

4.4.2003

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: D45/2002

BETWEEN:

MELISSA S. A. MERCER

AND:

RENE W. G. HERMANS



Respondent

BEFORE: THE HON. JUSTICE LEVERS

APPEARANCES:

Counsel for Petitioner: Z. Merren

Counsel for the Respondent: L. DaCosta

HEARD: January 30-31, March 17-18, 21, 27, 2003



REASONS FOR JUDGMENT

On the 21st August, 2002, this Court handed down a Ruling, which was by its very terms, an Interim Ruling, awarding joint custody of the children of the marriage to both the Petitioner and the Respondent and care and control to the Respondent ("father") for six months. The further orders made as to access during the six months were:-

- (a) During the month of December in the Netherlands or wherever she may be employed;

- (b) Generous telephone access to either party when the children are with the mother or father;
- (c) Generous access in the Netherlands should the mother be there including overnight access commencing and concluding at such dates and including such blocks of time as shall be reasonable at the time;
- (d) The parties were to immediately advise each other of any change of residential address, email address or telephone fax numbering;
- (e) Each party was to keep the other fully informed of significant issues relating to the children's education, health, welfare and the children's school reports and any medical reports to which they have access;
- (f) The parties were to refrain from denigrating the other to or in the presence of the children whether in person or by telephone;
- (g) The Respondent ("father") was to use his best endeavors to register and/or file the Order in the relevant court in the Netherlands;

- (h) The father was to maintain the children fully;

- (i) The Order was to be subject to review on or before six months from the date made. Prior to the six months review, leave was reserved to any party to apply to this Court for such further order or directions as may be necessary in connection to any of the orders thereby made, if immediately there was a change of circumstances in the lives of either party more particularly if either party should get married, find employment or seek to change residence.

- (j) The Order dated 17th April, 2002, was discharged.

Other orders were made but this review deals only with the question of custody, care and control of the children.

Before embarking on a review of the facts of this matter, the chronology of the relevant events that took place after the 21st August, 2002, is set out herewith:

On the 22nd August, 2002, an Application for Leave to Appeal was granted and a Stay of the Order was refused.

On the 23rd August, 2002, a Notice of Appeal was filed.

On the 29th August, 2002, an Application for a Stay of the Order was extended until the 2nd September, 2002.

On the 25th September, 2002, the matter was heard but the Stay of the Order was not extended and judgment was delivered.

On the 26th September, 2002, due to certain allegations made by the Petitioner against the Respondent's counsel, the matter was investigated by the Chief Justice and another Stay granted was continued pending the investigation.

On the 4th October, 2002, as a result of a complaint previously filed by the Petitioner with the Government of Netherlands in Jamaica alleging that her signature on the application for the children's passport was forged, the police interviewed the Respondent.

On the 7th October, 2002, although the Stay was lifted and the Respondent was permitted to travel, as a result of the Royal Netherlands' Embassy in Jamaica holding that the youngest child's passport was not validly issued, the Respondent left Cayman with the eldest child on the 9th October, 2002.

On the 10th October, 2002, an Order was issued by the Court ordering the Petitioner to sign a new request for a passport for the youngest child.

On the 21st October, 2002, an Application for Cost was filed by the Respondent.

On the 25th October, a new passport arrived. The Respondent returned to the Island and the youngest child was collected on the 29th October, 2002, after a further Order was made ordering the return of the youngest child.

On the 29th October, 2002, the Respondent finally left with the youngest child to reunite with the eldest child in the Netherlands.

On the 22nd November, 2002, a Motion was heard by the Court of Appeal in the Cayman Islands and the application dismissed.

PRESENT APPLICATION

This application now comes before me by way of two summonses. One in which the Petitioner ask for sole custody, care and control of the children and another summons filed by the Respondent asking for joint custody, care and control of the two children of the union. Both applications are governed by a section 7 of *The Guardianship and Custody of Children's Law* (1996 Revision). Section 7 (1) reads:

“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 or after the death of either parent, of any guardian under this Law; and in every case may make such order respecting costs as it may think just.”

The hearing of both summonses commenced on the 30th January, 2003, by way of a review of my previous interim order. At the hearing of the summonses certain concessions and agreements were reached and they are as follows:

1. That the evidence on Affidavit was to be proceeded with and no *viva voce* evidence and cross-examination was to be undertaken.
2. It was agreed that the Respondent need not return to the Island with the children until the review and final determination of the matter was undertaken by the Court.
3. Mrs. Merren, on behalf of the Petitioner, confirmed that the Petitioner did not intend to proceed with the Notice of Appeal filed previously in this matter.
4. By consent it was ordered that the previous Order made giving care and control to the Respondent on the 21st August, 2002, be extended to the determination of the review proceedings by this Court.

Prior to embarking on the Review, it is perhaps convenient at this stage to deal with the question of the Respondent's alleged contempt, of the previous interim orders made on the 21st August, 2002.

The Petitioner alleges that the Respondent is in contempt for the following reasons:

- (a) That he denied the Petitioner access to the children during the Christmas holidays. The Order made gave access to the Petitioner "for the month of December 2002, in the Netherlands or wherever she was employed." The evidence is that the Petitioner was due to go to the Netherlands and had informed the Respondent of her plans. She did not go as she commenced work on the 11th December, 2002. She then asked the Respondent to let her have the children in Cayman. There was a delayed response to the query on the 20th December, 2002, by which time it was too late for the Petitioner to make the necessary arrangements. There is no evidence that the Respondent denied access to the Petitioner. Although the Petitioner could have dealt with the Respondent directly on this issue, the query was addressed through the attorneys, and this Court has no evidence that the delay in responding to the Petitioner was caused by the Respondent

himself. I do not hold that the Respondent was in breach of this Order, there being no evidence that he refused access.

- (b) A complaint is also made that the Petitioner was not allowed generous phone access. The evidence is that the Respondent calls every other week to enable the Petitioner to speak with the children. The Petitioner could call more frequently but does not have the funds to expend on international telephone calls. The Order does not contemplate the Respondent having to pay for telephone access, but to permit such access. I do not hold that he is in breach of this Order either, as he has never denied telephone access.
- (c) Further complaint is made that the Respondent is in breach of condition 4 of the Order "the parties shall keep each other fully informed of significant issues relating to the children's education, health, welfare and the children's school reports and any medical report to which they have access." The Order does not contemplate the Respondent asking the Petitioner permission, but only that the Respondent was to keep her informed. I find that he has done so and is not in breach of that Order.

- (d) Similar complaint as to (c) above was made as to the Respondent not informing her of the change in residential address. The Respondent informed the Petitioner perhaps not immediately but there was no disruption of the telephone access with the children. I therefore, find that he has not breached this Order.
- (e) The final aspect of the complaint pertaining to the breaches of the Order of the 21st August, 2002, was the Respondent's failure to file that Order in the Netherlands. I find that the Respondent's explanation that this was an Interim Order and he was advised not to file it until the final order was made is feeble. This Order should have been filed. However, this was not a mandatory Order, but one which stated that the Respondent should use his best endeavor to file the Order, I do not hold him in contempt as he seems to have followed legal advice.

FACTS

The Petitioner, Mrs. Mercer and the Respondent, Mr. Hermans went through a form of marriage ceremony in August 1997. For technical reasons (as the Respondent's divorce had not been effective until one day after the marriage ceremony was conducted") the parties had to remarry on the 16th December, 1999, in Miami Florida. The eldest child of the family Sabine was born on the 9th

July, 1997. A second child Famke was born to the union on the 4th September 1999.

At the time of the marriage both the Petitioner and the Respondent were employed in the service industry. Both parties commenced living in the Cayman Islands sometime in 1998, the Respondent having arrived on the 13th March, 1998, to work with the Hyatt Hotel. During their lives together in the Cayman Islands, the Petitioner cared for her children fulltime and the Respondent maintained the family. The Petitioner concedes that she was entirely dependant on the Respondent, but states that it was a decision taken jointly for the benefit of the children.

In or about November 2001, the Respondent received notification of a transfer to the Hyatt in the United States. This in fact did not come through and the Respondent and Petitioner stayed in accommodation provided by the Respondent's employer Hyatt (Cayman). Due to differences in the marriage and it is alleged due to the Respondent's behavior, the Petitioner left the matrimonial home on the 5th March, 2002 and obtained an apartment on South Church Street, George Town, Grand Cayman. The Petitioner took the children to live with her.

In the month of March 2002, the Petitioner applied for an order asking for the children to be made wards of this Honourable Court and she also applied for maintenance for herself and for the children.

On the 18th March, 2002, the Petitioner also filed an Application for Divorce based on several acts of cruelty and violence by the Respondent.

On the 16th April, 2002, an Affidavit filed by the Respondent indicated that he wanted certain parts in the Petition struck out and stated that if they were struck out, he would then acknowledge service and the Petition could then be permitted to proceed as an undefended one.

As the parties were unable to resolve their differences, amicably as to custody, care and control and maintenance of the children, the matter came up for hearing before the Court which resulted in the Interim Order dated the 21st August, 2002 being made. At this stage it is perhaps convenient to dispose of one aspect of the law that could have some impact on this matter but does not in fact in the opinion of this Court have any impact on the matter and that is section 11 of *The Guardianship and Custody of Children's Law* (1996 Revision):-

“In any case where a decree for judicial separation, or a decree for divorce is pronounced, the Court pronouncing such decree may thereby declare the parent by reason of whose misconduct such decree is made to be a person unfit to have the custody of the children, if any, of the marriage, and, in such case,

the parent so declared to be unfit shall not, upon the death of the other parent, be entitled as of right to the custody or guardianship of such children."

In this case although allegations were made about the Respondent's behaviour no declaration was made as to his fitness and therefore in my opinion this section does not apply. Further, the Affidavits filed by the Petitioner are replete with the assertion that both herself and the Respondent are good and loving parents as evidenced in the following paragraphs of the Petitioner's Affidavit.

Paragraph 25 of the Petitioner's Affidavit filed on the 28th June, 2002:-

"I fully believe that the Respondent should have generous access to the girls, no matter where he chooses to live. I know that the girls love their father very much and they miss him being part of the family unit."

Paragraphs 26:-

"I have always encouraged access between the Respondent and the children. I agreed to generous defined access terms so that the girls would be able to adjust to the new routine of their parents living separately."

Paragraph 27:-

"When the Respondent leaves the Island, as he intends to do at the end of July 2002, I have no difficulty with him having the majority of the school holidays with the children."

It then falls on me therefore to examine the evidence in the context of section 7 of *The Guardianship and Custody of Children's Law* (1996 Revision). It is clear that the welfare of the minor children of the union is of paramount importance when considering the question of custody care and control. What I believe the law does try to do and what this Court has to endeavor to do is to ensure that it directs its mind to the issues which are relevant to the children and to their welfare.

In this particular application a lot of irrelevant matters have been brought to the attention of the Court. Most of those matters deal with the hostility between the adults. However, under section 7 (1), of *The Guardianship and Custody of Children's Law* (1996 Revision), I bear in mind that the law requires this Court to consider the welfare of the children as of paramount importance. The Court can only decide such questions by reference to the evidence. In considering the children's welfare, I must do so on the widest possible basis. All the circumstances must be taken into account. In this case, the children's ages, the conduct and character of the parties, their earnings, their employment, the prospects of the parties, the environment in Cayman into which they will be brought back as opposed to that in the Netherlands are all factors for consideration. There must be a balancing process, and I must ask myself, at the end of the day how will the children's interest best be served? The other factors that will also have to be taken into account are the children's physical, emotional

and educational needs; the likely effect on the children of any change in their circumstances; any harm that the children have suffered or are at risk of suffering; and how capable is each of their parents of meeting the children's needs.

I do not think that one can express this matter in any arithmetical way but what the Court has to deal with is the life of human beings and these cannot be regulated by formula. In my judgment I must take account of all relevant matters bearing in mind that my first and paramount consideration is the welfare of the children. Of necessity an order of this Court would require preserving contact after an international relocation of the children.

It is clear that, if the children were given to the mother, the father who has settled in the Netherlands will need to have access across the sea and vice versa if the children were given to the father, the mother would have to have access across the sea and this is, in my view, in this case one of the most difficult issues to resolve. However, where the final decision, whether through the exercise of my discretion or as a result of agreement is to permit the relocation, measures must be put in place to try to ensure that those rights of the children and the parent who needs access are protected and their relationship preserved.

Prior to embarking on the analysis of the evidence I wish to emphasize that the fact that the children are living in the Netherlands presently and are apparently

settled in the Netherlands is not persuasive in any decision I come to in relation to this particular hearing.

The history of the proceeding has already been outlined and the Court now has to make a decision based on the fact that the father has decided to live permanently in the Netherlands and the mother is presently residing as a visitor in the Cayman Islands.

There was a time when the Courts tended to apply presumptions that young children should be with their mother; that girls approaching puberty should be with their mother and at a certain age boys should be with their father. The modern approach and one with which this Court agrees with is not to make such presumptions.

THE CHILDREN'S PHYSICAL, EMOTIONAL AND EDUCATIONAL NEEDS.

There is little doubt that both the father and the mother adore these children. There is also little doubt that both parents can provide for the emotional needs of the children. The question therefore is the stability that they each can provide and the guarantee of security routine, and social development of the children.

The evidence is, that the father has now enrolled the children in a school in the Netherlands and he is shortly to buy a home. Even if that purchase does not go

through, he is living in a very comfortable residence with his sister and the children apparently are following a routine in which strong and moral frame work is the norm. Therefore, their physical needs and educational needs are being met by the Respondent. The Respondent has carefully in his various Affidavits itemized exactly what the children do on a day-to-day basis. The Petitioner on the other hand has not had the benefit of having the children with her for some five to six months and therefore is unable to advise the Court what her routine would be if she had them. This is not to be held against her.

The Respondent having care of the children as a result of a Court Order it follows that the Petitioner temporarily has had little contact with the children. Being unable to financially support herself she has not been in a position to travel and or communicate as frequently as she would with the children. If all things were equal this Court would have little difficulty in making a decision as to where the children should reside, bearing in mind their ages and sex. There is no conflict about the affection shown by either parent but there is a conflict of values between them and the Courts today generally start from the proposition that stability is important for the children's welfare. In this context therefore the evidence should be viewed under the following sub-headings.

THE LIKELY EFFECT ON THE CHILDREN OF ANY CHANGE IN THEIR CIRCUMSTANCES AND THE CONDUCT OF THE PARTIES.

As indicated previously the father is now working and seems to have a routine stable life with the comfort of his family supporting him. It would appear therefore that there is an element of stability love and routine in the children's life, at present with their father. The mother is an American, living in Cayman as a visitor. In August 2002, when the first ruling was made, giving the Respondent temporary custody, care and control of the children, the mother indicated to the Court she was highly likely to get employment. See paragraph 16 of her affidavit dated 28th June, 2002:-

"I am now seeking permanent employment because the fact that I had no option than to leave the Respondent because of his infidelities, left me with no choice but to separate from him."

"However, I believe that it is only responsible to seek permanent employment in order that their well being is maintained."

Since August 2002, to date, the Petitioner has not found permanent employment despite her constant assurances to the Court that she will. (Affidavit sworn to on the 28th June, 2002, at paragraph 20):-

"I am able to provide them with stability here. I am presently being interviewed for a number of posts which will not only help contribute financially to their life style, but will also provide me with the work permit to remain here once the Respondent has left the Islands."

The Petitioner in September or October 2002, informed the Court that she was highly likely to be employed by Extreme Technologies Limited. She was not. In the latter part of last year, on the 11th December, 2002, she was employed to attorneys, Woodward Terry & Co. In particular, Mr. Clyde Allen, gave her a letter of employment and applied for a three months temporary work permit.

This employment too did not last. The Petitioner informed the Court by way of affidavit evidence that because of her interruptions in her work schedule due to her court attendances she was no longer employed with attorneys, Woodward Terry & Co. As there were no court attendances after November 2002 and none were scheduled until the 30th January, 2003, the Court of its own volition summoned Mr. Allen, to ascertain why the Petitioner was no longer working for him. The Petitioner had informed the Court in her affidavit that as a result of the many court appearances and the fact that she was going to the Netherlands, it was decided that a permanent job could not be given to her by the company. Mr. Allen informed the Court that there were several reasons for termination including, bad time keeping and that she was terminated on the 24th January, 2003.

Had the Court not summoned Mr. Allen to give sworn evidence, this would never have been brought to the attention of the court. Prior to hearing from Mr. Allen, the Court specifically enquired of the Petitioner through her attorneys when exactly she was terminated by Woodward Terry & Co. Mrs. Merren advised that

it was an oral termination and took place on the 3rd February, 2003. This was not so, and the Court was left in doubt as to the Petitioner's credibility.

From August, 2002, to the 30th October, 2002, when the Petitioner was emotionally upset about the children departing, she may not have been able to hold a job. However, after the 30th October, 2002, to date the Petitioner has not held a job permanently and in the view of this Court she should have done everything in her power to keep her employment in view of the previous ruling. She is at present still a visitor to the Island. In her latest Affidavit, which she was given leave to file, as a result, of the Court still being in the dark as to her status, she informed the Court that she is likely to get a business license that she is likely to get some employment as a fitness trainer to work and that she is also likely to go to Atlanta for a few days. All of these are likely to happen but have not happened. The present proposals for employment are all dependent on a gentleman called Mr. Rivers, who is the Petitioner's present boyfriend with whom she has had a relationship since June of 2002 and on whom she is now entirely dependent. It cannot be said therefore, that the Petitioner is stable and independent in her own right in Cayman.

There is a subsidiary matters that must be dealt with. The Petitioner complains that the initial Interim Order in August 2001, was made due to the Court finding that she was unemployed. She casts the blame on Mrs. DaCosta, Counsel for the Respondent for her loss of employment. It is alleged that Mrs. DaCosta's

interference at her place of employment caused the termination. So strongly did she feel about this that a letter of complaint as to Mrs. DaCosta's interference in this and other matters was sent to the Chief Justice who had the matter investigated by the Royal Cayman Islands Police Force. Mrs. DaCosta was exonerated. The Petitioner's employers gave specific reasons for the termination none of which had anything to do with the matter before the Courts or Mrs. DaCosta.

It must be emphasized that in this review, the Court is concerned with the present situation as to employment, residency and the ability of both parents to provide for the children, not necessarily what has already transpired. If the Petitioner has a grievance against Mrs. DaCosta she must seek her redress in the appropriate forum.

At the resumed hearing of the review on the 17th March, 2003, the Court was asked to adjourn the matter, as the Petitioner was disappointed with the investigation conducted by the Chief Justice. Having ascertained the extent of the investigation, I refused the application and the matter continued on the 18th March, 2003.

The Petitioner has not been able to keep permanent employment in this country. She is therefore, still a visitor. The Petitioner has not put any proposals to this Court, as to how she intends to look after the children or where she intends to

live with the children should her work permit not be granted in the Cayman Islands. The Court has no evidence as to where she will go and if it is the United States how she will maintain herself, and the children there.

A maintenance order can support the children only to a certain extent. The Petitioner is not asking for maintenance for herself. She has conceded that in the Cayman Islands, she is entirely dependant upon her boyfriend Mr. Rivers.

What the future will hold as far as employment is concerned in the United States of America or in the Cayman Islands has not been placed before the Courts with any certainty. Is it therefore, in their best interest to bring the children back to Cayman where the mother is a visitor who could be asked to leave at any time, and in circumstances where she is financially not independent? The conduct of the Petitioner causes this Court some concern as to the element of irresponsibility and instability in her life style and personality. During the course of this case since August 2002, the Petitioner:

1. Has informed the Court of the likelihood of obtaining employment with various employers including Government and none have materialized.
2. The only employment she obtained she has not been able to maintain having been terminated on the 24th January, 2003.
3. She has indicated her desire to enter Law School either in UK, in the Netherlands and/or in the Cayman Islands.

4. She has indicated that she hopes to be employed by her boyfriend but still has not produced any evidence of a work permit application.
5. She prematurely terminated the hearings on the basis that she would wish to go to the Netherlands in January 2003. That did not materialize.
6. She frequently lost her temper during these hearings and on one occasion walked out of the Court in a temper.

If this Court was to relocate the children, they may be left in the Cayman Islands with a mother who has no work permit, with no income and a father who is not in Cayman. If the children return to Cayman at present they will be dependent on Mr. Rivers who is a stranger. He has to-date not filed an affidavit. On him, it has been conceded by Mrs. Merren, the Petitioner is totally dependant. The father, on the other hand, has family support and is able financially, to meet the needs of the children, as well as the emotional needs. There has been every opportunity for the Petitioner to come up with evidence from family or friends of support. The Court was informed that she had relatives in the United States whom she had recently met and had contacted through the email. Since August 2002 (some six months later) there is absolutely no evidence from the Petitioner and or her family that they are in contact with each other, or that they communicate with each other and that the Petitioner is likely to get some support from them. There is no evidence from the Petitioner as to any support that she

is likely to get from any friends either, except Mr. Rivers. There is no evidence before me that Mr. Rivers is in a position to be a stepfather. However, there is evidence before me that the Respondent's sister is playing a role as a caregiver in conjunction with the Respondent who is the primary caregiver in the Netherlands.

The children are presently secure, stable, well looked after and being educated. There is no evidence to contradict this belief. These are to my mind some of the relevant factors to be taken into account. The Interim Order has resulted in the relocation of the children, to the Netherlands and it has to a large extent resulted in the denial of daily contact to the absent parent.

I have therefore, to consider all the factors, including that factor. She has the right of access to the children. Bearing in mind that the welfare of the children remains the paramount consideration, the order made must take all these matters into account. The leading case of *Payne v Payne* [2001] EWCA Civ 1666, FCR [2001] assists the Court in affirming the rule that the effect of all the cases to date, including, the effect of *Poel v Poel* [1970] 1 WLR 1469, is that in relocation cases, the Court should have regard primarily to the welfare of the child. The proposition put forward by Omland LJ in *Re A v A* (Child Removal from Jurisdiction) [1979] 1 FLR at 380, 381 to 382:-

“The test which is often put on the basis of whether it is reasonable for the mother to return to her own

country with the child, I myself doubt whether it provides a satisfactory answer to this question. The fundamental question is what is in the best interest of the child; and once it has been decided with so young a child as this that there really is no option so far as care and control are concerned, then one has to look realistically at the mother's position and ask oneself the question: where is she going to have the best chance of bringing up this child reasonably well?"

In this case the answer is, the Court does not know if the mother can remain in Cayman and if not where, the mother and indeed, how and where the mother is going to bring up the children? In *Belton v Belton* [1987] 2 FLR 343 at page 349, the Court held:-

"I sympathize and understand, where a lay person such as a father is concerned, the difficulty of reconciliation with the concept of such a separation being in the paramount interests of the child in the long term, but the long-term interests of the child revolve around establishing, as Griffiths LJ (as he then was) said in *Chamberlain v de la Mare*, a sound, secure family unit in which the child should go forward and develop. If that can be supported by contact with the father, that is an immense advantage, but, if it cannot, then that is no reason for diverting one's concentration from the central and paramount issue in the case."

He further summarized the authorities by saying at page 349-50:

"The authorities in the law which dictate the hard and difficult decision which must be made once it is established that the custodial parent genuinely desires to emigrate and, in circumstances in which there is nothing adverse to be found in the conditions to be expected, those authorities are quite clear in the

course that the court must take, whatever the hardship and distress that may result.”

In *Payne v Payne* (supra), Thorpe LJ, in his judgment states:

“Furthermore practicalities are all against this submission. International travel is comparatively cheaper and more competitive than ever before. Equally communication is cheaper and the options more varied.”

Logically and as a matter of experience, the child cannot draw emotional and psychological security and stability from the dependency unless the primary caregiver herself is emotionally and psychologically stable and secure. The parent cannot give what she herself lacks.

In *Payne v Payne* (supra), Thorpe LJ said:-

“I am in broad agreement with the view expressed by Ward LJ to the effect that the advent of the Convention within our domestic law does not necessitate a revision of the fundamental approach to relocation applications formulated by this court and consistently applied over so many years. The reason that I hold this opinion is that, reduced to its fundamentals, the court’s approach is and always has been to apply child welfare as the paramount consideration.”

“But once a united family the right to family life is a shared right. But once a family unit disintegrates the separating members’ separate right can only be to a fragmented family life. Certainly the absent parent has the right to participation to the extent and in what

manner the complex circumstance of the individual case dictate.”

In *Johansen v Norway* [1996] 23 EHRR page 33, 72 para 78, the Court held that: “the court will attach particular importance to the best interests of the child, which...may override those of the parent”. If therefore, the best interest of the child demands that the mother in this case has limited access, then the interest of the children must be paramount.

The other matters, which I now need to examine in light of the evidence, are the ages of the children, and their sex. If the Petitioner 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 is little doubt that two young girls should ideally be with their mother. However, I do not believe that greater consideration should be given to the mother because of the age and sex of the children, where all things are not equal.

In *Simpson v Candappa* [1978] 25 JLP 444, the Court reiterated this principal.

There is no evidence that if the children were in Cayman and the maintenance contribution was either late or in arrears, the mother could support the children. She is a visitor to the Island and her prospects of earning an income and staying here are entirely dependent on the good offices of Mr. Rivers who can withdraw his support at any time, leaving the Petitioner and children destitute. The

Respondent on the other hand, is working has a steady income and the children are in the Netherlands a country known for the social and educational benefits provided by the state. It would appear therefore that the least damaging to the children at present would be to stay in the Netherlands with the Respondent.


I now turn to the question of access. Whilst the mother has the right of access to the children, it must be born in mind that the welfare and interest of the children take precedence. The preamble to the Hague Convention states that the signatory States are firmly convinced that the interest of the children are paramount, in matters relating to custody. The Petitioner has on occasions indicated that she can live in the Netherlands or study law there she can visit the children regularly even if she did not want to reside there permanently.

In view of the circumstances prevailing at this time, therefore, I make the following orders:-

1. Custody of the children Sabine born on the 9th July, 1997 and Famke born on the 4th September, 1999, to the Petitioner and Respondent jointly;
2. Care and control of the said children to the father ("Respondent"), who shall fully maintain them as long as they are resident with him;
3. The mother to have the following access: any time in the Netherlands including overnight access, half Easter holidays and all summer holidays wherever she is resident. The Respondent to pay half of the fares required for the children to visit the mother during the summer holidays;

4. The Respondent to consult the mother pertaining to all major medical, educational requirements for the children;
5. The Respondent to keep the mother apprised of all major changes in the children's life's including, educational achievements, change of residential address;
6. Finally the Respondent to file these orders in the Courts of the Netherlands forthwith;
7. Liberty to apply;
8. Costs to the Respondent to be agreed or taxed.

Dated this ^{4th} April, 2003

 *Levers J.*



Levers J.
Judge of the Grand Court