

1-08-03

IN THE CAYMAN ISLANDS COURT OF APPEAL

C.I.C.A. (Civil) # 15 of 2003  
(D 45/02)

BETWEEN:

MELISSA SAMANTHA BRIGITTA MERCER

Appellant/Petitioner

- and -

RENE WALTERUS GERADUS MARIA HERMANS

Respondent/Respondent



**BEFORE:** The Rt. Hon. Mr. Justice E. Zacca, President  
The Hon. Mr. Justice I. Rowe, J.A.  
The Hon. Mr. Justice M. Taylor, J.A.

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

Heard: 29<sup>th</sup> & 30<sup>th</sup> July, 2003      Delivered: 1<sup>st</sup> August, 2003

**ORAL REASONS:**

1. The Appellant, who I will call the Mother, is a 35 year old citizen of the United States. The Court was informed by her Counsel, that she is also a citizen of a European Union country. She was employed in the hotel industry in Miami and Puerto Rico before she came to reside in Grand Cayman with the Respondent, in 1998. The parties had gone through a ceremony of marriage in 1997, but believing that marriage to have been a nullity, the parties were validly married in December 1999.

2. The Respondent, who I shall refer to as the Father, is a Dutch National. His parents reside in the Netherlands.
3. In about 1990, the Father gained employment with the Hyatt chain of hotels. In 1995 the parties met when they both worked for the Hyatt Hotel in Miami.
4. Two children were born to the parties to wit: Sabine on July 9, 1997 and Famke on the 4<sup>th</sup> September 1999.
5. Since the arrival of the parties in Grand Cayman, in 1998, the parties decided that the Mother would remain at home as a Stay at Home Mom. This continued until March 5, 2002 when the Mother moved from the marital home and took the minor children with her.
6. The Mother filed an Amended petition for Divorce on 15<sup>th</sup> March 2002 and by Consent Order entered on the 26<sup>th</sup> April 2002, the Father consented to the filing of the amended petition and agreed that the facts and matters stated in the amended petition were proved. These facts and matters included physical abuse of the Mother and verbal abuse of the Mother in the presence of the children. There were admissions of numerous extra-marital relationships during the marriage. By Summons dated 18<sup>th</sup> March 2002 the Mother sought interim relief.

7. The matter came before Kellock J on 17<sup>th</sup> April 2002 and his Order, approved by the Attorneys for the parties, was entered on 29<sup>th</sup> April 2002. That Order is important, it provided:
  - a. That the parties were to have joint custody of the two minor children.
  - b. That the Mother should have care and control of the said children.
  - c. That the Father should have liberal access and the minimum periods were set out;
  - d. Interim maintenance for the Mother of \$1,000 C.I. per month.
  - e. Interim maintenance for each child of the parties in the sum of C.I \$1,000 per month.
  - f. Payment by the Father of medical expenses and school fees.
  - g. Non- removal of the children from the jurisdiction without the written consent of the parties or Order of the Court.
  - h. Liberty to apply.
  
8. On May 15, 2002, within two weeks after the Order of Kellock J. the Father voluntarily resigned his job at the Hyatt and resolved to return to live in the Netherlands. On May 17, 2002, the Father filed a Summons seeking:-
  - a. To be given the day to day care and control of the minor children;
  - b. To remove the minor children permanently from the jurisdiction to the Netherlands, the country of the Father's domicile; and
  - c. To provide for access to the Mother.

9. The Father wished to leave the jurisdiction as soon as possible and to take the children with him. The Father sought an early decision of the Court on the issue of care and control of the minor children to fit the timetable which he had set. On June 11, 2002, the parties agreed that a Social Inquiry Report be prepared by the Social Services Department. Such a Report was prepared and submitted to the Court on August 2, 2002.
  
10. It appears from the judgment of Levers J. of 5<sup>th</sup> September 2002, that the parties provided affidavit evidence and were each cross-examined during the hearing before her. Unfortunately, the notes of the evidence given by the parties were not available to the parties or to this Court. The Social Worker was not examined or cross- examined on her Report.
  
11. There was a Mediation Process. The parties did not agree on the broad issues of custody or care and control. The Father proposed certain financial arrangements:
  - a. If he was to become the primary residential parent, he would cover the children's financial needs (unless the Court Ordered otherwise);
  - b. If the Mother was the residential parent the Father would maintain the children within his means. Such maintenance would preferably be directly paid towards the necessities of the children's care; i.e. school savings plan, sports clubs, etc. A document headed "Statement of Intent/Purpose/Fitness"

embodying the proposals at (a) and (b) above was executed by the parties on July 26, 2002.

12. The Mother obtained employment at the Marriott Hotel as Director of Sales and Catering in Grand Cayman and was employed at a salary of C.I \$35,000.00 per annum when the matter was heard in August 2002. The Mother lost her job on August 19, 2002; and the Court was so advised. On August 21, 2002, Levers J. entered an Order granting:-

- a. Custody of the minor children to both parents.
- b. Care and control to the Father for six months;
- c. Access to the Mother
- d. Liberty to either party to apply during the six-month period.

Full reasons for judgment were delivered on September 5, 2002.

13. There were various proceedings involving passport issues for the minor children and by October 28, 2002, the Father removed both children from Grand Cayman to the Netherlands.

14. Two summonses were heard on the review by the trial judge of her Order of August 21, 2002 between January 30 and March 27, 2003. The Court Ordered joint custody to the parties and care and control of the minor children to the Father. Provisions for access to the Mother, for maintenance of the children solely by the Father and for registration of the Order in the Courts of the

Netherlands were included in the Order. There was an Order for costs against the Mother. Against all these Orders of April 4, 2003 this appeal has been taken.

15. We have considered the material which was before the Court below in August 2002 and in the review process in 2003.
16. No allegation was made that either the Mother or Father was an unfit parent. The evidence before the Court was that she had been the principal caregiver of the two young girls, aged 5 years and 2 and a half years until the separation and was their sole caregiver at the time of the hearing in August 2002. All the evidence was that she had bonded with the children and that they were happy, healthy children.
17. The necessity for the Mother to seek employment did not arise until March 5, 2002 when she left the matrimonial home for cause.
18. On April 29, 2002 the Mother obtained an Order from the Court for maintenance for herself and her two children amounting to CI\$3,000.00 per month. There has been no evidence that this amount was insufficient to maintain the Mother and children in Grand Cayman. There was evidence that plans were in place for the older child to attend school and that she was attending pre-school at the time when she was interviewed by the trial judge. The evidence was that if the Father

continued to make the payments ordered by the Court the Mother would be able to provide a proper home for them in the Cayman Islands.

19. As has been already noted, only 2 weeks after the Court had entered a Maintenance Order against him, the Father resigned his employment in Grand Cayman and resolved to return as soon as possible to the Netherlands.
  
20. In our view the learned trial judge gave insufficient consideration to the relationship between the Mother and the two very young girls of the parties at the time that the Order of August 21, 2002 was made. She was of the opinion that there was no presumption which required the Mother to be considered as the primary caretaker in preference to the Father. She acted on the basis that, "there in no principle or presumption that young children are best left in the care and custody of the Mother," but went on to say that the circumstances of each case should be considered. The fact remained, however, that the Mother had been their principal caregiver since birth and that there had to be very good reason to terminate that relationship in the case of children of their age.
  
21. The minor children are now in the Netherlands. The learned trial judge considered them at the review hearing to be secure, stable and well looked after and being educated. That has come about because of the Interim Order locating them in the Netherlands. The possible psychological effect upon these very young girls of being displaced from the unbroken relationship with their Mother

will not as yet be known. It does not seem to us that is either the original or in the review judgment the learned trial judge placed sufficient emphasis to the principle that in normal circumstances a Mother who has from birth been their principal caregiver must be better able than a Father to fulfil the needs of very young children.

22. In our view the learned trial judge placed undue emphasis on the economic and financial status of the Father. The Mother had not sought outside employment for a number of years while she performed the duties of parenting. She is at present experiencing difficulty in obtaining and maintaining employment but she has a history of previously stable employment in responsible positions. Her present predicament has been caused by the breakup of her marriage due to the conduct of the Father. We are of the firm view that the differences in the financial position of the parents was something that the Court could by its Order have done much to equalize. The Father could have been ordered to pay maintenance to the Mother for herself and the children. The Court should have considered it is in the best interest of the minor children for both parties to contribute to their maintenance.
23. There was therefore no sufficient basis in our view for the status quo which had existed since the birth of the children and which had been confirmed by the Order of Kellock J. to have been disturbed.

24. It was the Social Worker's impression that removing the children from the care of their Mother in August of 2002 would not be in their best interest bearing in mind their young age and the possible effects of any trauma at this stage of their lives. The separation and divorce of their parents had taken place in a very short time and the Social Worker felt that those and the other changes could not be properly assimilated by these young children. The trial judge found the Social Report of little assistance because of what was said to be agreed fundamental flaws. These flaws were not identified before us with the exception of the exaggerated claim of the Mother that she had a degree from the University of Miami, Florida. The learned trial judge appears to have rejected, without explanation, the recommendation of the Social Worker.
25. The Judge's findings regarding the Mother's conduct in other respects, especially when faced with the loss of her children and after that became a reality, do not in our view reflect on her ability, given adequate financial support, to continue to look after them.
26. The Father's decision to leave Cayman could not by itself justify a decision that it was in the best interests of the minor children that the Father should become the primary caregiver. The Father precipitated the conduct which he now seeks to exploit. He cannot be permitted to rely entirely upon his superior financial position to retain the care and control of these two very young girls.

The appeal is allowed.

We make the following Orders:

It has not been possible in the time available to provide full reasons for our judgment.

We will therefore present our full reasons at a later date.

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Zacca, P.

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Rowe, J.A.

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Taylor, J.A.

