

4/5/05

CAYMAN ISLANDS
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1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 HOLDEN AT GEORGE TOWN, GRAND CAYMAN - Civil

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4 CAUSE NO. D11/99

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7 BETWEEN: VERONICA ETHELYN LEWANDOWSKI PETITIONER
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11 AND: JOSEPH BRUNO LEWANDOWSKI RESPONDENT
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18 Appearances: Mrs. Sheridan Brooks of Brooks & Brooks for the Petitioner
19 Mrs. Linda DaCosta of Myers & Alberga for the Respondent
20

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22 Before: Hon. Justice Henderson

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25 Heard: January 11, 2005
26



27
28 RULING
29

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31 The applicant, Joseph Lewandowski, applies for a series of orders which would allow a
32 child or the marriage, James, to live in Chicago temporarily between the present time and
33 June 12th, 2005. That would enable James to complete his school year in Chicago.
34

35 After the recent hurricane, Mr. Lewandowski took James to Chicago and left him in the
36 care of some friends who enrolled James in a local school. James has performed
37 reasonably well at that school.
38



1 More pertinently, Mr. Lewandowski says that James' health requires that he be away
2 from the Cayman Islands for the next several months. James has been diagnosed as
3 asthmatic. There is some evidence that the current high level of construction and the high
4 quantity of debris found strewn through Grand Cayman after the hurricane has given rise
5 to antigens and pollutants in the atmosphere. It is suggested that the presence of these
6 antigens and pollutants exacerbate James' asthmatic condition, a circumstance which
7 would not occur were he living in Chicago. In addition, it is suggested that by the middle
8 of June, when the school year is over, the situation here will be much improved. Mr.
9 Lewandowski is in the process of renovating his house to repair hurricane damage and he
10 considers that the atmosphere inside the house quite likely presents the problem I have
11 just described.

12
13 There are three reasons advanced for the proposed temporary residence of James in the
14 Chicago area. First, the health issue, which I have explained; second, the fact that he is
15 doing reasonably well in school there and should be entitled or permitted to complete his
16 school year there; and, third, the wishes of the primary caregiver, Mr. Lewandowski,
17 who supports the idea.

18
19 On an application of this sort, I must be guided only by my opinion as to the best interests
20 of the child.

21
22 Where, as here, two parents share joint custody, the burden of proof rests with the parent
23 who wishes to remove the child from the jurisdiction. There must be convincing

1 evidence justifying the removal of the child to a foreign country. I consider that the
2 burden of proof is relaxed somewhat when the proposal is to remove the child
3 temporarily, but there still must be credible evidence supporting the need for removal.

4

5 I will examine each of the three issues in turn.

6

7 On the health issue, Mr. Lewandowski called the evidence of Dr. Glatz, an allergist, and
8 Dr. Lacanilao, a paediatrician.

9

10 The evidence of Dr. Glatz did little to support the application. Dr. Glatz was asked if
11 there are less allergens in the atmosphere in Chicago than in the Cayman Islands, which
12 was clearly the material point upon which he was called to give evidence. His answer
13 was “I suspect” there are more in the Cayman Islands. That was as far as his evidence
14 went. It did not appear that he had any knowledge, in the scientific sense, of the nature of
15 the atmosphere in the Chicago area.

16

17 Towards the end of his evidence he said, “my sincere feeling about this child is he’s
18 better off with a parent.” That is to say, better off living with a parent than living with
19 two other people. He did say that the result of the hurricane has been an increase in the
20 amount of mold and mildew in the Cayman Islands’ atmosphere in the area of people’s
21 houses. He said James does not have a strong reaction to molds. Dr. Glatz had certain
22 allergy tests performed on James. He identified a number of allergies. He said, “I have
23 not seen a major difference in severe symptoms since the hurricane.” He said, “I have

1 seen the child since he came back from Chicago.” “I see no acute symptoms of asthma.”
2 He ended his evidence by saying, “if there is less antigen and pollutant in the atmosphere
3 in Chicago, I could not disagree with his father’s views that he would be better off there.”

4
5 The remarkable thing about this evidence is how little support it lends to the application.
6 I say again that he was called by Mr. Lewandowski, not by Mrs. Lewandowski.

7
8 Dr. Lacanilao was more assertive. He is a paediatrician and has been since 1996. He has
9 practiced in the Phillipines, Canada and the Cayman Islands. He has had a lot of
10 asthmatics as patients. He explained that there were various environmental effects of
11 asthma and he explained that, after some other diagnoses were considered and rejected,
12 James was diagnosed in April 2004 as an asthmatic. He was hospitalized at that time and
13 appears to have had a relatively severe attack. The next time Dr. Lacanilao saw James
14 was in August, and after that in December 2004. On both occasions, James had not had
15 an asthma attack and was taking preventative medicine in the form of inhalers and
16 another medicine to ward off such attacks. I infer, therefore, that there has been no actual
17 attack of asthma since April 2004. One must remember, however, that attacks of that
18 nature may be seasonal. Dr. Lacanilao said, in retrospect, a difficulty James had in
19 March 2003, at which time he was hospitalized for the first time, was an asthma attack.

20
21 In cross-examination counsel adduced what I consider to be a significant and material
22 fact. Dr. Lacanilao has a son the same age as James and his son is also asthmatic.

1 Dr. Lacanilao did send his son away after the hurricane but brought him back to Grand
2 Cayman Island in October 2004. The son has been residing here since and has not had
3 any difficulties. In fairness, Dr. Lacanilao emphasized that his son has never been
4 hospitalized, so one might infer that the son's asthmatic condition is less serious than that
5 of James. In addition, he said he is not allergic.

6
7 Dr. Lacanilao also said that when one is caring for an asthmatic child, it is strongly
8 recommended that no one in the household be a smoker. That is significant because Mr.
9 and Mrs. Frost, with whom it is proposed that James will reside in Chicago, are smokers.
10 They have promised not to smoke in the house or the car if James comes back to live with
11 them. I appreciate the good spirited nature of that promise. However, I also observe that
12 they (apparently) have not refrained from smoking in James' presence during the time
13 that James has already spent with them. Since they know he is asthmatic, this raises a
14 question in my mind as to the degree to which they are sensitive to the special needs of
15 this child.

16
17 Dr. Lacanilao said that he lived in Chicago temporarily. He then was asked if Chicago is
18 better for James. He said that there is a lot of dust in the Cayman Islands but it depends
19 on the situation in Chicago. He said, "I don't know the particular case in Chicago". He
20 also said, "I assume his father would check on the environment in Chicago".

21
22 Thus, neither expert called by the applicant offered any independent or scientific
23 evidence of significance to the effect that the atmosphere in Chicago is preferable to that

1 on Grand Cayman. Chicago is widely known as a heavily industrialized area. I am not
2 prepared to speculate and assume, without credible evidence, that the Chicago
3 atmosphere would be better for this boy.

4
5 I was not impressed with the evidence of either doctor insofar as it was advanced for the
6 purpose of demonstrating that James should live for the next six months in a foreign
7 country due to health reasons. I will simply say that the applicant has not met the burden
8 of proof by advancing the medical evidence that I have considered and summarized
9 above.

10

11 With respect to schools, it is true that James is performing reasonably well in his new
12 school in Coal City, Illinois, a suburb of Chicago. It is also true that he was performing
13 at roughly the same level in school here on Grand Cayman Island. I think the evidence is
14 equivocal. It does not permit, on the one hand, a conclusion that James would be better
15 off in school on Grand Cayman, nor, on the other, a conclusion that he would be better
16 off in school in Coal City. In these circumstances, again, the burden of proof has not
17 been met.

18

19 I turn to the third reason advanced for the proposed change of residence, the wishes of the
20 primary caregiver. A significant issue of fact before me is which of these two joint
21 custodial parents has primarily been the caregiver for James. I was impressed by the
22 evidence called by Mr. Lewandowski on that issue. He called a number of witnesses who
23 are neighbours of his in the Tropical Gardens area and who collectively asserted under

1 oath that they saw James in the care of Mr. Lewandowski most days, including weekdays
2 and weekends. The evidence advanced by the respondent on this issue was, in my view,
3 biased. I refer to her affidavit and the way in which it is phrased. It is not entitled to
4 much weight.

5

6 I am satisfied on the balance of probabilities that Mr. Lewandowski has been, in recent
7 years, the primary caregiver for James. What is the significance of that? When I
8 conclude that the primary caregiver wishes his son to live in a foreign country for a
9 period of months because (in his view of that parent) it is in the best interests of the child,
10 I must place some weight on that. I must, in other words, give weight to the views of the
11 primary caregiver. I do not think, however, that those views can ever be determinative;
12 if they were, there would be no need for a court hearing of the type I have just conducted.

13

14 Here I must weigh the views of Mr. Lewandowski against the fears that Mrs.
15 Lewandowski undoubtedly has. Mr. Lewandowski is a United States' citizen. He has no
16 job at the moment. His passport was lost in the hurricane. He does not have a
17 replacement. He does not have permanent residency status, although he is eligible soon
18 to apply for it. Most significantly, he is facing a criminal charge of refusing to give a
19 breath sample. A trial has not yet been held. If he is convicted, I expect he will lose his
20 license for something in the neighbourhood of 18 months. He will be unable to drive on
21 Grand Cayman for that period of time.

22

1 That collection of circumstances gives rise to a reasonable apprehension that Mr.
2 Lewandowski will decide to return to the United States. As I have said, if he is convicted
3 and loses his right to drive here, that would provide him with additional incentive to
4 return to the United States, because I doubt that the driving suspension would be effective
5 in that jurisdiction. I say “additional” because the fact that James is residing in Chicago
6 would itself be an incentive to his father to leave Grand Cayman.

7

8 I consider the possibility of Mr. Lewandowski returning to the United States to live there
9 with James a realistic possibility that I cannot and should not ignore.

10

11 In summary, no health or educational reason for the move has been established. The
12 wish of the primary caregiver is that the boy live in Chicago until June 12th. Set off
13 against that is a reasonable apprehension on the part of the other joint custodial parent
14 that her son will not return.

15

16 In these circumstances, I conclude again that the burden of proof has not been discharged.
17 The application therefore is dismissed.

18

19 **Submissions on Costs**

20

21 The Court: I think costs here have to follow the event. I am going to reduce them by one-
22 third to reflect some unnecessary material which has been filed. An award of two-thirds
23 of costs would be appropriate in this case.

1

2 Paragraph one, the abridgment of time, is granted. Paragraph two is refused. Paragraph
3 three is refused. Paragraph four was not addressed in detail because it was assumed that
4 James would be in Coal City for the next several months. Paragraph four is dismissed.
5 As far as maintenance goes, the only argument that I am aware of is the argument that if
6 James were to go to Chicago Mrs. Lewandowski should not have to pay any portion of
7 the expense of that.

8

9 I am prepared to make an order in these terms. I will order that Mr. Lewandowski is
10 entitled to have the child for one-half of the school summer vacation and for one-half of
11 the Easter and Christmas holidays, and that he is entitled to have the child every other
12 weekend from 9:00 a.m. Saturday until 7:00 p.m. Saturday, and 9:00 a.m. Sunday until
13 7:00 p.m. Sunday until such time as Mr. Lewandowski's house is repaired. Thereafter he
14 is entitled to have the child every other weekend from 5:00 p.m. on Friday until 6:00 p.m.
15 on Sunday.

16

17 I will make an order in the terms of paragraph seven that neither party shall remove
18 James from the jurisdiction of the Cayman Islands without an order of the Court or the
19 prior written consent of the other party.

20

21 Dated this 4th day of May, 2005

22

Henderson, J.

23

Henderson J.

24

Judge of the Grand Court

