

12/9/96

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 4 OF 1996 - civil

RE: M

EXCERPT OF PROCEEDINGS had and taken before
His Lordship Justice D. Murphy on Wednesday,
September 11th, 1996, in George Town,
Grand Cayman.

APPEARANCES:

For the Applicants:	Mrs. G.I. Nervik
For the Defendant:	Mr. M. Alberga
	Mrs. L. Dacosta
For the Adoption Board:	Mrs. J. Banks
Guardian ad litem	Ms. S. Brooks

REPORTED BY: Karen A. Steer,
Official Court Reporter

1 Now, as to the main issue before me, which we refer
2 to as the preliminary issue of the propriety of the
3 proposed access condition to be inserted in an adoption
4 order, the terms were as follows -- the terms which I
5 slightly amended: "Until the child [HM] is 18 years of
6 age, [Mr. and Mrs. W] are to allow visitation rights to
7 [Miss M] for one week per year during summer vacation, and
8 in the event that permission from the Cayman Island
9 immigration authorities (the obtaining of such consent to
10 be the obligation of [Miss M] alone) is not obtainable for
11 [Miss M] to visit the Cayman Islands for this purpose,
12 that [Mr. and Mrs. W] would either together, or one of
13 them, travel to Jamaica with the child for purposes of
14 allowing [Miss M] visitation. Such visitation not to
15 include any overnight access with the child alone." That
16 was the condition proposed.

17 Initially it appeared that the mother's consent was
18 going to be forthcoming, whether any adoption order
19 contained such a condition or not; that is, in the latter
20 case she would have consented and been prepared to rely
21 simply on the goodwill of [Mr. and Mrs. W] to allow access
22 in similar terms. As she gave her evidence, and in
23 response to my questioning, it became clear that this may
24 not have been the case; it did appear that her consent
25 would only be forthcoming if such a condition were

1 actually inserted in the adoption order, and I then was
2 asked to determine a preliminary issue, as I've set out
3 above.

4 My initial two concerns, at least in my own mind,
5 were these: first, that such a term might fly in the face
6 of the nature of adoption itself and, second, as to
7 whether the Court should be seen to participate in what
8 might be regarded as by some as an unseemly attempt to do
9 a deal for a consent order, if I can put it that way; and
10 I wondered initially whether it might be more appropriate
11 to deal with the issue of the propriety of such a
12 condition in the context of a full adoption hearing
13 itself. On reflection, I reconsidered, mainly for three
14 reasons; first, I subsequently learned of the precise
15 terms of the proposed consent condition which I regarded
16 as quite modest in the scheme of things. Secondly, the
17 case law, in particular the House of Lords decision in
18 Re C [1988] 1 All ER 705, and other authorities cited in
19 that case. And, thirdly, what I regarded as the
20 substantial benefit that the determination of this
21 preliminary issue would have in terms of sparing the
22 parties, that is, the mother and the proposed adopters, of
23 a lengthy hearing -- at least that is what I am led to
24 believe based on their joint consent.

25 A full-blown adoption hearing, based on what I know

1 of this case so far, would probably take a week with
2 numerous witnesses and lengthy submissions. I did notice
3 the difficulty with which some of the witnesses gave their
4 evidence this morning, even on fairly straightforward
5 matters, and my view is that in a matter of this type, if
6 I can spare the parties trauma, and get a result that is
7 acceptable in legal terms, then I am going to attempt to
8 do it. (I stress that this factor affects whether I will
9 hear this as a preliminary issue. I close my mind to it
10 for purposes of determining the issue itself.)

11 So I have decided to treat as a preliminary issue of
12 fact and law whether, assuming adoption is consented to
13 (and that is my understanding of the present position)
14 such a condition is appropriate. That preliminary issue
15 was heard this morning. The evidence was limited to that
16 narrow issue. I do not intend to review all of the
17 evidence. I will mention parts of it. A very important
18 feature of that preliminary issue was, of course, the fact
19 that both the natural mother, [Miss M], and the potential
20 adopters, consent to a condition in the terms set out.

21 The propriety from the child's perspective was
22 probed, and quite properly so and expertly by Ms. Brooks,
23 who is guardian ad litem, and also by me. I must say that
24 I found the participation, both in examination of the
25 witnesses, and also in argument provided by Ms. Brooks

1 extremely valuable in terms of giving me the full
2 picture.

3 I have authority to insert a condition in any
4 adoption order, and that authority derives from
5 subsection 14(2) of the Adoption of Children Law.
6 Authorities such as Re C, which I've already cited, make
7 it clear that an access order can be such a condition.

8 There are, I see, numerous English authorities
9 dealing with access orders as conditions to adoption
10 orders. The statutory provisions are very similar. Re C
11 in particular, a House of Lords decision, is useful for
12 general principles even though, as was noted, it does
13 involve an older child.

14 Clearly I have to have regard for the welfare of the
15 child. I am mindful of that. There was some confusion in
16 argument as to the requirement of "exceptional
17 circumstances". What the House of Lords actually said in
18 that case, and I'm referring to the bottom of page 712
19 is:

20 "...that each case must be considered on
21 its own particular facts. No doubt the
22 court will not, except in the most
23 exceptional case, impose terms or
24 conditions as to access to members of the
25 child's natural family to which the

1 adopting parents do not agree."

2 That was what was actually said by the House of Lords. I
3 take from that that it is very clear that agreement is an
4 important factor, is a major factor. It is not simply
5 that there must be exceptional circumstances, whether there
6 is agreement or not. There must be exceptional circumstances,
7 absent agreement.

8 As to what is proposed by way of condition, I regard
9 it as a minimal incursion or intrusion into the lives of
10 the potential adopters; requiring as it does a visitation
11 of one week in the summer, no overnight stays, and one or
12 more of the adopters to accompany the child. This is in
13 fact a much narrower access provision than is normally
14 seen in the English case law on which access terms are
15 involved. For example, in Re W [1988] 1 Family Law
16 Reports 175, also cited in Re C, the term was simply
17 "reasonable access". There was evidence of [Miss M] and
18 [Mr. and Mrs. W] to the effect that such contact could be
19 beneficial insofar as the child should eventually get to
20 know the natural mother, and I certainly take notice of
21 the modern trend that this is desirable. Older case law
22 has to be seen in this light.

23 The evidence of [Miss M] and [Mr. and Mrs. W]
24 indicated that there was some sort of
25 previously-established relationship, which makes this

1 forced by [Mr. and Mrs. W] on their child, if it
2 subsequently transpires that the child does not wish it.

3 There was no actual evidence of any potential harm,
4 only evidence of what [Miss M] and [Mr. and Mrs. W] both
5 see as good.

6 Accordingly, assuming that the adoption order is made
7 on consent, as I am led to believe that it will, I agree
8 that such a condition, as was proposed to me, is
9 appropriate in the circumstances of this case.

10 Now that is the disposition of that preliminary
11 issue, and I assume, unless someone tells me differently,
12 that this is now a consent adoption in which the
13 Applicants seek an order subject to that term. Is that
14 correct?

15 MR. ALBERGA: Correct, My Lord.

16 MRS. NERVIK: Yes, My Lord.

17 THE COURT: I will hear submissions if necessary, but
18 I can say on the basis of the material filed before me
19 that I am satisfied to make such an order. I don't see
20 any need for additional evidence, but I will hear
21 submissions. Would you like to take five minutes?

22 MR. ALBERGA: No, I'm just confirming the consent is
23 fine.

24 THE COURT: There are no other loose ends to be dealt
25 with?

1 MRS. NERVIK: My Lord, as long as you are prepared to
2 accept evidence in front of you in order to make the
3 adoption order, I don't have anything more to add.

4 THE COURT: Ms. Brooks?

5 MS. BROOKS: No, I have nothing to add.

6 THE COURT: I am content to make an adoption order as
7 sought by the Applicants; subject to an access condition
8 in the terms set out above.

9 MR. ALBERGA: Much obliged.

10 THE COURT: No order as to costs.

11 MRS. NERVIK: Much obliged.

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13 (PROCEEDINGS CONCLUDED AT 3:05 P.M.)

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REPORTER'S CERTIFICATE

I, KAREN A. STEER, Official Court Reporter, do hereby certify that the foregoing pages are a true and accurate transcript of the proceedings had in the said Court and reported in machine shorthand by me on the date and place aforementioned.

DATED the 12th day of September, 1996.


