement. However, I will endeavour to make myself available to resolve any outstanding matters.

Background:

The appellant is a Canadian citizen, who came to the Cayman Islands in March 2001 after a successful application for a job at the family business of the respondent, (the Company), situate here in Grand Cayman. The respondent was then, and still was at the time of the hearing, the Managing Director of the

Company. During her employment a relationship developed between the appellant and the respondent, which eventually resulted in the birth of the child ('C') on the 9th July 2002.

Both parties at one stage lived together, but were never married. The respondent (the father) is a 43 year old Caymanian who has lived most of his life in Cayman. They are both single, the Father having been once married but now divorced. C is his only child. The appellant (the mother) has another child (D) whom it may be necessary to refer to later.

While the parties lived together the relationship was (to use the words of the learned trial judge) "a fluctuating one because the Mother apparently continued to have a relationship with another man".

The learned trial judge captured the nature of the parties' relationship in paragraph 8 of his judgment when he stated:

> "Although the relationship between the Mother and the Father seems to have been inconsistent and variable there were times when their relationship was good. The time around C's birth appears to have been one of the happiest but there were other times too when they were happy together. I got the impression that for some time the Father would have liked the Mother's relationship with him to be stable and permanent and there was reference during the course of the evidence of the Father

> having proposed marriage to the Mother at one stage. However the Mother was not willing to commit to a permanent and exclusive relationship with the Father. From the beginning she appears to have carried on an independent lifestyle much of the time and, although there were periods of stability in her relationship with the Father, she had relationships with other men and led her own life to a large extent, notwithstanding that she and the Father continued to live in the same house."

The relationship deteriorated resulting in the Mother moving out of the house into rental accommodation. She took the child C with her. Sometime before that, she had taken C out of the jurisdiction to Canada. She had done so without telling the Father who eventually went to Canada and persuaded her to return. The Mother alleged that she only returned on the understanding that the Father would purchase and provide her with separate accommodation where she would live alone with C. The Father denied this and said that in any event he could not afford to do so. It appears, nevertheless that, on her return to Cayman with C, the Mother willingly moved back into the house with the Father and C.

Subsequently the relationship deteriorated and the Mother moved into separate accommodation taking C with her.

In 2006, the Mother purchased her own house, where at the time of the hearing she lived with C.

Shortly after the Mother moved out with C, on the 11th August 2005 the Father commenced these proceedings, applying for orders relating to custody of and access to C. He also applied *ex parte* for an order restraining the Mother from removing C from the jurisdiction. A temporary restraining order was granted which was subsequently extended to the 14th September 2005 for a hearing on that date, to determine custody, care and control of C. At that time the Mother had care and control of C and the Father was awarded interim access to be agreed between the parties.

On the 14th September 2005, the various applications by both parties culminated in the court granting a comprehensive order dated 30th September 2005. This order *inter alia* awarded the Mother and the Father joint custody of C with care and control of C to the Mother. The Father was awarded access to C including overnight access. He was ordered to pay monthly maintenance for C. Importantly, this order recorded an agreement between the parties that neither of them would remove C from the jurisdiction without the written consent of the other or the prior approval of the Court.

At the time of the hearing in this matter the parties continued to have joint custody of C with the Mother having care and control and the Father having access to C on 3 week-day afternoons and overnight on alternative Saturdays as

well as for periods during school holidays. A restraining order remained in place that neither party may remove C from the jurisdiction.

The hearing:

The Court recognizes the difficult task a trial judge has, in exercising his/her discretion one way or another in cases such as this. A finding in favour of one side inevitably results in unhappiness and hurt of the other, and naturally some adverse effect on the child. The exercise of the discretion must therefore have one main purpose i.e. to come to a decision which is in the best interest of the child. In this case, we have been the beneficiary of a well reasoned and thorough judgment which has been of tremendous assistance to us in coming to our own decision. For example the above outline of the background of this case, has been due to the clear summary given by Foster, J.

In coming to his decision the learned judge examined carefully all the evidence in the case, and by careful analysis of the same and his own application of the relevant law, came to a conclusion as to how he should apply his discretion.

In determining whether we should interfere with the learned trial judge's exercise of his discretion, we bear in mind the following dicta of Asquith, L.J. in ***Bellenden v Satterthwaite*** [1948] 1 All E.R. which was cited with approval in the House of Lords' case of ***Piglowski v Piglowski*** [1994] 2 FLR 763:

> "It is of course not enough for a wife to establish that this court might, or would, have come to a different order. We are concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is in fact, plainly wrong, that an appellant body is entitled to interfere".

The Court in the ***Piglowski*** case (supra), also sets out in the following words the rationale for the statement of Asquith, L.J. in the ***Bellenden*** case (supra).

> "First the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies to the judge's evaluation of these facts."

In the instant case the learned trial judge did have the advantage of seeing and hearing the parties and their witnesses and in his judgment carefully analysed their testimony.

The focus of the case depended on the learned judge's assessment of what was the paramount consideration in the case i.e. what was best for the welfare of the child.

In this regard he was correctly and expressly guided *inter alia* by the provisions of the Cayman Legislation. He stated in paragraph 77:

> "There was little, if anything, between counsel on the principles to be applied and the factors to be considered. They submitted, and I accept, that in considering whether or not to grant the Mother's application for permission to take C out of the jurisdiction to live permanently with her in Canada, as is well established by the authorities both here and elsewhere in the Commonwealth, and as is also prescribed in the Law, the first and paramount consideration for the court is always the welfare of the child. Section 7(i) of the Law provides that "The Court may, upon the application of the father or mother of a child, make such order as it may think fit regarding the custody of such child and the right of access thereto of either parent, having regard to the welfare of the child and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary

> or discharge such order on the application of either parent...". Section 19 of the Law provides that: "Where in any proceeding before any court the custody or upbringing of a child ... is in question, the court, in deciding that question, shall regard the welfare of the child as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father."

Both parties testified to the provisions they would make for the care and upbringing of C in the event that they were granted custody – the Mother being allowed by the Court to take C back with her to Canada. She would with C and her other child D live in the basement apartment of her parent's home, from where she could do most of the work in respect of the job she had already secured in Canada. In the event that she had to leave home, her parents would be happy to take care of the children (C & D) in her absence. On the Father's part, C would live with him in his home to which C was already accustomed, having lived there with the Mother and himself and also having spent "access" time with the Father in the home after the parties had separated. He (the

Father) would have the support of his family in the care of C. There was evidence that the Nanny presently employed for the care of C would, like the Mother, be subject to the new "Roll over" policy of the Cayman Government and consequently would have to leave the Cayman Islands later in the year. The Father, however, testified that if that occurred he would employ another Nanny to help in the care of C.

In the trial much was made of the fact that the Mother would be compelled to leave the Island later this year, as she would be subject to the "roll over" policy which requires persons with work permits to leave the Island after seven years' residence with the option of applying again after a year outside of the Island. This issue, however, became relatively insignificant as the Mother stated that she wanted to leave and was determined to leave in spite of the Father's willingness to apply to the authorities to extend her permit on the basis that she was a "key employee" of the company.

Also called to testify at the hearing was Dr. Hughes, "a highly qualified and experienced specialist in child psychiatry" in these matters. He has had extensive experience of cases such as this, where one parent wishes to move elsewhere and to take the child. The court ordered that a report be obtained from Dr. Hughes. As a result Dr. Hughes spent "considerable" time in Cayman with the Mother and Father, both alone and with C, as well as with C alone. The learned judge found him to be an expert witness upon whose testimony he could rely.

Having analysed all the evidence, and having expressly accepted the evidence of the Father and Dr. Hughes, he came to his conclusion.

Before stating his conclusion, it is appropriate to examine his assessment of the evidence.

(a) The Mother:

Here is what the learned judge said in paragraph 69 of his judgment:

> "Even making allowance for her inevitable nervousness, emotion and defensiveness, I did not find everything that the Mother said entirely convincing or reliable. My distinct impression was that some important parts of her evidence were somewhat misleading or exaggerated and intended to prejudice the position of the Father or to enhance her own position rather than being wholly accurate or genuine. ... I formed the strong view myself that the Mother is quite unable or unwilling to divorce her own strong antipathy and hostility towards the Father from C's interests and that she is insensitive to C's welfare in this respect. The evidence of the Nanny and of Mr. Hollins was clearly to the effect that the Mother has been using C and the arrangements for access in order to hurt and inconvenience the Father. She was, I

thought unreasonably and unfairly, not prepared to concede anything at all positive about the Father or his part in C's life. She was insistent that the Father played no role in the past in caring for C and that he is simply not capable of looking after C himself, directly contrary to the clear findings of the Court in the judgment dated 10th October 2005. Her evidence in that respect was also clearly contradicted by all the other witnesses at the hearing before me. I did not accept what she said about that and did not feel she was being truthful. She also blames C's anxieties and emotional upset entirely on the Father and I felt that she could not or would not consider the possibility that such anxieties and emotional upset might be due to the effect on C of her own overt hostility towards the Father and her very obvious negative attitude towards access. ... I was not convinced by her assertion that she is afraid of the Father and my distinct impression was that she is quite capable of holding her own in any verbal argument or dispute with him or anyone else. I regret to say that my overall impressions of the Mother were not entirely favourable."

(b) The Father:

"The Father is clearly a quite different personality from the Mother and, as Dr. Hughes said, he is in a much better emotional state. I was more impressed with him as a person. I found him to be considerably more objective and frank in what he said. Although there were some parts of his evidence relating to his relationship with the Mother which seemed somewhat self-serving, I did find the Father generally credible and convincing. He also seemed to me fairer in his approach, notwithstanding that he clearly feels strongly that it is not in C's best interests to go to Canada to live with the Mother. For example, while he clearly found the Mother and her attitudes and behaviour very frustrating and provoking, he did quite fairly say that she is a good mother. He also affirmed that it never has been or would be his intention to damage the relationship between C and the Mother, still less to try to take C from the Mother and I believed that. I found his assurances that he would always encourage C to maintain a close relationship with the Mother to be convincing and consistent with what other witnesses said about him. ...

he appeared to me to be genuinely motivated by his assessment of C's best interests rather than solely his own. I do not doubt that the Father gains much personal pleasure and satisfaction himself from his obviously close relationship with C but having seen and heard him give evidence at length I am satisfied that the Father's objection to the Mother's application to take C to live with her in Canada is motivated by genuine concern for C's welfare and not by some other ulterior motive." [Emphasis mine]

Paragraph 73:

"I found the Father's evidence concerning the part he had played in caring for and looking after C over the first 4 years convincing, consistent with the evidence of the Nanny in particular and I accept what he said about that time. I accept that he is capable of looking after C himself and that he has the ability and genuine desire to do so."

(c) Evidence of Dr. Hughes:

Paragraph 74:

"Like Dr. Hughes, my own assessment of the Mother is that a significant part of her motivation to go to Canada

to live with C is her underlying belief that she and C would really be better off without the Father in their lives. ... I did get the clear impression that in her mind keeping the Father out of her life necessarily means keeping the Father out of C's life. I felt that in her desire to have nothing more to do with the Father, she does contemplate C also having nothing or as little as possible to do with the Father. As I have already noted, the Mother denied this in her evidence and said she agreed that the Father should have access to C in Canada but I was not persuaded that she was really genuine and certainly not enthusiastic about this. I got the impression that she was paying lip service to the desirability of a strong relationship between C and the Father. I felt that it was more likely that she was saying that she agreed that the father should have access to C because she thought she had to do so in order to support her case rather than because she was truly committed to it. It seems to me that at most she envisages 1 or 2 short visits to Canada each year by the Father and nothing more and that she and C will not have to see or hear from him otherwise. My

assessment of her over a considerable time giving evidence, her demeanour and attitude, together with the past history of this matter, her obvious malevolence towards the Father and her difficult and obstructive approach towards access to date, also causes me to seriously question whether registration of any order of this court relating to C in the court in Ontario would in effect simply amount to a transfer of the ongoing disputes from this court to the Ontario court. In the final analysis I think the Father is probably right that if C lived with the Mother in Canada she would be likely to continue to undermine C's relationship with the Father and to create whatever difficulties she could about anything more than very limited physical access and that over time she may well try to discourage even that. I consider it improbable that moving to live in Canada would cause any significant change in her present attitude. It certainly seems most unlikely to me that she would actively encourage C to maintain an ongoing close relationship with the Father." (emphasis mine)

Paragraph 75:

"Dr. Hughes was also of the view and considered that this attitude could be indicative of and was consistent with her negative attitude towards the Father playing any significant part in C's life. Dr. Hughes said that his assessment of the Mother is that she has a negative view of men generally and it did seem to me possible that this underlies her actions and her attitude to some extent. I did infer from the evidence of the Father and Dr. Hughes, as well as from the Mother's own attitudes and reactions, that it was not unlikely that she had simply wanted children for herself and had deliberately become pregnant with C and then with D with no intention to their respective father's playing any role in relation to the children other than their procreation."

Paragraph 76:

"Although the Mother feels that going home to Canada will remove the source of all of her problems, Dr. Hughes' opinion was that such a move is unlikely to solve all her difficulties. While there may well be some improvement, he was very much of the view that it would not be the panacea to all the Mother's worries

and problems that she appears to think. I found his views convincing."

Against the background of these findings of fact I turn now to the test to be applied which was suggested by Thorpe, L.J. in ***Payne v Payne*** [2001] 1 FLR 1052 at pages 1064 -1065. The learned Lord Justice of Appeal was here considering whether there should be a presumption that the reasonable proposal of the primary carer should be accepted. He was doing this against the background of the assessment of guidelines offered by cases over the previous thirty years in which he concluded that "relocation cases" have been consistently decided upon the application of the following propositions:

(a) the welfare of the child is the paramount consideration; and

(b) refusing the primary carer's reasonable proposals for relocation of her family life is likely to impact detrimentally on the welfare of her dependent children. Therefore her application to relocate will be granted unless the court concludes that it is incompatible with the welfare of the children.

At page 1064 in an apparent disagreement with the guideline set out in (b) above Thorpe, L.J. expressed the view that such a proposal by the primary

carer (in this case, the appellant) should be no more than an important factor in the assessment of the welfare of the child. He said:

> "The Court focus upon supporting the reasonable proposal of the primary carer is seen as no more than an important factor in the assessment of welfare. ... Certainly the absent parent has the right to participation to the extent and in what manner the complex circumstances of the individual case dictate."

Thereafter (at page 1065) he suggests his own "discipline" as a "prelude to conclusion". He states (paragraph 40):

> "However there is a danger if the regard which the court pays to the reasonable proposals of the primary carer was elevated into a legal presumption then this would be an obvious breach of the respondent's rights under Art. 8 [European Convention] but also his rights under Art. 6 to a fair trial. To guard against the risk of too perfunctory an investigation resulting from too ready an assumption that the mother's proposals are necessarily compatible with the child's welfare, I would suggest the following discipline as a prelude to conclusion:

(a) Pose the question: is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life? Then ask, is the mother's application realistic, by which I mean, founded on practical proposals both well researched and investigated?

If the application fails either of these tests refusal will inevitably follow:

(c) If however the application passes these tests then there must be a careful appraisal of the father's opposition: is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future relationships with the child were the application granted? To what extent would that be off-set by extension of the child's relationship with the maternal family and homeland.

(d) What would be the impact on the mother, either as the single parent or as a new wife of a refusal of her realistic proposal?

(e) The outcome of the second and third appraisals must then be brought into an overriding review of the child's welfare as the paramount consideration, directed by the statutory checklist insofar as appropriate.

The learned judge obviously had these guidelines in his consideration when he came to his conclusions. An examination of his findings demonstrates that that is so. *Inter alia* he found –

(i) (paragraph 93) "I consider that it is understandable in light of her depressed and unhappy state for the Mother to wish to return home to her family in Canada to live and that she genuinely wishes to do so. I do not think it reasonable to expect her to continue in employment with the Company in order to be able to remain in Cayman. Her case is that she wants to leave and go home and intends to do so. ... However, it is my opinion that the Mother is motivated to a considerable extent by her feelings that she and C would actually both be better off without the Father in their lives and that a move to Canada will help her to achieve that. Like Dr. Hughes I sensed a bitterness, towards, even hatred of the

Father on part of the Mother, which I do not believe is likely to be dispelled by a move to Canada. ... In fact, the Mother's underlying hope that a move to Canada with C would make it much harder for the Father to have any part of their lives seems to me most unlikely to be fulfilled in light of the Father's obvious determination to maintain as close a relationship with C and to play as much of a part in his life as possible. That would undoubtedly continue to impact considerably on the Mother's life. In my view a grant of sole custody of C to the Mother is most unlikely to deter the Father from this. If the Mother's reaction to that continues as it has done so far, as seems most likely, there would inevitably be continuing friction and more stress and emotional strain for her, which in turn would continue to adversely affect C."

(ii) (paragraph 94) "In my opinion in the circumstances of this case, it is in the best interests of C's welfare that he maintains as close a relationship as possible with both his parents and this was very much the opinion of Dr. Hughes. ... in order for that

desirable situation to come about the parent having day to day care of the child must take all steps reasonably possible to positively encourage and actively promote the relationship of the child with the other parent. It seems to me that it would obviously be desirable if there was also such active encouragement of the child by other family members and friends who are close to the child and who should at all times promote to the child a positive view of the absent parent. Mere reluctant or grudging compliance with court orders for defined physical access is not sufficient and very unlikely to achieve this objective in the best interests of the child."

(iii) (paragraph 95.) "My conclusion is that unfortunately the Mother really would prefer to have nothing more or the minimum possible to do with the Father, including through C. In my judgment she does not genuinely believe that the Father should have any or at least any significant part to play in C's life and will at least covertly try to resist or even undermine that. Her open hostility and bitterness towards the Father is and is likely to remain obvious

> to C while he is in her care. I am also concerned about the Maternal Grandmother [who also testified]. My impression is that she would be likely to encourage or at least not discourage the Mother's attitude. I think it most improbable that the Mother would positively support the relationship of C with the Father; it is much more probable that either expressly or by her behaviour and attitudes she will continue to make her feelings of antipathy and hostility towards the Father obvious to C and deter him from having any meaningful relationship with the Father and possibly over time deter him from having any relationship at all. I do not consider that to be in the best interests of C's welfare."

Paragraph 96:

> "On the other hand I accept the Father's evidence that he has no intention of taking C from the Mother and that he believes that C's relationship with the Mother is important. I am satisfied that he would genuinely support that relationship and that he would actively promote and encourage it. I do not consider that the Father's opposition to the Mother's

> application for permission to take C to live with her in Canada is other than genuine and I conclude that it is motivated by concern for C's welfare. My overall conclusion is that if C were living in Canada with the Mother it would not be possible or at least very difficult for him to maintain a close relationship with both parents. He would have a much better prospect of doing so if he were living with the Father."

The learned judge went on to accept Dr. Hughes' opinion that at C's age it was particularly important developmentally for C to identify with his Father as he moves "from being a child to being a little boy". He also accepted the view of Dr. Hughes that although it was not desirable for C to be parted from his Mother at his "relatively young age", that on a balance, at this stage of C's life it is more important for him to live with the Father than the Mother. He found also that C's relationship with his Father is "generally a healthier, happier and more natural one than his relationship with his mother.

Then in paragraph 101, he found:

> "In other words I do consider that the Mother's proposal to take C to live in Canada is not compatible with C's welfare. In my judgment in all the particular circumstances the option which would be least damaging to C would be for him to remain in Cayman

> living with the Father rather than moving with the Mother to live permanently in Canada. I consider that this is the alternative that [is] most likely to promote C's happiness and well being and the most likely to enable him to maintain a close relationship with both his parents."

These passages which are cited (without apology) demonstrate that the learned judge carefully analysed the evidence, applied the principles set out in ***Payne v Payne*** (with which we agree) and focused on the predominant consideration necessary i.e. the interest of the welfare of C, and thereafter exercised his discretion in favour of the Father.

Nothing was advanced which led us to the conclusion that the decision of the learned judge was plainly wrong or that he did not properly evaluate the evidence of the witnesses whom he saw and heard. On the contrary it is our view as we earlier stated, that he made a thorough assessment of the evidence and applied correctly the relevant principles of law before exercising his discretion to refuse the application of the appellant.

In those circumstances, we came to the conclusion that this was not an appropriate case for interference with the learned judge's decision and consequently dismissed the appeal and affirmed the orders of the Court below including specifically the refusal to make an order for costs against the Mother.

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Zacca, P.

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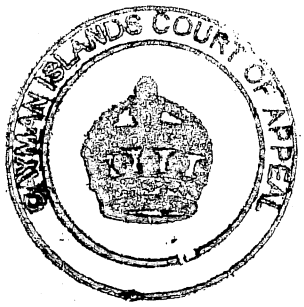
Forte, J.A.



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Mottley, J.A.