

EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. BVIHMT2012/0041

BETWEEN:

MARTHA JOSEFINA RAMIREZ TORRES

Applicant/Petitioner

And

PEDRO MIGUEL CASTELLANOS BASTO

Applicant/Respondent

Appearances:

Tamara Cameron for the Petitioner

Susan Demers for the Respondent

2014: April 3

JUDGMENT

[1] **ELLIS J.:** By Notice of Application for Ancillary Relief filed on 26th February, 2013, the Mother (Mother) applied for sole custody and primary care and control of the minor child of the marriage. Her Affidavit in Support makes clear that her wish is to temporarily relocate to Barbados with six year old, Luca (the Child) and she asks the Court for permission to remove the Child from the jurisdiction. The Mother also proposes the following access arrangements for the Father (Father):

- (1) When the Child resides within the Territory with the Father:
 - (a) visitation every other weekend; and
 - (b) visitation on Thursday night of the week when the child is not visiting the Father for the weekend;
 - (c) visitation on alternative birthdays and school holidays.

- (2) When the child resides outside the Territory with the Mother:
 - (a) visitation every summer holiday and alternate Christmas holidays and such other times as shall be agreed by the parties.
 - (b) She also seeks an order that the Father bear the costs of any travel expenses necessary to effect such access.

[2] By Notice of Application dated 11th April 2013, the Father applies in essence for orders refusing the Mother permission to remove the child from the jurisdiction. The Father seeks instead, an order of joint custody of the child with primary care and control to him and visitation to the Mother on a schedule to be agreed by the Parties. In regards to maintenance of the child he asks that both parties equally contribute to the maintenance of the child including the medical and educational expenses until the child attains the age of 18 or until he attains the age of 21 if he pursues higher education. The Father also seeks his costs of the Application.

The Law - Statute

[3] The starting point must be the relevant statutory framework. In the British Virgin Islands, custody of children within the context of matrimonial proceedings is governed by the **Matrimonial Proceedings and Property Act 1995** (the Act). Section 44 of the Act gives the Court a wide discretion to make any order it sees fit in the circumstances of this case in respect of custody, access or financial provision.

[4] Section 44 (1) of that Act provides as follows:

"The Court may make an order as it thinks fit for the custody and education of any child of the family who is under the age of eighteen,

(a) in any proceedings for divorce, nullity of marriage or judicial separation, before, by or after the final decree ,

(b) where such proceedings are dismissed after the beginning of a trial, either forthwith or within a reasonable period after dismissal, and in any case in which the court has the power by virtue of this subsection to make an order in respect of a child, it may, instead if it thinks fit, direct that proper proceedings be taken for making the child a ward of Court.

[5] This provision reinforces section 11 of the **Guardianship of Minors Act Cap 270** of the Laws of the British Virgin Islands which also makes clear that the Court may make such orders as it thinks fit regarding custody of an infant and the right of access of either parent. Section 3 of that Act however provides that in exercising

its discretion, the Court shall regard the welfare of the child as the first and paramount consideration. It provides as follows:

"Where in any proceeding before the Court the custody or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the Court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father."

- [6] It therefore follows that it is the interests of the child which are to be regarded as paramount and not the personal desires or preferences of the parents. A parent who has been granted primary care and control of a child would ordinarily have the right to determine where the child should live (including outside of the jurisdiction), unless the court makes an order prohibiting the removal of the child. It is abundantly clear in the case at bar that the Parties have very different views on this critical issue and this has no doubt informed their respective Applications.

Analysis – Custody and Access

- [7] The relevant legislative framework regulating custody and financial provision in respect of children enjoins the court to take into account the welfare of the child as the first and paramount consideration. Unfortunately, the legislation provides little guidance as to what constitutes the "*welfare of the child*". In the Eastern Caribbean however, the courts have increasingly been guided by the welfare principles set out in the section 3 of the UK Children Act and in **Brathwaite Jr. v Brathwaite**¹ Olivetti J made the following observations which are adopted by this Court.

"The welfare checklist as set out in section 3 of the Children Act, 1989 (UK) is also useful as to the words of d'Auvergne J. in **Alvin Hodge v Marguerite Denise Hodge 33/2002**, where the learned judge made reference to the UK Children Act section 3 noting – "much weight is now given to the child's sex, age, his physical, emotional and educational needs, the likely effect on the child with regard to any change in his circumstances and any harm he or she may be at risk of suffering as a result of the change." Thus, it is apparent from these provisions and the authorities cited by both counsels that each case must in the end turn on its own particular circumstances."

¹BVIHMT 2011/69 - British Virgin Islands 18th July 2012

[8] The Court is guided by the useful check list and guidance provided by section 3 of the Children's Act and will now consider the criteria in light of the particular evidence in this case.

The Child's Wishes and Feelings

[9] At a little over six years old Luca lacks the maturity to properly articulate his views on what is best for him. It is therefore understandable that no evidence was led as to his wishes and feelings. However, all of the experts have reported that he has repeatedly expressed his desire to have both of his parents living together with him as a family.

[10] It is also apparent that the child enjoys the love and support of his parents both of whom have demonstrated to the Court that they are committed parents who have for the most part diligently tried to minimize the adverse impact of the separation and divorce on him. It would certainly be in the child's best interest to be raised by both his parents in circumstances where they all reside in the same jurisdiction and where the parents are able to maximize their support of him. Unfortunately, the Court in this case must consider an alternative scenario in which the parents do not intend to reside in the same jurisdiction, which will inevitably mean that the child will be deprived (at least temporarily) of the constant presence, attention and access to one of his parents.

The Child's Physical, Emotional and Educational Needs

[11] The Court notes that from all accounts that the Child has adjusted to the arrangements which are currently in place. It is apparent that he has a strong relationship with both parents and that his current needs are being met under both households and in the current arrangements. The report from the experts reflect that:

"Luca appears to be a well-adjusted member of a bi-nuclear family and has not presented any symptoms of maladjustment or distress to this clinician." Dr. Rubaine.

"...the current custody arrangements for Luca should be maintained. This arrangement has been in place for approximately two years – and has worked well for Luca. He accepts residing with his mother and visiting with his father. He has adjusted well to this plan –and, therefore the arrangement should not be changed." Dr. Ronald McAnaney:

"...both parents engage Luca in educational and other activities that he clearly enjoys and benefits from. The atmosphere at both homes ...is adequate for the growth, rearing and development of a child." Ms Freeman, Social Worker.

- [12] Both parents have the capacity to meet the child's physical needs. Both parents are gainfully employed and from all indications earn fixed salaries. The Mother's evidence is that she intends to undertake specialist training in the field of medicine which will improve her earning capacity. The Father is currently employed as a commercial attorney in a reputable local firm.
- [13] There can be no doubt that an education is an important aspect of a child's upbringing and it appears from all accounts that both parents have an appropriate regard for its importance. The child's educational needs are currently being met at First Impressions Child Care Centre. He commenced his attendance in 2011 when he began pre-school. He is described as intelligent and is currently on the honour roll.
- [14] Further, it is common ground among all of the experts that the Child is attached to both of his parents, and that they have attempted to minimize the effect of the separation and divorce on him. From all accounts the parents have each provided a safe, loving and conducive environment for his growth and development. Luca has almost daily physical access to both Parents and strong bonds have developed as a result. Under the current shared care arrangements, the Mother has primary care and control of Luca while the Father has regular access every other weekend and on Thursdays evenings during the week when he does not have him for the weekend. The Father also indicated that he regularly spends his lunch hour with Luca at school and that he talks to him every day.
- [15] The Court recognizes that it is a fundamental emotional need of every child to have a persistent loving relationship with both parents and in the case at bar the general consensus of all the experts is that Luca would continue to benefit from a healthy relationship with both his Parents and that an order of joint custody would be appropriate.

Effect on the Child of any Change in Circumstances

- [16] The Mother's case is that for the past nearly three years, Luca spends approximately 65% of each month with the Mother and 35% with the Father. He has reportedly adjusted to this arrangement where he lives with his Mother and visits his Father. Although there is some disagreement regarding the scope of future access, for the most part, the Experts have counseled against any change

to those arrangements. The general consensus is that any change in his current living situation where Luca is displaced from his mother is likely to be detrimental to his welfare.

[17] There can be no doubt however, that the Mother's application before this Court contemplates a fundamental change in current status. At present, the Parties share custody of Luca although the Mother has primary care and control. Regular access arrangements have been agreed by the Parties although the Father testified that he has repeatedly implored the Mother to increase his current access without much success.

[18] Luca has been settled in the Territory since 2011 and for almost 3 years has been enrolled in the same school. He would have established bonds with his teachers, classmates and friends. He has an established routine in which he sees both of his parents on a regular basis and despite the unfortunate demise of his parents' marriage, this has no doubt contributed to his sense of well-being².

[19] Given the Mother's expressed intention to relocate to Barbados, there are obvious implications for all aspects of the child's life including his home, schooling and friends; his relationship with his parents, his way of life and emotional well-being. In the event that sole custody is granted to the Mother with permission to relocate with the child, he would effectively be transplanted to a new environment which would require him to establish new routines and form new relationships.

[20] In this regard the Court has considered judgment of the learned d'Auvergne J in **Hodge v Hodge**³ where she cited the following dictum in **Thain v Taylor**⁴;

"...one knows from experience how mercifully transient are the effects of parting and other sorrows and how soon the novelty of fresh surroundings and new associations effaces the recollections of former days and kind friends..."

While the Court accepts this dictum and accepts that given the child's tender age, it ought not to attach much weight to this aspect of the case, there can be no doubt that the contemplated changes (notwithstanding the impermanent nature) would be significant and abrupt.

[21] Perhaps the most significant change would be the fact that the child would no longer have the degree of personal daily contact which he now enjoys with the

² The Court has already noted the expert's opinion on the current custody and access arrangements.

³ BVIHC 33 of 2002 d'Auvergne J

⁴ [1926] Ch. 676

Father. Both Parties agree that the child has a close relationship with his father which must be maintained. There is an overabundance of research material detailing the importance of the role that fathers play in a young child's life and the overwhelming consequences of allowing one parent to remove the child permanently from the jurisdiction and away from the "left behind parent".

- [22] The Father relied heavily on the evidence of Dr. Virginia Rubaine who testified that relocating to Barbados and reducing the time spent with his father will have a detrimental effect on Luca. It was her view that it would be easier for the Father to maintain a stable base in the BVI for Luca while the Mother goes to complete her education. She noted that the least destructive solution would be for Luca to continue to live in the BVI with his Father surrounded by his maternal family and friends and in a familiar school environment. She stated further that it is always in a child's best interest to maintain a warm and loving relationship with both parents and that separation from a parent would always have adverse effects. In her psychological report of 7th January 2013 opined that:

"Research demonstrates involved fathers provide practical support in raising children and serve as models for their development. Children with involved loving fathers are significantly more likely to do well in school, have healthy self-esteem, exhibit empathy and pro-social behavior compared to children who have uninvolved fathers. Committed and responsible fathering during infancy and early childhood contributes emotional security, curiosity and math and verbal skills."

- [23] Dr. Rubaine concluded that:

"...there should be shared equal custody of Luca between Mr. Castellanos and Dr. Ramirez during this time. Mr. Castellanos has more than established himself as a competent, loving and stable primary care giver."

"...equal parental access will only serve to enhance the benefits from this arrangement. Mr. Castellanos is an involved and committed father and it is my opinion that any barriers to him making an equitable and meaningful contribution to Luca's life should be removed."

- [24] The Mother concedes that a variation of the current custody arrangements and the relocation of the child would cause a change in the relationship between the child and his father. However, she stressed that this relocation is intended to be a temporary one solely in order to facilitate her course of training. She contended that Skype would be a useful tool in maintaining communication between the Father and Luca during this period and pointed out that they have had recourse to this tool in the past.

[25] While seeking sole custody, she proposes the following visitation and access schedule:

- (1) Christmas Holidays – the Parties will alternate so that one year Luca will spend the first half with one parent and then the next year with the other.
- (2) Summer Holidays – Luca will spend the first 6 weeks with the Father and the last 2 weeks with her.
- (3) Easter Holidays – Luca will spend the entire period with the Father.
- (4) Mid Term Breaks – Luca will spend in the BVI with the Father.
- (5) The Father will also be welcome to visit the Child in Barbados at any time and at his expense.

[26] The Mother maintains that the following visitation schedule would be equitable and best suited for Luca as he will have vacation with both parents rather than associating one parent with school and the other with vacation which will aid in his social and psychological development.

[27] The Mother relied on the expert report of Dr McAnaney who in his recommendations stated that:

“...the current custody arrangement for Luca should be maintained. This arrangement has been in place for approximately two (2) years – and has worked well for Luca. He accepts residing with his mother and visiting with his father. He has adjusted well to this plan- and therefore, the arrangement should not be changed.

Any change to the current custody arrangement will be detrimental to Luca's overall emotional well-being. He will experience a lack of continuity and feelings of insecurity and confusion.”

[28] Notwithstanding these observations and in direct contrast to Dr. Rubaine, Dr McAnaney then goes on to state that:

“It is my professional opinion and recommendation that if Dr Ramirez were to relocate temporarily for additional medical education or relocate after her marriage to Mr Small, the visitation plan submitted by Dr. Ramirez does provide a viable visitation arrangement between Luca and his Father.

It is my professional opinion if Luca were to relocate temporarily with his mother during her pursuit of additional medical education, this relocation would not be detrimental to Luca's emotional and social well-being.”

- [29] Although the Social Services Department declined to make any recommendation within its report regarding the proposed change and the likely impact on the Child, in her oral testimony before the Court, Ms. Freeman, the Social Worker indicated that it would not be detrimental to Luca as it would be possible for him to maintain a healthy relationship with his Father if the Mother's plans for contact by Skype and telephone and for visitation over the school breaks and other occasions are implemented.

The Child's Sex, Age and Background

- [30] Luca is a male child of tender age. The Child is a national of the BVI who has resided here permanently since 2011. His Mother is a national of the BVI and a British Overseas Territory Citizen. His Father is a national of Columbia who has been habitually resident in the BVI since 2011 with work permit exemption status.
- [31] The child is currently enrolled in a local school in the BVI where he has attended full time since February 2011. The Father is bilingual and wishes that Luca also be fluent in Spanish.
- [32] Both the BVI and Barbados are multicultural societies so that the child's race, culture, religion and linguistic background are not overwhelming issues which would militate against either Application.
- [33] The Court is also aware that there is no longer any presumption or principle of law that mothers should have custody of young children. However the Court is of the view that the weight to be ascribe to this factor is as adumbrated by Lord Jauncey in **Brixey v Lynas**⁵

"...the advantage to a very young child of being with its mother is a consideration which must be taken into account in deciding where lie its best interests in custody proceedings in which the mother is involved. It is neither a presumption nor 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 other circumstances of each individual case such as whether the child has been living with or apart from the mother whether she is or 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

⁵1996 SLT 908 at 911

ability to care for the child only the strongest competing advantages are likely to prevail."

Harm or Potential Harm Suffered or Likely to be Suffered

- [34] The Parties have not alleged that the Child has suffered any significant harm while in their respective care, but they have each highlighted concerns about the other's apparent lack of diligence.
- [35] In the case of the Mother, her concerns were raised in the affidavit filed on 22nd April 2013 where she avers that the Father often picks up Luca too later after school (nearly 6:00 p.m.) and that he has unreasonably delayed Luca's medical care. In oral evidence, she also stated that the Father has allowed Luca to attend school with ripped uniform and does not attend Luca's school activities. She also has expressed concerns about Luca's diet not consisting of enough water and vegetables while in the Father's care and highlighted the incident of Luca being constipated for 5 days when he came to visit her in Barbados at Christmas. The Mother contends that despite an express agreement between the parties, the Father unilaterally discontinued paying Luca's tuition in March 2012 which she learned for the first time in correspondence from his counsel.
- [36] These concerns were summarily dismissed by the Father who had his own concerns about the quality of the Mother's care. In court he testified that they had disagreed about the timing of the surgery because he wanted it done in Miami Children's Hospital where Luca would have the best care. He denied that Luca had ever suffered from constipation while in his care because he has provided him with fruits and water. He stated that on occasion, he has had to mention to the Mother that **she** should provide better snack and lunches for Luca. He stated that he is unable to sew and that as a result he has purchased a duplicate set of school uniforms for Luca. He concedes that he misses Luca's school concerts and sports days but he stated that this is because he wishes to avoid confrontations with the Mother.
- [37] When the Social Worker was questioned by the Court, she testified that there was no cause for an order of sole custody in this case. She noted that she had investigated the homes of both parents and found that there was no abuse and no issues regarding safety. She also reported that neither parent had ever raised any of the concerns which had been mentioned or indeed any concerns regarding negligent care. In light of this and having had the opportunity to observe all the witnesses, the Court was not satisfied that any of the allegations raised, were serious enough to militate against either Application.

- [38] However, in the context of the application for temporary relocation, the Father has alluded to the risk of emotional and psychological harm which would be suffered by the Child if he were to be deprived of his relationship with him. He again relied on the expert evidence of Dr Rubaine as to the potential impact of such displacement or relocation. She emphasized that the Mother's proposal which includes communication through Skype, email and the phone would be a poor parenting substitute. Her recommendation, is that given the Child's bond with both Parents, that there should not only be joint custody but joint care and control with Luca spending equal time with both parents.
- [39] This contrasts with the Mother's expert, Dr. McAnaney who has stated that in his professional opinion *"that temporary relocation would not be detrimental to Luca's emotional and social well-being ... the visitation plan submitted by Dr. Ramirez provides a viable visitation arrangement between Luca and his Father."*
- [40] His Report also states that *"...the current custody arrangement for Luca should be maintained.... Any changed to the current custody arrangement will be detrimental to Luca's overall emotional well-being. He will experience a lack of continuity and feelings of insecurity and confusion."*
- [41] This latter conclusion is shared by the Court's expert Ms. Freeman who testified that that joint care and control at this time would not be advisable as Luca is accustomed to his current routine. She opined that the Father's proposal is not practical for a six year old as it provides no stability or continuity. She recommends that the current arrangements should continue.

Capability of parents in meeting the child's needs

- [42] It is common ground that both parents have the potential and are otherwise capable of ensuring that the child's needs are met. They both have secure and well paid employment and they offer reasonable homes with a comparable amenities and standards of child care. However, Counsel for the Mother argued that she has for the past 3 years been the primary caregiver for the Child. The Father on the other hand maintains that his role in the Child's care was no less involved than that of the Mother. He indicated that for a significant part of the Child's life, he was unemployed and essentially fulfilled the role of stay-at-home-father. He noted that even after they moved to the BVI, he continued to provide primary care.

- [43] In the event that he is granted custody of the child and remains in the BVI while the Mother chooses to relocate, the Father does not deny that he will have to rely on the assistance of paid caregivers. He concedes that he would not have extended family support because the child's paternal grandparents do not reside in the BVI or are otherwise unable to assist. He indicated further that in the event of an emergency, he would have to rely on the assistance of friends or members of the Mother's extended family. He professed to have a cordial relationship with them, although the Mother disputes this.
- [44] In respect of the Mother, it is apparent that the specialist training contemplated will mean that she will have to be employed at a local health care facility when she relocates to Barbados. Given this schedule there can be no doubt that professional childcare arrangements will have to be employed to supplement basic childcare when friends or family members of the Mother's intended fiancé are unable to assist.
- [45] For the purposes of this Application, the Court must consider a scenario where the Mother elects (as she has expressed to the Court) not to relocate to Barbados in the event that her application is refused. From all accounts, it appears that the Mother would have a strong network of family support available to her and that the child would continue to be embraced by her extended family.

Wishes of the Parents and their Interaction with Each Other

- [46] Originally, the Father's claim for relief also included a claim for sole custody of Luca. He advanced this on the basis that the Mother's intention is to pursue specialist training outside of the Territory. This position was later reconsidered, so that Counsel for the Father indicated to the Court that he would no longer insist on sole custody. However, in respect of physical care and control, the Father's proposal is that physical custody of Luca be split equally so that each parent would have Luca for 2 weeks at a time in every month. The Father maintained that this was a sensible arrangement which could be sustained on a long term basis and this was generally endorsed by his expert, Dr. Rubaine in her report.
- [47] This proposal is trenchantly opposed by Counsel for the Mother who argued that such an arrangement goes against established authority on child care as it is impracticable and patently inconsistent with a child's best welfare. She submitted that it creates no stable home base for Luca and forces him to live a very unsettled and disruptive life which can only be more harmful than good for his psychological, social and educational well-being.

- [48] This position is confirmed by the expert Dr. McAnaney who opined that the arrangement of having a child reside 50% of each week or month with each parent is an unhealthy custody arrangement. In his view, it is much healthier for the child to be in the primary care of one parent so that he has a stable base. His professional opinion is that *"It is especially destructive to the child because it interrupts the child's need for stability and continuity."* He advised that as Luca has adjusted well to living with the Mother and visiting his father that this arrangement should continue.
- [49] The Court's expert, Ms. Freeman was also vocal on this issue. She was of the view that equal visitation would be impractical as there would be no continuity or stability for the Child. She concluded that physical custody of the child should remain with the Mother with structured visitation to the Father as Luca was accustomed to living with her and was familiar with that routine.
- [50] The Mother seeks sole custody of the Child and this appears to be based largely on the acrimonious relationship between the Parties. She indicated to the Court that she finds it difficult to make joint decisions regarding Luca's welfare. She identified⁶ a number of instances where she contended that his failure to cooperate with her resulted in unnecessary delays and miscommunication.
- [51] This has been corroborated by the Court's expert, who in her Report indicated that the personnel at Luca's school had on more than one occasion spoken "very sternly" to the Parties about their inability or unwillingness to communicate. She noted that the Parties response was to *"point fingers at each other."* Ms. Freeman has also noted that the Parties have both indicated that communicating verbally is difficult and that conversations are often misconstrued. They therefore communicate solely by email.
- [52] The Court cannot ignore the Father's own disturbing admission in cross-examination that when the Mother calls his phone he does not answer it even when Luca is with him, but rather insists that she contacts him by email only. In cross-examination the Father also admitted that he has never attended any of Luca's sports' day or concerts because he does not wish to personally interact with the Mother. It was also clear that he has not done all that he could reasonably do to remediate this unfortunate situation.
- [53] Not surprisingly, Ms. Freeman describes the relationship between the Parties as "a narrative of discord". She stated that Luca is well aware of the extent and scope of

⁶ Paragraph 9 of Petitioner's Affidavit of 30th May 2013

the acrimony and has stated openly to other adults that his parents “do not like each other”. It was also clear to the Court that the Father finds it difficult to disguise his animosity towards the Mother’s fiancé, Mr. Small and that Luca is aware of this.

- [54] The Court has noted that all of the experts have indicated their concerns in regards to this critical issue. The general consensus is that the entire family unit should participate in family counseling and that the Parties need specific counseling to address issues of communication and co-parenting. Notwithstanding the expressed concerns, the Court has noted that none of the experts are of the view that this should militate against an order for joint custody. In fact, it was made clear to the Court that notwithstanding that there was no agreement as to physical custody and visitation; the Parties’ experts had endorsed the recommendation of the Ms. Freeman, that the Parties share joint custody of Luca. This recommendation is however contingent on the full participation in the recommended counselling.

ANALYSIS – Temporary Relocation

- [55] The Mother intends to commence a four-year post-graduate medical programme in September 2014 at the University of the West Indies to pursue a specialization in Family Medicine. She proposes to take the Child with her for the duration of this programme. She intends to leave the Territory in July of this year so that the family can be settled in and ready for the start of the school term in September.
- [56] Ultimately, the outcome of the Mother’s application for permission to relocate to Barbados with the Child is to be determined in a range of criteria established in case law. The decision as to relocation is generally arrived at by identifying the relevant criteria and applying them to the factual situation. Judicial authorities have repeatedly emphasized that this is a difficult discretion to exercise and this case is no exception. The fact that what is contemplated is a temporary relocation for the duration of the Mother’s course of study is significant consideration which must be properly weighed by the Court.
- [57] The Court will therefore now turn to the decided case law and the legal principles which are identified. The seminal decision is that of the English Court of Appeal in **Poel v Poel**⁷. In that case, the Court emphasized the importance of recognizing and supporting the function of the primary carer. Sachs J observed at page 1473;

⁷[1970] 1 WLR 1469

"The way in which the parent who properly has custody of a child may choose in a reasonable manner to order his or her way of life is one of those things which the parent who has not been given custody may well have to bear, even though one has every sympathy with the latter on some of the results."

[58] Later, the Court in **Payne v Payne**⁸ had to consider whether or not there was a presumption in favour of a custodial parent. Thorpe LJ summarized a detailed review of the English appellate decisions including **Poel** in this way;

"...a review of the decisions of this Court...demonstrates that relocation cases have consistently been decided upon the application of the following two propositions: (a) the welfare of the child is the paramount consideration; and (b) refusing the primary carer's reasonable proposals for the relocations of her family life is likely to impact detrimentally on the welfare of her dependent children. Therefore her application to relocate will be granted unless the court concludes that it is incompatible with the welfare of the children."

[59] It is the Mother's evidence that she has been the main caregiver for Luca since July 2011 when she returned to the BVI and that she has had primary care and control of him. While this cannot really be disputed by the Father, he has contended that his role has been no less significant and that in fact he has over the course of the Child's life performed the role of primary caregiver.

[60] Counsel for the Mother submitted that the Court in **Payne** observed that refusing the primary carer's reasonable proposals for relocation of her family is likely to impact detrimentally on the dependent children and therefore her application to relocate should be granted unless a court concludes that it is incompatible with the welfare of the child. So that where an applicant parent has advanced reasonable proposals for relocation and has genuine motive for the move, that then the fact that they are the primary carer is a key matter to be considered by the Court.

[61] Having reviewed the entire text of the judgment in **Payne**, the Court is not of the view that it prioritizes or establishes any presumption in favour of the primary carer. Thorpe LJ was careful to point out that any application to relocate would be granted **unless** the court concluded that it was incompatible with the child's welfare. The Court also notes Thorpe LJ's opinion was not the only judgment in the case. In the Court's view the judgment of Butler-Sloss P. more accurately expresses the Appeal Court's opinion and at page 500 she sets out the following helpful criteria as being relevant in a relocation decision:

⁸[2001] Fam. 473

"The strength of the relationship with the other parent, usually the father, and the paternal family will be a highly relevant factor . . . The ability of the other parent to continue contact with the child and the financial implications need to be explored. There may well be other relevant factors to weigh in the balance, such as, with the elder child, his/her views, the importance of schooling or other ties to the current home area. The state of health of the child and availability of specialist medical expertise or other special needs may be another factor. There are of course many other factors which may arise in an individual case. I stress that there is no presumption in favour of the applicant, but reasonable proposals made by the applicant parent, the refusal of which would have adverse consequences upon the stability of the new family and therefore an adverse effect upon the welfare of the child, continue to be a factor of great weight."

[62] She added:-

"As in every case in which the court has to exercise its discretion, the reasonableness of the proposals, the effect upon the applicant and upon the child of refusal of the application, the effect of a reduction or cessation of contact with the other parent upon the child, the effect of removal of the child from his/her current environment are all factors, among others which I have not enumerated, which have to be given appropriate weight in each individual case and weighed in the balance . . . " (Emphasis mine)

[63] The learned Judge then summarized the tests in this way:-

- (1) *The welfare of the child is always paramount.*
- (2) *There is no presumption...in favour of the applicant parent.*
- (3) *The reasonable proposals of the parent with a residence order wishing to live abroad carry great weight.*
- (4) *Consequently, the proposals have to be scrutinized with care and the court needs to be satisfied that there is a genuine motivation for the move and not the intention to bring contact between the child and the other parent to an end.*
- (5) *The effect upon the applicant parent and the new family of the child of a refusal of leave is very important.*
- (6) *The effect upon the child of the denial of contact with the other parent and in some cases his family is very important.*
- (7) *The opportunity for continuing contact between the child and the parent left behind may be very significant."*

[64] The **Payne** decision clearly identifies the welfare principle as being the paramount consideration and this is consistent with the subsequent English decisions of **Re Y** and **Re K**. In 2012, the position was further clarified in a case decided by the

English Court of Appeal. In **Re F (Relocation)**⁹ the learned trial Judge focused on the decisions in **Payne** and **Re K**, and asked himself whether the case before him was one to which **Payne** applied. He decided that he was entitled to "look at" the **Payne** guidelines, being the "discipline" set out by Thorpe LJ. Having done so, he then turned to an investigation and evaluation of the child's best interests, having regard to the "welfare checklist", before reaching his conclusion. On appeal to the Court of Appeal, the Father claimed that the trial Judge erred in his application of **Payne** and **K v K** and in his evaluation of the facts.

- [65] The Court of Appeal dismissed the appeal and found that the four stage process set out in the "*discipline*" was highly relevant where the applicant was a primary carer, but that it was not relevant *only* to such cases. The Court held that the issues raised could arise in many relocation cases where the application was being made by someone other than a primary carer. Therefore, the guidance in **Payne** could be utilized in other kinds of relocation cases if the judge considered it helpful and appropriate to do so.
- [66] The Court further held that although it was not a case where the primary carer was making the application, the Judge was entitled to have regard to the "discipline" as set out in **Payne**. He correctly appreciated that the case had to be decided by reference to the child's best interests and he carefully took into account the child's current circumstances in the UK, the quality of the father's care and his own plans, wishes and feelings. There was nothing to suggest that there was any presumption in favour of the mother's claim. The Judge also took into account and gave appropriate weight to each of the factors to which the father had drawn attention. He acknowledged that he was the primary carer and recognised the importance which he attached to the argument based upon the status quo. He gave appropriate weight to both those points, whilst correctly appreciating that neither could be decisive.
- [67] In light of these authorities, it seems to the Court that a decision of this nature is one in which a balancing exercise is involved. That balancing exercise must have regard to the child's right to have issues of custody and upbringing taken in the interest of his welfare.
- [68] The Court is satisfied that this is not a case where any presumption arises in favour of one parent or the other. Although it is entirely plausible that immediately prior to the applications for ancillary relief, the Mother has been the primary carer for the past three years since the separation. The Court is satisfied on the

⁹[2012]EWCA Civ. 1364

evidence of the Father that prior to the demise of the marriage; he played an equivalent role in Luca's care, particularly when the Parties lived in Barbados.

[69] The Court must therefore consider the evidence having regard to the current state of the judicial authorities which has been summarized to the point of clarity in the 2013 English case of **Re TC and JC (Children: Relocation)**¹⁰ in which Mostyn J observed;

"The foundation of the jurisprudence in this field is the well-known case of Poel v Poel [1970] 1 WLR 1469. Although there were many other subsequent decisions of the Court of Appeal the next major milestone was the case of Payne v Payne [2001] EWCA Civ. 166, [2001] Fam. 473, [2001] 1 FLR 1052, where Thorpe LJ set out his memorable "discipline" in para 40. That decision was controversial, at least in some quarters, for arguably perpetuating a covert presumption in favour of relocation, at least where the application was made by the child's primary carer. It was reconsidered in 2011 in the case of K v K (Children: Permanent Removal from Jurisdiction) [2011] EWCA Civ. 793, [2012] Fam. 134, and the entire jurisprudence was recently summarised, and the modern principles enunciated, in a characteristically lucid judgment of Munby LJ (as he then was) in Re F (A Child) [2012] EWCA Civ. 1364.

I have considered these four cases most carefully and, doing the best I can, I set out shortly what seem to me to be the presently governing principles derived from them for a relocation application:

- (1) The only authentic principle to be applied when determining an application to relocate a child permanently overseas is that the welfare of the child is paramount and overbears all other considerations, however powerful and reasonable they might be.*
- (2) The guidance given by the Court of Appeal as to the factors to be weighed in search of the welfare paramountcy, and which directs the exercise of the welfare discretion, is valuable. Such guidance helps the judge to identify which factors are likely to be the most important and the weight which should generally be attached to them, and, incidentally, promotes consistency in decision-making.*
- (3) The guidance is not confined to classic primary carer applications and may be utilized in other kinds of relocation cases if the judge thinks it helpful and appropriate to do so.*

¹⁰[2013] EWHC 292 (Fam.)

- (4) *The guidance suggests that the following questions be asked and answered (assuming that the applicant is the mother):*
- a) *Is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life?*
 - b) *Is the mother's application realistically founded on practical proposals both well researched and investigated?*
 - c) *What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal?*
 - d) *Is the father's opposition motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive?*
 - e) *What would be the extent of the detriment to him and his future relationship with the child, were the application to be granted?*
 - f) *To what extent would that detriment be offset by extension of the child's relationships with the maternal family and homeland?*
- (5) *Since the circumstances in which such decisions have to be made vary infinitely and the judge in each case has to be free to decide whatever is in the best interests of the child, such guidance should not be applied rigidly as if it contains principles from which no departure is permitted.*
- (6) *There is no legal principle, let alone some legal or evidential presumption, in favour of an application to relocate by a primary carer. The old statements which seem to favour applications to relocate made by primary carers are no more than a reflection of the reality of the human condition and the parent-child relationship.*
- (7) *The hearing must not get mired in taxonomical arguments or preliminary skirmishes as to what label should be applied to the case by virtue of either the time spent with each of the parents or other aspects of the care arrangements."*

[70] In applying these principles however, the Court must consider the nature of application before it and in this case the fact that the relocation is intended for a temporary period of 4 years. Counsel for the Mother referred the Court to the case of *W v A*¹¹ and submitted that the Payne guidelines should not be strictly or automatically applied in cases where temporary as opposed to permanent removal

¹¹ [2004] EWCA Civ. 1587

from the jurisdiction is sought. The Court in that case emphasized that a Court must properly recognize the finite term of a temporary relocation in which the relationship with the father could eventually be resumed in the fullest sense.

[71] In that case, the mother sought permission to take the child with her for 2 years to South Africa where she intended to pursue further studies. On appeal from the refusal of her application the Court of Appeal held that;

"The considerations relevant to an application for permission to relocate permanently are simply not automatically or perhaps at all applicable to applications for temporary removal. The consequence of the misdirection is that the judge's assessment of the detriment to A in the diminution of contact to her father and all that is familiar was an assessment as though the diminution and loss would be permanent and not temporary. Similarly, the criticism of the mother for prioritizing her career before the interests of A, again proceed as though her plan was for permanent removal."

[72] In reversing the lower court's decision, Thorpe LJ opined;

"... in my judgment the judge's task was to balance the very significant impact of refusal on the mother's blossoming career against the effect of moving A to South Africa for two of her early years. There needed to be a clear concentration on practical ways and means of mitigating deficit to A by investigating all the direct contact possibilities both in the United Kingdom and in South Africa, and all indirect contact options, given that A is almost four and therefore capable of benefiting from communication by telephone, email, text messages, DVD and digital photography."

[73] This Court respectfully adopts this summary and will now consider the evidence in the case at bar having regard to the identified criteria.

The Welfare of the Child

[74] Ultimately the child's welfare is paramount and the Court is concerned to promote what is best for him in the long term. In coming to this assessment, the Court has considered all of the material facts gleaned from the affidavits filed by and on behalf of all of the parties¹². The Court has also considered the Report from the Social Worker, Ms. Freeman.

[75] Given his young age, the Court has not received any evidence relative to the child's wishes. There can be no doubt however that relocation will involve a

¹²Including the evidence and reports of the Parties experts

disruption to his schooling and extracurricular activities, loss of established friendships and ties and adjustments to his daily routine. However, the Court cannot place as much weight on the impact of a change in his circumstances. The Court concurs with the dicta in **Hodge v Hodge**¹³ and **Thain and Taylor**. It may well be that if relocation to Barbados were handled sensitively, affording ample time for the Parties to collaboratively prepare him for the changes to his environment, relationships and routine, then any potential adverse impact would at least be minimized.

- [76] Notwithstanding this, the Court recognizes that there is a potential for emotional harm to the child which is likely to go further than a mere temporal disturbance. The child was born into a stable and committed relationship and from the time of his birth, he has been nurtured and protected by both his father and mother. He has a right to have both parents fully involved in his life and he now faces the loss of direct and daily contact with either parent depending on the Court's decision. The Court has no doubt that a strong meaningful relationship with both parents is critical to the welfare of any young child and it is clear that Luca has that and that he wishes to have his life return to the status quo prior to his parents separation, with both Parties living together even if that means that Mr. Small should join them.
- [77] As impractical as this may be, it is clear to the Court that despite his resilient nature, Luca has struggled emotionally with the separation. This was clearly recognized by his Parents who proactively sought counselling for him. He has been in the care of a psychologist because of deteriorating behavior including hitting his Mother and fighting and biting at school. The Court's expert has indicated that this behaviour has continued and is of concern to school officials.
- [78] Both Ms. Freeman and Dr. McAnaney have recommended that he continue in counselling. No doubt this is intended to address his behavior and also to develop coping skills and express his feelings and reactions to his parents' divorce – and his concerns about having to choose one parent over the other.
- [79] In the wake of his Parent's recent separation, Luca has had to contemplate his Mother's imminent remarriage and the birth of his sibling. This is in the context where he now faces a further quantum change i.e. the relocation to Barbados. The Court is obliged to consider the impact of this move on his welfare and the nature of the existing co-parenting relationship between the Parties.

¹³BVIHC 2002/ 033 unreported Judgment of d'Auvergne J, November 2003

- [80] It is clear that under the current arrangements, Luca's physical, emotional and educational needs are being suitably met. He is settled and has the support of not only of his parents but of his extended family and he is currently receiving psychological care from a practitioner with whom he has clearly built a relationship of trust.
- [81] In considering the temporary relocation, the Court has considered both the Mother and Mr. Small's evidence that Luca will have the support of Mr. Small's family which should contribute to his sense of well-being and stability. The Court must however contrast this with the present situation, in which the child would not only continue to have access to his maternal family¹⁴ but also readily available and almost daily contact with his Father in the BVI and the necessary counselling. The Court must therefore concentrate on the practical methods proposed for mitigating these deficits to the Child.

Is The Mother's Application Genuine in the Sense That It Is Not Motivated by Some Selfish Desire to Exclude the Father from the Child's Life?

- [82] The Mother is currently employed with the Virgin Islands Health Services as a medical practitioner and currently holds the post of medical officer I. She has stated that her sole purpose for the temporary relocation is her wish to undertake specialist training in Family Medicine at the University of the West Indies Cave Hill. The programme is to continue for a period of 4 years. At paragraph 30 of her Affidavit filed on 26th February 2013 she expresses her belief that specializing would give her greater leverage in her profession to choose her area of practice, her hours of work and to negotiate an increase in salary so that she could better provide for the Child.
- [83] It became clear during the proceedings that the Mother is currently engaged to be married to Mr. Small, a Barbadian national who is along with his family based in Barbados. The Mother however was very quick to point out that this did not motivate her Application. She pointed out that even while married to the Father she had always expressed an intention to further her training and that they had in fact discussed the possibility of her securing that training in the United Kingdom.
- [84] The Father does not dispute that the Mother's Application is genuine in the sense that it is not primarily motivated by a selfish desire to exclude him from the child's life. His concern rather is that that her Application is motivated by her own personal and selfish reasons. Ms. Freeman's Report recounts the Father's

¹⁴ Paragraph 20 of the Mother's Affidavit filed on 26th February 2013

concern that the Mother is putting her interests above that of the child and that her true motivation is her relationship with her new partner.

[85] On the evidence of both Parties, the Court is satisfied that the Mother has always intended to pursue further studies overseas and this had previously been discussed and agreed. She has advanced that the relocation is intended to be temporary and that she is bonded to the BVI Government. The Court has no reason to doubt that she will in fact return the Child to the BVI.

[86] Additionally, there is in fact no evidence before the Court that the Father has been prevented from accessing the Child or from discharging his parental role. It is apparent that the Parties have without the assistance of the Court arrived at an agreed arrangement facilitating access by the Father (although the Parties were unable to agree to any variation of that agreement) and the Mother's evidence is that she would do everything possible to encourage a positive and strong paternal relationship. She has in fact submitted a plan setting out her proposals for facilitating the Father's access to the child during the period of temporary relocation.

[87] The Court therefore finds that the Mother's proposal is not motivated by a desire to cut off contact between the child and his Father.

Is The Mother's Application Realistically Founded On Practical Proposals Both Well Researched And Investigated?

[88] The Mother contends that the Father's plan is poorly researched, particularised and investigated in several vital aspects. Most telling was the fact that even at the date of trial, the Mother could not confirm the fact that she had been accepted and was enrolled in the programme of study which is the sole basis upon which her Application has been advanced. Her indication is that her application is under review and that she is short listed. She therefore has no confirmation of her admission to the programme as at the trial date.

[89] Counsel for the Mother concedes that the Application lacks relevant detail but she submitted that at this juncture, the Mother has set out in as much data as she can provide regarding her plans. She posited that because of the uncertainty as to the outcome of this proceeding and the delay in the hearing of the application, the Mother has had to withdraw the previous enrollment applications for both herself and the Child and has had to re-apply to these institutions. Confirmation as to their respective acceptance will not be received until approximately, May/June 2014.

- [90] In respect of the Child's schooling in Barbados, she states at paragraph 32 of her First Affidavit that she has researched school options and has made application to Wills Primary and St. Angela's Primary. She stated that she has spoken with the school administrators about enrolling the Child and is awaiting confirmation that he has been accepted. Her evidence is that both schools have excellent teaching programmes within a wide range of extracurricular activities and with added advantage of being near her work place.
- [91] Counsel for the Mother submitted that the absence of any formal written confirmation as it relates to the Mother's schooling is not fatal for the following reasons (i) no acceptance letter could be produced to the court because the applications are still under review, the Mother having re-submitted her application this past Christmas; (ii) it is not disputed that it has always been the Mother's intention to further her medical studies and it has not been disputed that an application has been made; and (iii) the Order for relocation can be made conditional on the Mother producing confirmation of her acceptance into the programme. She submitted that the same would apply to Luca's schooling.
- [92] During her oral testimony, it became apparent that the Mother's intended training would involve practical working experience at a clinic in Barbados. This did not feature in any of her written evidence before the Court. There is no evidence of what her earnings are likely to be during this period and it was only in her viva voce evidence that she contemplated her working hours.
- [93] It was apparent that she had not previously considered Luca's care arrangements when she was unavailable. She indicated however that her hours of work will be from 8 am to 4:30 pm which coincides with the time when Luca will be in school or after-school activities. She stated that she would be able to pick him up from school in the afternoons and be home to take care of him. On occasions, when she would need assistance to care for Luca, she stated that she has the support of Mr. Small, his parents and friends.
- [94] The Court was also faced with the sketchy plans advanced in regard to the intended accommodation for the family or Luca. It appears that that there are no confirmed or definitive arrangements in place. The Mother's evidence is that she has identified Rockley as the area in Barbados where she intends to reside. She stated that the area is ideally close to both her intended work place and the Child's intended school and has many amenities conducive for the upbringing of children including open areas and sporting and outdoor activities. She indicated that she

has been in contact with a real estate agent about the possible availability in a residential complex located in that area. No further details were provided.

- [95] Counsel for the Father argued that the Mother's plan fails to adequately address every aspect of the child's present and continuing needs. Regrettably, the Court cannot disagree with this assessment. While some degree of detail is provided, there are critical aspects of the Mother's proposal which lack definition. She has generally failed to drill down to the detail and given the nature of her Application, this is surprising. There can be no doubt that the aspiration of relocation must condescend to particulars and to the proposed logistics, providing sufficient detail to enable the Court to conduct a thorough and confident assessment of each case. A very full statement needs to be produced for the purposes of any application to relocate. In addition to providing an explanation for the proposed move, it must exhibit all information pertinent to the move, including: (i) accommodation; (ii) schooling; (iii) detailed proposals for contact; (iv) costs of travel to and from contact; (v) immigration issues; (vi) enforcement of contact including mirror orders; (vii) childcare; (viii) employment; (ix) language issues; (x) health care (including counselling care); (xi) details of any new partner or family members and (xii) emotional effect of any refusal of permission.
- [96] In the case at bar, the Mother's proposal for relocation presented largely preliminary and tentative data on material matters which the Court must consider in assessing the welfare of the Child. What concerns the Court is that there is no plan setting out the steps to be taken in order to lessen the adverse impact of his separation, notwithstanding that it is intended to be temporary.
- [97] In regards to maintaining direct contact between himself and the Child, the Father has noted that the Mother's proposal does not address the practical difficulties of travel times, leave entitlements or school holidays, travel and accommodation expenses (should it be necessary for the Father to travel to Barbados). She has intimated that the Child would be able to travel at no cost to either Parent because of her Mr Small's employment with the regional airline, Liat. However, the definitive details of that arrangement are not known to the Court and it became apparent that the costs of his recent travel to Barbados had to be borne by the Mother.
- [98] Moreover, the Court was particularly concerned about the frank admission of the Mother's expert that he was unaware of the details of the arrangements proposed by the Mother's care plan for the Child's accommodation, schooling, after school care or the demands of the Mother's training and employment in Barbados. He indicated to the Court that he had not been provided with these details.

[99] In respect to the Mother's proposal for direct and indirect contact with the Child, he described the proposal as "viable" and neither he nor the Mother appear to have considered the obvious limitations (stemming from the Child's young age and attention span) of maintaining a parental relationship through Skype have not been addressed in her care plan. This is particular glaring in light of Dr. Rubaine's expert evidence and in light of the Mother's own frank admission that it would be wholly unsatisfactory for the same arrangements to regulate her contact and access with Luca.

[100] What was particularly telling was Dr. McAnaney's frank admission that it would be almost impossible for these two Parties to effectively co-parent while living in two different countries. Given the consensus of all the experts, it is also surprising that no details were provided as to proposals for counseling not only for the Child, but also for his Parents in the event that the Mother's Application is granted

What Would Be The Impact On The Mother Of A Refusal Of Her Realistic Proposal?

[101] The Mother's Affidavit evidence addresses the issue of the likely impact on her in the event that the Court was to refuse her Application. Her concern regarding the need to relocate stems largely from her desire to improve her professional marketability and earning capacity and ultimately her ability to adequately provide for Luca.¹⁵ Counsel for the Mother submitted that if relocation is refused she would be devastated as it would detrimentally impact her financial capacity to provide for the needs of her family. The potential impact is stated no higher than that.

[102] No evidence was submitted which would lead the Court to conclude that the refusal of the Application would impact on the Mother's emotional stability or health or adversely affect her long term future or her ability to continue to parent the Child in a stress free home environment. What was emphasized to the Court was the potential impact upon Luca's emotional health in the event that the Application was refused and the Mother still elects to relocate. Counsel for the Mother posited that Luca would be adversely affected by the displacement from his mother (who has been his primary caregiver) as well as his baby sister. The Mother gave evidence that Luca has already started to display such tendencies as over this past Christmas break he started acting out days before he was to leave the Mother and the baby in Barbados and when she called him in the BVI several times he was crying and saying that she no longer needed him now that she had the baby and that is why she "sent him away". It is submitted that the Court ought

¹⁵ Paragraph 13 of the Mother's Second Affidavit

to have regard to the likely detrimental impact on Luca if the relocation order is refused and he is separated from his mother and newborn sibling.

- [103] She noted that all three experts acknowledged that where a child was separated from his mother and a sibling, particularly a newborn sibling, the child is likely to develop feelings of alienation, jealousy and insecurity which were likely to manifest in negative behavioural patterns.
- [104] This submission however ignores the frank oral testimony of the Mother in which she made it quite clear that in the event that her Application is refused she would defer her plans and would not leave Luca in the BVI. It is therefore apparent that she will continue with her current employment and living arrangements.

Is the Father's Opposition Motivated by Genuine Concern for the Future of the Child's Welfare or is it Driven by Some Ulterior Motive

- [105] The Mother contends that the Father's concern is disingenuous and that he is motivated in large part by his animosity towards her. Counsel for the Mother expressed the Mother's concern that the Father will not permit her to freely contact the Child while he is in his custody as there have been occasions when he has denied her the opportunity to contact the child. She asked the Court to note the Father's admission that he refuses to answer his phone but rather insists that she contacts him by email only. She also stressed what she submitted was the Father's purported disregard of the impact which separation from his new sibling would have on Luca. In her words, the Father's response that "no, he won't be affected by not being around them" speaks volumes about his regard for Luca's best interests. She submitted that this staunch approach is potentially dangerous and demonstrates clearly that he does not have the Child's welfare at heart.
- [106] Counsel for the Father stridently denied that the Father has any ulterior motive rather than a genuine love and concern for his child. She argued that for a significant part of the Child's life, he had been primarily cared for by the Father. During the trial, he indicated that he would be devastated if relocation was permitted and he was forced to lose daily contact with him.
- [107] He expressed his concern that this Application is a prelude to a more permanent move to Barbados and that the Mother intended to replace him in Luca's life. He stated that it is important for Luca to be with his father. He stated that relocation would be hard for the Child because they are very close. He stated that "Luca is my life" and pleaded with the Court to refuse the Mother's application.

- [108] Luca has in his short lifetime had to adjust to several different moves and had lived in several different countries. The Father indicated that it is not in his best interest to relocate now and then to have to move again in 4 years. He indicated that the Child is well established here with all his friends and family. He argued that the Mother's proposals for maintaining contact were unrealistic and would make it hard for him to maintain his relationship with Luca. He indicated that the cost of airline tickets and hotel accommodation would be expensive and given his entitlements he was unsure of exactly how many times a year he would actually see Luca. He reiterated that Skype is not a satisfactory means of parenting.
- [109] The Father agreed that communication between the Mother and him was not satisfactory or practical and he indicated that he was prepared to participate wholeheartedly in any counselling geared at improving the co-parenting relationship.
- [110] When questioned as to his care plan should the Court refuse the Application, the Father testified that Luca would remain on the same school schedule. He works from 8 a.m. (9 a.m.) to 5 p.m. (5.30 p.m.) and does not work on weekends. As a result, he is free to spend every night with Luca. He stated that he would look to Luca's maternal family (grandmother and three aunts) for assistance and if necessary will hire a nanny.
- [111] In the event that the Mother's Application is refused and she chooses to relocate with Luca, his proposals to ensure that the Mother maintains contact, visitation and access to the Child are not original. Both he and his expert, Dr. Rubaine in addressing this issue suggested that the same contact arrangements suggested by the Mother in the event that relocation was approved would also be satisfactory if the Application were refused.

What would be the extent of the detriment to him and his future relationship with the Child if the Application was granted?

- [112] This issue is predicated on the classic relocation dilemma where the decision will, if granted, impose a significant geographical separation between the child and the left-behind parent. The Mother does not deny that Luca and his father have a close relationship and his father plays an instrumental role in his life. However, she submitted that while the reduction in the physical contact between the Father and the child will impact the Child, it will not so adversely impact him to the extent that it can be said to be detrimental or harmful to the Child's welfare given the fact that the relocation is temporary and the Father will be able to effectively maintain daily

contact with Luca through Skype and telephone and visitation for several weeks at a time during the school holidays. The Mother proposes the following visitation schedule or on such terms as the court deems fit:

- (a) Easter holiday with the Father;
- (b) First six weeks of the Christmas holiday with the Father and the last week with the Mother;
- (c) Alternate Christmas and New Year with each party;
- (d) Mid-term school breaks with the Father;
- (e) Liberal access to the Father.

[113] Counsel for the Mother also submitted that Skype and telephone calls are viable and effective means to maintain contact with the Child particularly in light of the fact that Luca has been accustomed to utilizing this form of communication with his father in the past. She referred the Court to the case of **Wilson v Auld** where the Court accepted that communication by telephone, email, text messages, DVD and digital photography were viable means of mitigating the deficit to the child arising from the reduction of physical contact with the remaining parent for the relocation period and that the court erred in not giving enough importance to this fact. In that case the child was 4 years old.

[114] Counsel further submitted that in the instant case, there have been periods throughout Luca's life where the Father was away from him for periods of time ranging from 2 weeks to 5 months. During those periods, he effectively communicated with Luca without any damage to their relationship or Luca's psychological well-being. If permission to relocate is granted, Luca will be away from his father a couple of months at a time until school breaks, when he can then travel to see his father. He will visit for several weeks at a time during the longer vacations or for mid-term breaks. During the time in Barbados, he will be available to speak to his father daily by Skype or telephone. The Mother and her partner, Mr. Small have also deposed that he will be able to facilitate free travel for Luca between Barbados and the BVI so that he can visit his Father.

[115] She urged the Court that emphasis should therefore be placed on the fact that the separation from the Father is for a finite period during which daily contact and visitation at regular intervals would be maintained before the relationship with the Father is resumed in its fullest sense.

[116] Both Dr. McAnaney and Ms. Freeman have concluded that relocation for the period will not be detrimental to Luca's welfare in view of the Mother's proposals for his care in Barbados and importantly, because Luca will be able to maintain

contact and visitation with his father. Both agreed that the temporary loss of physical contact can be mitigated by utilizing effective means of communication such as Skype and telephone. Coupled with the visitation arrangements proposed by the Mother, they concluded that it is a viable means of maintaining a healthy relationship with the Father. They therefore conclude that the temporary relocation is not incompatible with Luca's best welfare.

- [117] Conversely, the Father has articulated his concerns about the potential impact of relocation. He points to the cost involved in travel between the BVI and Barbados, his leave entitlements and the rigidity of the Child's school timetable as factors which will militate against proper direct contact.
- [118] Relocation, no matter how temporary would inevitably reduce the time the Father spends with the Child. It would undoubtedly limit the opportunity he has to be involved with the Child's day to day life; particularly his school and social life. This reduction would be a significant change from the current care and access arrangement.
- [119] It is clear to the Court that the Father is convinced that relocation would irrevocably alter the close bond which he now shares with the child and that he feels a profound sense of sadness at the prospect. In reality, he would probably see the Child a few times a year and he is understandably concerned that he would not be able to maintain his current relationship without spending substantial periods of time with the child on a regular basis. There is a concern that the quantity and the quality of his contact would inevitably change with Father becoming a "recreational or holiday parent". Given the Child's age, there are also real limitations to maintaining a healthy parent-child relationship via Skype. These concerns are reiterated by Dr. Rubaine who described Skype as a "sub-par substitute" for effective parenting which does not allow for natural physical displays of affection and comfort or for social and emotional support.
- [120] Unfortunately, this is also a case where the Parties are at loggerheads when it comes to any genuine communication. Although the Mother's intimation is that she would sincerely seek to facilitate contact, the Court is concerned that the Father's exhortations for increased access and visitation have not been resolved amicably and instead views of the 6 year old Child have been lobbied not only by his Parents but also the medical experts.
- [121] Within the context of the Parties admittedly acrimonious relationship, this does not augur well for the future and the Court is concerned that the distance, though

temporary, could not assist in consolidating or developing a functioning co-parenting relationship.

- [122] At paragraph 21 of her second affidavit, the Mother stated that Luca is emotionally attached to her as he has spent the majority of his time with her over the past 22 months so that she could not imagine leaving her child behind. She stated that it would be a devastating blow to Luca and detrimental to him to be displaced from her. While these contentions cannot be doubted, the father complains that there is palpable lack of appreciation of the potential impact of relocation on the relationship between himself and Luca. In fact, the simple position of the Mother is best reflected at paragraph 21 where she states;

“... although moving to Barbados will be a change for him, it will not result in a major or any catastrophic disruption for him as he will be in a loving and stable environment receiving my devoted support every step of the way.”

The Court has no doubt that Luca would always have his Mother's support, however, this statement depreciates the inevitable impact which deprivation of the established consistent contact with his Father would have on the father-child relationship.

To What Extent Would That Detriment Be Offset by Extension of the Child's Relationships with His New Sibling, The Mother's Fiancée and His Family?

- [123] Obviously, if the Child were to move to Barbados he would see less of his maternal extended family. There can be no doubt that there are emotional and social benefits consequent upon the access to extended family members and relatives. They clearly have a role to play in safeguarding a child's sense of well-being. This was not disputed by the Mother, who at paragraph 16 of her affidavit avers that she does not intend to cut Luca off from her family. Again, she reiterates that he will have the opportunity to Skype, call or visit with them during the holidays. There is however no evidence that temporary separation from his extended family would have a detrimental impact on the Child.

- [124] During the course of the trial, the Mother was forthright in advising the Court of her marital plans. She makes it clear that for the past 2 years, they have been building their lives together with Mr. Small traveling to the BVI every weekend. It is apparent that Mr. Small will have a significant role to play in Luca's rearing and in the event that relocation is permitted, he has expressed his willingness to facilitate travel of Luca to and from the BVI to visit his Father. It is also contemplated that

Mr. Small's "extensive family network" will play a significant supporting role.¹⁶ Notwithstanding, it has not been represented to the Court that this could compensate for the loss of regular direct contact with the individual who is best placed to provide the male role model in Luca's life – his Father.

- [125] During the trial, the fact that Luca now has a new baby sister also featured prominently. Dr Rubaine conceded that separation of a child from his mother and her new born could have adverse effects psychologically. A child such as Luca could feel abandoned and jealous and "act out" in various ways as an effort to try to seek attention from his mother. The Court has no doubt that this observation is accurate. It is clearly important that the sibling relationship be permitted to develop naturally but is especially important at this time that Luca grow up secure and confident in the love and support of both of his Parents. It is apparent to the Court that any separation from his immediate family would have potentially serious consequences for Luca.

The Experts' Advice

- [126] The Court notes that from all accounts the Child has adjusted to the shared custody arrangements which are currently in place. It is apparent that he has a positive and strong relationship with both parents and that his needs are being met under the current arrangements. The Report of Social Worker, Ms. Freeman indicates that "*During my interaction with Luca he appeared happy, content, curious and at ease in the company of both his parents. He displayed no apprehension or fear.*" Although she points out that mutual allegations had been levied by both parties, "*neither disputed the fact that they both share an immense love, affection and overall care and concern for Luca.*"
- [127] Ms. Freeman was able to articulate her understanding of the wishes of both Parties. She confirmed that it was her understanding that the Father wished to remain in the BVI with the Child. She also understood that the Mother wished to relocate with the Child to Barbados. Understandably, Ms. Freeman is of the view that the ideal situation would see the child having a strong meaningful relationship with both of his parents and although she declined to provide a definitive opinion as to the appropriate order to be made on the relocation application, she observed that Luca will benefit from a healthy relationship with both his parents and she recommended an order of joint custody between his parents, conditional upon an order of family counselling sessions in order to address conflict resolution and effective communication an co-parenting.

¹⁶ Affidavit of Terry Small filed on 23rd April 2013

- [128] Ms. Freeman concluded that it would not be detrimental to Luca as it would be possible for him to maintain a healthy relationship with his father if the mother's plans for contact by Skype and telephone and for visitation over the school breaks and other occasions are implemented. She noted that although Luca would miss his father as a result of the reduced physical contact, once the Father maintained communication, the impact would be of less effect.
- [129] Her view is that it would be more detrimental to Luca if he was displaced from his primary caregiver i.e. his mother. Further, she opined that Luca could adjust well to life in Barbados if he is in a positive environment where he has the love and support of his Mother and her partner, Mr. Small as well as his family. She indicated that she was aware of the support network that the Mother would have in Barbados and believed that he could do well.
- [130] She noted however that relocation (even temporary) would reduce access to his Father and as Luca is a six year old boy this would not be ideal. He is used to seeing his father regularly, they have a "great relationship" and he would miss him. When the Court queried whether there would be harm suffered by Luca as a result of this separation, she replied that there would be less harm if communication is maintained.
- [131] While the Parties' two experts concur on the question of custody, their recommendations as regards primary care and control, access and relocation vary extensively. In the case of the Mother's Expert, Dr. McAnaney, he recommends that if the Mother is to relocate to Barbados for additional medical studies, Luca should remain in his mother's primary care. He advanced that a viable visitation and contact arrangement had been proposed to maintain the relationship between Luca and his father. In his professional opinion, the temporary relocation would not be detrimental to Luca's emotional and social well-being.
- [132] Dr. McAnaney's recommendations were generally consistent with Ms. Freeman's report but it diverted starkly from that of the Father's expert, Dr. Rubaine. She has had Luca in her care for the past year and she sees him regularly. She does not accept that the Father plays any lesser role in Luca's life and has advocated for equal physical custody, care and control of Luca. She has stressed the important role that Fathers play in the life of a child and she advised the Court of the potential adverse impact which relocation would have on Luca and his relationship with his Father. She recommended that the least potential harm for Luca would be for him to remain in the BVI with his Father in the event of relocation. Although she acknowledged that a potentially equivalent adverse impact (caused by separation

from his Mother) she opined that a cost benefit analysis would lead to the conclusion that this solution posed the least potential for harm.

[133] Generally, the Court was not satisfied that any of the experts had adequately considered the details or the deficiencies in the care plans proposed by either Party in respect of Luca. In the premises, the Court was largely unassisted in this regard. Notwithstanding their joint recommendation as regards the issue of custody, the Court was quite perplexed by their vacillating positions during their oral testimony. What is also apparent from the Parties' expert reports is that the Parties and their experts at some point became bogged down in personal differences which were largely irrelevant to the matters which would concern the Court.

Conclusion

[134] The Court is fully cognizant that any decision taken could not be regarded as ideal. Rather, the Court must decide the best that can be done in the circumstances. In the words of Cumming – Bruce LJ in **Clarke –Hunt v Newcombe**¹⁷

“There was not really a right solution; there are two alternative wrong solutions. The problem for the judge was to appreciate the factors in each direction and to decide which of the two bad solutions was the least dangerous, having regard to the long term interests of the children.”

[135] The Court has no doubt that both parents have played an active role in the child's upbringing although the Court accepts that immediately prior to the Application; the Mother would have assumed a more primary role as carer. Having heard all of the evidence in this case and the consensus of the experts, there is no doubt that both Parents would be entitled to an order for joint custody of the Child. It is apparent that they have both taken measures to ensure a loving safe and conducive home environment for Luca. Both Parents play an active role in his life and there are no serious allegations of neglect and no allegations of abuse made in respect of either Party. This is a credit to both parents.

[136] However, such an order presupposes that the Parties are able to share decision making in a non-combative atmosphere. For the sake of the Child, the goal of these Parties should be to engender an amicable relationship with each other, to communicate well and to understand the importance of flexibility in co-parenting. It

¹⁷(1982) 4 FLR 482, CA

is clear to the Court that absent these key elements an order of joint custody could only result in perennial visits to the court.

[137] In this regard, the Court has considered the Parties' evidence that they are both wholeheartedly prepared to undertake relevant counselling to improve their communication and co-parenting skills. The Court has also noted notwithstanding the vacillating positions adopted during the trial that the general consensus of the experts in this matter is that an order for joint custody should be made.

[138] The Court is also of the view that there is no good reason in the instant case to disrupt the current status quo by removing the child from the primary care and control of the Mother. There can be no doubt that any major changes in the current custody, access and residency arrangements would require significant adjustment and coping skills. By all accounts, the Child is thriving in this current situation and there has been no allegation that the Mother is unfit or incapable of taking care of the child. On the contrary, the considered view is that it would be to Luca's detriment if he is removed from his current primary caregiver since this is what he has known for the past 2 to 3 years.

[139] The Court does not accept the shared custody on the equal basis as proposed by the Father would be in the best interest of the Child. While the Court does not doubt the strength of the relationship between Luca and his father, the Court is concerned that such an arrangement given his young age would have implications for his stability and would likely become stressful for the Child and is ultimately not sustainable.

[140] The Court has sought to place in the balance all of the relevant factors. These include the status quo, the strength of the relationship with both Parties and their ability to continue contact with the child, the likelihood of harm to the child and the impact on both parents. In the end, however, the Court concluded that the Child's best interests would be served by preserving the status quo as it relates to care and control. The Mother will therefore have the right to make every day decisions affecting the Child while all major decisions are to be made by the Parents jointly.

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[141] As it relates to the Mother's application to remove the Child temporarily from the jurisdiction. In deciding which "bad solution" best served the needs of the Child, the Court considered the effect on the Child of an inevitable reduction of contact with his Father and also the effect of his removal from his current environment

¹⁸Jussa v Jussa [1972] 2 All. E.R. 600;

where he appears to be slowly coming to terms with the changes in his life and where he appears to be content. In the Court's view, altering his living environment at this stage in his development would likely be a disadvantage. The child's needs a father figure and a male role model in his life, which role can best be filled by his own available parent. Relocation, notwithstanding it is intended to be temporary, the consequence of making an order granting leave to remove the child would be to diminish the quality and the quantity of contact which he now has with one parent – the Father and would limit the Father's capacity to shoulder his fair share of the burden of parental responsibility.

- [142] The Mother's proposal for maintaining indirect contact at this stage of the child's life is no more than a substitute for the existing position. Even with the best of intentions, and with the communication technology now available, at his tender age, there is a substantial risk that the Father would indeed become a "holiday parent", where he now has both parents actively and daily involved in his life. Remaining in the BVI is in the Court's opinion most likely to secure the Child's best interests, which include his right and need to be effectively fathered as well as mothered.
- [143] The Court is satisfied that the Mother is not motivated by any desire to diminish the relationship between the Child and his Father. However, given the current acrimonious relationship, the Court has some concerns that the Parties could, with the additional challenges that distance presents, continue to improve their critical co-parenting relationship and even less the Child's relationship with the Father.
- [144] Turning to the Mother's situation, the Court recognizes that there are reasonable arguments which favour temporary relocation to Barbados. She would clearly wish to improve her qualifications; experience and earning potential and these are all laudable aspirations. It is obvious that the Court cannot compel the Mother to physically remain in the BVI. She of course has a right to choose to improve herself and to lay a foundation for the financial prosperity of her family, and she may well feel compelled to remain in the BVI notwithstanding those ambitions. In that regard, a refusal of her Application would be a grave disappointment to her. However, the Court is not convinced that it would go any higher than that. Unlike the case of **Wilson v Auld** this is not a case of an offer that cannot be refused. There was no evidence that her employment was contingent on this course of study, neither was it advanced that it would render her future prospects nugatory.
- [145] There was no evidence adduced by the Mother on the question of the effect that refusal of the Application is likely to have on her emotional stability and capacity to parent effectively. Having observed her oral testimony in this Court, I am satisfied

that she is an entirely sensible and caring mother who is concerned about her Child and who will endeavor to place his interests above her own. Ultimately, the Court is satisfied that this is a case where Mother's interests can and should yield to the best interests of the Child.

[146] The Court has considered that part of the Mother's expressed motivation for relocation is the need to better provide for Luca. However, the quality of a child's home cannot be measured solely in material terms. Much more important, in the Court's view are the stability and security; the loving and understanding care and guidance, the warm and compassionate relationship, that are essential for the full development of the child's own character, personality and talents.¹⁹ The amount of time and energy that a parent can devote to his care and upbringing is of considerable importance and where possible the Court will always encourage the full participation of both parents. Like the Court in **Re A [2005] Fam Law 215** the court must balance the mother's desire to move abroad for relocate for her professional development against the child's welfare including his need for contact with the Father. Having weighed the relevant factors, the Court is of the view that relocation should not take place now.

[147] The Child currently has a well-established family, social and educational life. The Court has considered that this relocation is intended to be temporary and that the Child would ultimately return to that life in the BVI. However, the Court was not presented with sufficiently determined information about the arrangements in Barbados. No commitment was presented in respect of Mother's training and the Court was provided with cursory information as to how she would support herself and Luca during her period of study. The Court must consider the future contingencies of the Mother's intended relocation to Barbados and as indicated, the Court is satisfied that the precise details necessary in order to properly assess an application for removal from the jurisdiction has not been sufficiently articulated here. The present application is entirely inadequate and provided limited information upon which the Court could confidently assess the intended care plan.

[148] Ultimately, the fulcrum of the balance will always be the welfare of child. There may well be strong reasons informing the Application, but the rights and the welfare of the child must and will determine the outcome. Presently, Luca enjoys a close relationship with both parents, not one. His physical, emotional and educational needs have been, and are well provided for and notwithstanding the demise of his parent's marriage, he is essentially stable.

¹⁹ Walker v Walker and Harrison per Hardy Boys J

- [149] The Court has also considered that Luca is currently engaged in individual counselling with a practitioner with whom he has built a degree of trust. The Report of the Social Worker has recommended that he continue to receive such counselling in order to address some aggressive behavior observed at school. This is an urgent matter which should concern both Parents. The Court has also noted the joint recommendation of all of the experts that that Parties undergo family counselling to address conflict resolution, communication and co-parenting. This is clearly crucial for the future family dynamic and ultimately for Luca's welfare and well-being and must be the priority for his Parents.
- [150] In the Court's view the totality of these factors outweigh any of the perceived advantages of relocation to Barbados.
- [151] The Court cannot close this matter without observing that decisions of this type are never final. They are always subject to changes in circumstances especially where they impact young children. The change of circumstances may be due to the current position of the parent or parents or of the growing child and the changes caused by the passage of time. In a case such as this, the Court will always have a continuing supervisory role, but for now the application and analysis of the welfare checklist demonstrates to the Court that the child's interest would be best served by an order granting joint custody with primary care and control to the Mother and access to the Father and by an order refusing the Mother's Application for leave to remove the child from the jurisdiction.
- [152] **The Court will therefore make the following Orders:**

Custody, Care and Control

- (1) The Parties are granted joint custody. This Order is contingent upon the Parties participation in the counseling which will be prescribed below.
- (2) The Mother will have primary care and control of the child.
- (3) The Father will have the following access and visitation: In addition to current arrangements, the Child will spend half of the summer and Easter holidays with the Father.
- (4) Neither Party shall change their residential address or telephone contact information without 48 hours' notice to the other party.
- (5) Each Party must obtain the written consent and approval of the other before travelling overseas with the child.

Permission for temporary removal from the Jurisdiction

The Mother's Application to remove the child from the jurisdiction is refused.

Maintenance of the Child

The Father will pay to the Mother such monthly sum as to be agreed between the parties as maintenance until the Child reaches the age of 18 years or completes tertiary education. In default of such agreement, the Father shall file an affidavit of means together with full supporting documents on or before 25th April, 2014. The matter is to be set down for hearing and determination before a judge in Chambers. The Father will also pay one-half the educational and uninsured medical expenses incurred in respect of the Child.

Counselling

The Parties will undergo a course of counselling facilitated by the Social Services Department. A completed plan is to be submitted to the Court and will include no less than 10 sessions. A thorough report is to be filed and served on the Parties once the plan is completed.

Costs

Given the nature of the Applications, the Orders made and on the authority of **D v D**²⁰ the Court will exercise its discretion to make no order as to costs.

Sgd.

Vicki Ann Ellis
High Court Judge

²⁰ [2000] EWCA Civ 3009

