5-12-03

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS.

Civil Appeal No. 15 of 2003
(Grand Court Cause No. D45 of 2002)

BETWEEN

MELISSA SAMANTHA BRIGITTA MERCER
Petitioner/Appellant

AND

RENE WALTHERUS GERARDUS HERMANS
Respondent/Respondent

BEFORE: **The Rt. Honourable Mr. Justice E. Zacca, President.**
The Honourable Mr. Justice Ira D. Rowe, J. A.
The Honourable Mr. Justice Martin Taylor, J. A.

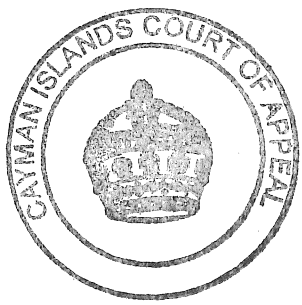
Mr. Douglas Schofield and Ms. Zena Merren-Chin of Hunters for the Appellant and Ms. Keva Reid of McKinney Reid and Company for the Respondent.

Heard: July 29 & 30, August 1, 2003 Delivered: 5th December, 2003

REASONS FOR JUDGMENT

ROWE, J. A.

1. The parties to this appeal are the parents of two young girls. Their marriage broke down. On the petition of the wife, the marriage was dissolved. The problem with which the Court has been faced is with which of the parents the children of the marriage should reside on a day to day basis, or to put it another way which parent should have the care and control of the children. In March 2003 the learned trial judge entered an order granting care and control of the children Sabine, born July 9, 1997 and Famke, born September 4, 1999, to the respondent who was ordered to fully maintain them while the children resided with him. Consequential orders for access were made. From this order the mother of the children appealed.



2. On August 1, 2003 we allowed the appeal and entered the following orders:

   a. That the appellant shall have care and control of the two children of the marriage, namely, Sabine and Famke;

   b. That the said children shall be returned to the jurisdiction by August 31st, 2003. The respondent to be responsible for returning the children to the jurisdiction and shall bear one half of the cost of the travel expenses for the children;

   c. That the respondent have access to the children in the following terms:

      (i) The school summer holidays;

      (ii) Every other Christmas break beginning in 2004;

      (iii) Every other Spring break beginning in 2005;

      (iv) Such access to be realized wherever the respondent is residing. He shall provide to the petitioner his address and phone number of such residence one week prior to the exercise of such access.

      (v) The respondent shall pay one half of the travel expenses and shall be responsible for collecting the children from the appellant until such time as they can travel unaccompanied;

      (vi) The appellant shall be responsible for the return of the children to her until such time as the children can travel unaccompanied;

      (vii) Any other access to be agreed by the parties;

   d. The Order for maintenance for the children made by Kellock, J. on May 29, 2002, is restored;

   e. The respondent shall pay one half of the cost of the school expenses at the commencement of each school year. The appellant shall provide a receipt for all said costs incurred.

3. The appellant was born in New York on 13 July 1968. It is reported that her father was a US citizen whilst her mother was Swedish. Both parents had been previously married. Her father had 5 children by his previous wife but they were no part of the appellant's family. Her parents divorced when she was 10 years old and she was sent to boarding school. After graduating from High School, the appellant worked at various jobs. Some time later she enrolled at the University of Miami but did not graduate from that institution. While working at the Hyatt Hotel in Miami in 1995 the appellant met the respondent. They developed an intimate relationship and subsequently the respondent was assigned to Puerto Rico. He was joined there by the appellant.

4. The respondent was born in Aruba in January 1962 and is a citizen of The Netherlands. He has a brother and two sisters. His parents who are Dutch nationals, resided in Curacao and Aruba where his father was a school teacher, before they returned to The Netherlands. The respondent enlisted in the Dutch army, then he later married in 1990 and moved with his wife to Aruba where he had gained employment with the Hyatt Hotel. That marriage broke down and the respondent secured a transfer to the Hyatt in Miami.

5. While in Puerto Rico the respondent filed a petition in Holland for the dissolution of his marriage. He received advice that his marriage was dissolved and so he went through a ceremony of marriage with the appellant in 1997. It later appeared that the effective date of the dissolution of the respondent's first marriage was subsequent to the "marriage" to the appellant and so the parties went through a second ceremony of marriage in Miami, Florida on 16th December 1999. That marriage has now been dissolved.

6. The parties moved to the Cayman Islands in 1998. The respondent had employment at the Hyatt Hotel. The parties agreed that the appellant should

remain at home and care for their child Sabine. Famke was born in September 1999 and the appellant remained at home and cared for both girls. From the volume of evidence that was presented to the court below it appeared that the parties chose to live a life of great excitement, " on the edge" as they termed it. The appellant was accused by her husband of being a wild spender and she countered that he had no proper idea of what the cost of living and services were in the Cayman Islands.

7. The respondent was transferred to the Hyatt in Maryland USA in 2001. In preparation for the transfer the parties gave up their rented accommodation and went to reside in accommodation provided by the Hyatt. On 5th March 2002 the appellant separated from the respondent and took the children with her. She filed for dissolution of her marriage. The petition as originally filed was not before us but, by consent, an Amended Petition was filed on April 26, 2002.

8. The Amended Petition alleged, *inter alia*, that:

> "a. The respondent has been physically abusive to the petitioner during the marriage. He frequently argues with the petitioner and will push and shove her. Shortly after the birth of the parties' second child, the respondent slammed the petitioner against a wall and on a second occasion he poked her in the stomach.
>
> b. The respondent has been verbally abusive to the petitioner throughout the marriage. He swears at her constantly and belittles her. He calls her a "bitch" and a "slut" and other demeaning names in front of the children. He often tells the petitioner that she is nothing without him and that he can treat her however he likes because she will never have the guts to leave him. The respondent frequently displays a violent temper and will rage at the petitioner for no good reason. He shows utter contempt for her and he has no regard for her as a person.

c. The respondent has admitted to the petitioner that he has had numerous extra-marital relationships throughout the marriage. His first confession was when the petitioner was seven months pregnant with their first child but he did not desist with his behaviour. Due to the respondent's philandering, the petitioner contracted Chlamydia during the course of the second pregnancy".

9. A Consent Order was entered on April 26th, 2002 that did two things. The Petitioner was granted leave to file the Amended Petition and the respondent agreed that "the facts and matters stated in the Amended Petition are proved and that the ancillary matters be adjourned to Chambers".

10. On 17th April, 2002 an order was entered by Kellock, J. to deal with the custody, care and control of the children of the parties. Joint custody was granted to both parents. This situation has not been changed by any subsequent order of court. The appellant was granted care and control of the children and the respondent was given access, the details of which are now of historical interest only. It was ordered that the children were not to be removed from the jurisdiction without consent of both parties or order of court. Then followed an order for child support and maintenance of the appellant. The order was for the payment by the respondent of CI$1,000.00 per month for the maintenance of the appellant and CI$1,000.00 per month for each child of the marriage. Liberty was granted to the parties to apply generally for variation of the orders.

11. The respondent voluntarily resigned his job at the Hyatt on May 15, 2002 and determined to return to The Netherlands. He applied by Summons on May 17, 2002 to the Court to vary the order of Kellock, J. by granting to him the day to day control of the children, permission to remove the children to Holland and to provide reasonable access to the appellant. In his affidavit in support of the

summons, the respondent alleged that the appellant had threatened to report their marital problems to his employers, to make his life miserable in every way possible and to seek additional financial assistance from him should he locate to the United States. He alleged that his decision to return to The Netherlands to start a new career was not lightly made and that in Holland he would live in his family home and would have the assistance of his mother in the care of the children. His concern was that the appellant had no confirmed employment in the Cayman Islands and could not remain there indefinitely as a visitor. His last working day in Cayman was July 31, 2002 and as a consequence, an early determination of his summons was desired.

12. The parties engaged in mediation. There was an impasse as the parties could not agree on which parent should have care and control of the children. On June 11, 2002 the parties agreed that a Social Inquiry Report should be prepared for use by the court. Ms. Christine Miller of the Department of Social services was assigned to prepare the Social Inquiry Report and she presented her Report on August 2, 2002. She was not cross-examined. Her Report was not received with favour. The learned trial judge said that both parties agreed that the Social Inquiry Report was fundamentally flawed and she found the report of little assistance. The flaws were not identified with the exception of the exaggerated claim of the appellant that she had a degree from the University of Miami, Florida. The Social Worker said that both parties were reported to be good parents who attended to their children's needs. It is unlikely that this precise portion of the Report was flawed as during the submissions before us counsel did not say either parent failed to attend to the needs of the children. The trial judge did not accept the opinion of the Social Worker when she said "It is this Worker's impression that removing the children from the care of their mother at this time would not be in their best interest, bearing in mind their young age and possible effects of any trauma at this stage of their lives".

13. In August 2002 the learned trial judge considered the affidavits of the parties and they were cross-examined before her. The proceedings were dominated by concerns regarding the insecurity of the appellant in the Cayman Islands and the superior prospect of the respondent obtaining employment in The Netherlands and thus to maintain his children. The learned trial judge found the respondent to be "a stable character, a person who appears to be meticulous in his attitude towards his life". These findings appear to us to us contrary to the respondent's admission that he had numerous extra-marital relationships throughout the marriage to the extent that he infected his pregnant wife with a sexually transmitted disease. The notes of the evidence taken during cross-examination of the parties were not available and the Court was informed that these notes cannot be located.

14. There was evidence before the trial judge that the appellant had obtained employment with Marriott Hotel and it appeared important that this employment would be permanent so as to give the appellant a sufficient immigration foothold to remain in the Cayman Islands. By the time the judge came to make her decision, however, the appellant was no longer employed by the Marriott Hotel. The appellant was said to have exaggerated her academic qualifications and to be a big spender. The appellant had no address in the United States and she had no home in the United States to take the children. The learned trial judge took these matters into consideration and made a decision to discharge the order of Kellock, J., and to (a) grant temporary care and control of the children to the respondent; (b) permit their removal from the jurisdiction to The Netherlands. The judge ordered a review on or before six months and at any time that there was a change of circumstances, more particularly if either party remarried, found employment or sought to change residence.

15. Bitter disputes developed between the parties over the issue of a Passport for one of the children and there were contested issues between the appellant

and her then counsel. These legal wrangles did not have a direct bearing on the issue of care and control of the children of the parties although they kept the appellant very much before one or other of the judges of the Grand Court. The passport issues were resolved. On 9 October 2002, the respondent removed the older child to the Netherlands and on October 29, Famke was also removed from the jurisdiction to The Netherlands.

16. The interim order of 21 August 2002 came up for review on January 30, 2003. We did not have sight of the actual summons on which the matter proceeded but it is recorded in the judgment of the court below that there was a summons from the appellant in which she sought sole custody and also care and control of the children and a summons from the respondent in which he continued to seek joint custody and requested care and control of the children. There was a complaint by the appellant that the respondent was in contempt of court as he had breached the interim order in that he had denied the appellant access to the children at Christmas 2002; that the appellant had not been permitted generous phone access to the children and that the respondent had not kept the appellant informed as to the education and health of the children. The trial judge found in each case that the respondent was not in breach of the order for access and did not find the respondent to be in contempt. The respondent had changed the residential address of the children and he had not informed the appellant immediately of this change. However, as the telephone contact remained the same, the judge did not find the non-notification a breach. The respondent had not filed the 21 August 2002 Order of the Grand Court with the Court in The Netherlands as he had been ordered to do. The trial judge said the order was not a mandatory one and as the respondent explained that it was on legal advice that he had not filed the interim order, the respondent would not be held in contempt. There was no appeal against these decisions of the learned trial judge.

17. At the review hearing the parties agreed (a) that affidavit evidence only would be used and that the parties would not be cross-examined, (b) that the respondent's presence was not required, (c) a previous notice of appeal to the order of 21 August 2002 would be withdrawn and (d) that the interim order would remain in force pending the result of the review.

18. Levers, J. in giving judgment after the review of the interim order, recounted the history of the relationship between the parties, their separation, the filing of the divorce petition and the making of the interim order in August 2002. Mr. Schofield in the course of the appeal before us complained that in two passages at pages 204 and 206 of the Record, the learned trial judge understated the evidence as to the conduct of the respondent. At page 204 it is recorded that: "Due to differences in the marriage and it is alleged due to the Respondent's behaviour, the Petitioner left the matrimonial home on 5th March 2002..." (emphasis added) and at page 206, it is recorded that : "In this case although allegations were made about the Respondent's behaviour no declaration was made as to his fitness .." (emphasis added). The reality is, that the statements contained in the Amended Petition for Divorce were proved through the Consent Order of 26 April 2002. The statements as to the respondent's acts were not mere allegations but established facts in the case. In our view, these facts were important enough to have deserved consideration by the trial judge when she came to determine with which parent the children ought to reside. We quote a passage from the judgment of Dame Elizabeth Butler-Sloss P in Re: L, et al, [2000] 2 FLR 334, 341 where she said:

> " The family judges and magistrates need to have a heightened awareness of the existence of and consequences (some long term), on children of exposure to domestic violence between their parents or other partners. There has, perhaps, been a tendency in the past for courts not to tackle allegations of violence and to leave them in the background on the premise that they

> were matters affecting the adults and not relevant to issues regarding children. The general principle that contact with the non-resident parent is in the interest of the child may sometimes have discouraged sufficient attention being paid to the adverse effects on children living in the household where violence has occurred. It may not necessarily be widely appreciated that violence to a partner involves a significant failure in parenting – failure to protect the child's carer and failure to protect the child emotionally".

19. The learned trial judge distilled from the affidavit evidence that; the respondent was employed in The Netherlands, that he was residing with his sister in a comfortable home with the children, that the children had been enrolled in school, and were following an orderly routine. She concluded that their physical needs and educational needs were being met on a day to day basis. The respondent's situation was compared with that of the appellant who had lost her job at the Marriott, had consistently assured the Court that it was highly likely that she would be employed by Extreme Technologies Limited, but which job had not materialized and she had only been employed by a firm of attorneys for a short time. Between 30 October 2002 and March 27, 2003, the appellant had not had steady employment. The court below concluded that "she should have done everything in her power to keep her employment in view of the previous ruling". The Court went on to consider the evidence that the appellant was romantically linked with one Mr. Rivers on whom she was entirely dependent. In the view of the Court it could not be said that the appellant was stable and independent in Cayman in her own right.

20. With these facts in mind the court went on to consider the law. As we said in our oral reasons, in our view the learned trial judge gave insufficient consideration to the relationship between the appellant (Mother) and the two very young girls at the time when she made the interim order and when she confirmed the same. The learned trial judge was of the opinion that there

was no presumption that young children are best left in the care and custody of the Mother, or that girls approaching puberty should be with their mother and at a certain age boys should be with their father. The modern approach, said the judge, and one with which the Court agreed, was that one should not act on those presumptions. We think that the decision of the House of Lords in ***Brixey v. Lynas*** [1996] 2 FLR 499 has many parallels to this case and states clearly the rules of law applicable in a case such as the present. In that case the child was a very young girl born to unmarried parents. Both were very young people, the mother aged 20 and the father aged 18. The parties lived with the father's parents for a while and then separated. The father took physical possession of the child and after a hearing, the court awarded care and control to the father. The matter went to the House of Lords where Lord Jauncey of Tullichettle delivered the speech with which the other Lords of Appeal agreed. We shall quote liberally from Lord Jauncey's speech.

At page 500F of the report, Lord Jauncey summarized the facts as found by the sheriff. He said:

> "The sheriff found as a fact that apart from being subject to respiratory infections, K was happy, healthy and well cared for in the mother's house. In his note he drew attention to the different social backgrounds from which the parties came. The father was, he said, comfortably middle class, while the mother had had none of the educational and social advantages which he had had. The mother's lifestyle was not particularly stable although that was not unusual for a person of her background. However, he concluded that were the mode of life of each party much the same he would not think that there were sufficient grounds for separating the child from her mother and sister".

Lord Jauncey then quoted a passage from the sheriff's judgment as follows:

> "But if the child were to be in the custody of the father she would become part of the Lynas family, and as a

> member of that family she would have all the advantages of comfort, education and a strong and stable moral framework which they can offer. The decision is Solomonic in its' difficulty, and I lay no claim to Solomonic traditional wisdom. I have however come to the view that I should not deprive the child of the advantages which the accident of her paternity make available to her, and that at the end of the day it is in her best interests that her father be awarded custody. I appreciate that it would be possible for the Lynas family to provide for the child's education etc. even if the father did not have custody, but I do not see the child being able to take advantage of such help if she remains with her mother. I appreciate, too, that there is a sense in which what I am saying represents an award of custody to the Lynas family or to Mrs. Lynas as much as to the father. I think, however, that the best way of serving the child's interests at this stage, is to award custody to the father."

21. The sheriff's decision was appealed and was reversed. The appellate court found that the advantage of father's background which was held by the sheriff to be decisive was not balanced against the practice in Scotland to recognise as an important factor which must be fully taken into account in a dispute concerning custody between a mother and a father of a very young child, that during his or her infancy the child's needs for the mother is stronger than the need for the father. This principle the court said, should not create a presumption in favour of the mother, nor amount to a rule of law, but the court accepted that it was a generally recognized belief that a mother is ordinarily better able, for whatever reason, to minister to a very young child's needs than is a father.

22. Lord Jauncey rejected the submission that to suggest that any recognition of the mother's ability to look after a very young child amounts to sexual discrimination as absurd. He said at p. 504C that:

> "To suggest any recognition of the mother's normal ability to look after a very young child amounts to sexual

> discrimination is absurd. Nature has endowed men and women with very different attributes and it so happens that mothers are generally better fitted than fathers to provide for the needs of very young children. This is no more discriminatory than the fact that only women can bear children. Every case must be considered on its own facts".

23. Finally, at page 505, Lord Jauncey gave a summary of his judgment. He said:

> "My Lords, to summarize, the advantage to a very young child of being with its mother is a consideration which must be taken into account to determine where lie its best interests in custody proceedings in which the mother is involved. It is neither a presumption nor a principle but rather recognition of a widely held belief based on practical experience and the workings of nature. Its importance will vary according to the age of the child and to the other circumstances of each individual case such as whether the child has been living with or apart from the mother and whether she is or is not capable of providing proper care. Circumstances may be such that it has no importance at all. Furthermore, it will always yield to other competing advantages, which more effectively promote the welfare of the child. However, where a very young child has been with its mother since birth and there is no criticism of her ability to care for the child only the strongest competing advantages are likely to prevail. Such is not this case".

24. ***Allington v. Allington***, [1985] FLR 586 was a case in which the mother deserted her husband in June 1984 and went to live with another man leaving her daughter who was born in October 1982 with her husband in the former matrimonial home. The mother visited the daughter regularly. The parties were divorced in August 1984. Both mother and father sought care and control of the child and the trial judge found both parents to be devoted to the child but held that the status quo should not be disturbed and awarded care and control to the father. On appeal the court held that the judge's approach was not correct. Given the age of the little girl and the obvious devotion of the mother to the child, the fact that the mother had always brought up the child in

the ordinary way until she left, it was in the best interest of the child that she be reunited with her mother notwithstanding the period of 10 weeks when the child lived with her father after the mother had deserted the matrimonial home. In the present case Levers, J. found that both the appellant and the respondent adored the children and both were capable of providing for their emotional needs. There was never any suggestion that during the period from March to August 2002 when the appellant lived away from the respondent in Grand Cayman that the children were not properly cared for by the appellant. There was no suggestion that when the parties lived together the appellant did not take proper care of the children in the ordinary way.

25. The trial judge said that if the appellant and the respondent were equally positioned financially with family support in a stable environment with guarantees of security in which the children could develop there was little doubt that the two young girls should be with their mother. She concluded, however, that greater consideration should not be given to the mother in this case because of the age and sex of the children as things were not equal. At the time Sabine was 5 and Famke was 3 years old. The Social Worker had interviewed the parties, the older child Sabine and Jeffery Rivers, the boyfriend of the appellant. She reported that Sabine was happy at school, articulated well for her young age and had made friends at school. The Social Worker's impression was that "removing the children from the care of their mother at this time would not be in their best interest, bearing in mind their young age, possible effects of any trauma at this stage of their lives. Additionally, the children have bonded well with their mother. The Worker feels that the separation and divorce of their parents have taken place in such a short time that it has not allowed them sufficient time to prepare for all the changes taking place". She recommended that the children remain in the care and control of their mother.

26. As we noted earlier the trial judge met with Sabine, the older child. The trial judge did not include in her judgment the information which she gleaned in that meeting and her impressions thereon. In our view, the decided cases show that the emotional and psychological attachment of the child to the parent is a consideration of very great importance in custody cases and the trial judge must take it into consideration or explain it away. ***Re W. Residence***, [1999] 2 FLR 390.

27. We were somewhat troubled by the fact that the Social Worker's Report was treated as of no real assistance due to unspecified fundamental flaws. The ascertainment of a child's wishes and feelings is, where relevant, normally the province of the court welfare officer or the guardian *ad litem*, who can, of course be cross-examined in the usual way. If the judge exercises his or her discretion to interview a child in private, what the child says to the judge cannot be the subject of cross-examination. The Courts have therefore decided that the discretion to see children should be exercised cautiously. It should in no sense be automatic or routine. It should only be exercised after hearing submissions from the parties. There must be a good reason for a judge to see a child and it must be perceived by the judge that it is in the interest of the child to see him or her. See ***B v. B. (Minors)***, [1994] 2 FLR 489, 496. The report from the Social Worker stated that the children had met the respondent's family from The Netherlands a few times and although the children knew that they were related they had formed no significant relationship with the members of the respondent's family. There was no evidence from the respondent denying this assertion of the Social Worker.

28. In her Fourth Affidavit sworn to on 26 July 2002, the appellant stated that she estimated the marital assets of the parties to be $91,429.59. Mr. Schofield submitted that the trial judge could have equalized the immediate financial disparity between the appellant and the respondent by utilizing the marital assets towards maintenance of the children. A number of things had occurred

between March 2002 and April 2003 that changed the fortunes of the appellant. She had not been required to seek employment in the Cayman Islands from 1998 to March 2002. That had been the joint decision of the parties and the appellant devoted her entire time to the care of her home except for some volunteer work at Sabine's school. She had been employed prior to arrival in Grand Cayman and there was nothing to suggest that she was unemployable or unwilling to seek employment. The respondent had an obligation to maintain his children and had been ordered by the Court to pay the appellant a total sum of CI$3,000.00 per month for maintenance of herself and the children. As long as that Order stood, the appellant was in no financial distress. She could make and maintain a home for the children. By his voluntary act the respondent resigned his position in Grand Cayman and decided to relocate to The Netherlands. He declared in his affidavit evidence that his decision to relocate was not done with a view to avoid paying maintenance pursuant to the Order of Kellock, J. When the matter was being considered at mediation the respondent understood and accepted that he would have to make maintenance payments to the appellant if he was not granted care and control of them. This Court cannot proceed on a basis that a litigant will not obey the Orders of the Court. The learned trial judge ought properly to have considered what would be the appellant's financial circumstances when she was receiving maintenance of CI$2,000.00 per month from the respondent for the children.

29. The appellant's immigration status in the Cayman Islands was that of a visitor, as she had no work permit in March 2003. We were advised by Counsel for the appellant that she had gained top marks in the Cayman Islands Law School entrance examination and would be entering Law School in September 2003. Additionally, we were advised the appellant had been offered employment with Blue Water Tours by Robert Cummings to commence on September 1, 2003 and that Mr. Cummings would provide flexible hours so as to enable the appellant to attend Law School. We said in

our oral reasons that we were firmly of the view that the differences in the financial position of the parties was something that the trial court could, by its order for maintenance, have done much to equalize. We said that the respondent could have been ordered to pay maintenance for the children and for the appellant and this would have removed the financial disparity between the parties.

30. The welfare of the children of the parties is the first and paramount consideration. In the view of this Court all the equities were in favour of permitting these two very young girls to remain with their mother who had reared them from birth. The possible psychological damage to these two young girls in being reared by a father who had evinced in their presence domestic violence and gross disrespect of their mother was not taken into consideration by the learned trial judge when she made her order to grant to the respondent care and control of the children. The stability of the respondent was given undue weight by the court below in circumstances where the financial position of the mother was changed by the very order that gave the respondent the ability to establish his stability. The order for payment of maintenance then in force was discharged and the respondent was able to take the children away from the mother and away from the jurisdiction. Insufficient weight was given to the age and sex of the children and the bond, which they had formed with their mother from birth.

31. In our view the best interests of the children will be served by restoring the status quo, which had existed prior to August 2002. The children should be returned to their mother who should have care and control of them with liberal access to the respondent. We restored the order for maintenance of the children made by Kellock, J. and now provide our fuller reasons for our decision.

32. The Grand Court retains jurisdiction over this matter and the parties have liberty to apply.

_____

ZACCA, P.

_____

ROWE, J.A.

_____

TAYLOR, J.A.