EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHMT 2017/0034

BETWEEN:

MYKL CLOVIS FULLER

Petitioner

and

ELI JAMES MARTIN FULLER

Defendant

Appearances:
Mrs. C. Debra Burnette for the Petitioner
Mr. Kendrickson Kentish for the Defendant

2018: March 12th
October 8th
2019: 4th March 4th
October 24th

JUDGMENT

[1] **WILKINSON, J.:** The Petitioner, Mykl Clovis Fuller ("MF") on 21st March 2017, filed her petition for divorce on the ground of separation, the Parties having lived separate and apart since on or about February 2015. By her petition, MF sought the following relief: -(i) that there be joint custody of Skye Fuller (the Minor Child), (ii) that care and control of the Minor Child be to MF because she was the primary caregiver and could provide the Minor Child with a stable home that would best meet the Minor Child's needs.

[2] At paragraph 26 of the petition on the question of material changes in the circumstances of the spouse which were expected to affect the Minor Child, custody and visiting arrangements in the future, MF stated that she wished to migrate outside of Antigua and would wish to continue to have physical custody of the Minor Child with access to the Respondent, Eli Fuller ("EF").

[3] At paragraph 27 of the petition, MF stated that the existing arrangements between herself and EF for support of the Minor Child were $4000.00 per month together with school fees and other

incidentals as needed. MF further proposed that support arrangements for the Minor Child should be at $9000.00 per month.

[4] At paragraph 28 of the petition, she stated that the education needs of the Minor Child were being met.

[5] Approximately 2 months later, on 15th May 2017, MF filed an application seeking the following orders: (i) joint custody of the Minor Child (ii) care and control of the Minor Child to MF with access to EF, (iii) that EF make monthly periodic payments to MF for maintenance and education of the Minor Child, and (iv) a lump sum payment to MF for spousal support or such other periodic payment as the Court considers just. The application was supported by the first affidavit of MF. On 15th May 2017, MF filed a notice of the afore-mentioned application addressed to EF. The petition was served on 20th May 2017. On 6th June 2017, EF filed a notice of intention to defend the petition.

[6] On 12th June 2017, EF filed a notice addressed to MF stating that he intended to apply to the Court for the following orders: (i) that EF be granted care and control of the Minor Child with liberal access to MF; (ii) alternatively, that EF be granted 4 overnight visits each week at his home with the Minor Child until further order, (iii) that time for service of the application be abridged, and (iv) that costs of the application be awarded to EF. An affidavit in support was filed on even date.

[7] The matter came on for hearing on 15th June 2017, and at which time the matter of EF's notice filed on 12th June 2017, was raised and the Court made the following order:

> "1. In the interim until the final custody and maintenance orders the following applies:
>
> (a) The Respondent is to during the week have visitation with the Minor Child on Mondays and Wednesdays from 3.00pm until he delivers him to school the following morning. During the school vacation the same days apply save the Minor Child will be returned to the Petitioner at 8.00a.m the following morning.
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> (b) The Respondent is to continue to pay maintenance in the sum of $6000.00 per month and cover medical and dental expenses for the Minor Child.
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> 2. The hearing of the application filed 15th May 2017, is adjourned to a contested chamber hearing date. The Registrar is to give the Parties 30 days' notice.
>
> 3. The Petitioner is granted leave to file an affidavit in rely to the Respondent's within 21 days.
>
> 4. …."

[8] On 29th September 2017, MF filed her affidavit in response to EF's filed 12th June 2017.

[9] The matter next came on for trial of the ancillary relief claim on 12th March 2018. The trial commenced with MF's evidence but her evidence was not concluded on that day. On that day, the Court with a view to obtaining assistance with its determination of what was in the best interests of the Minor Child made an order that the Director of Social Services meet with EF, MF and the Minor

Child and prepare a report to assist the Court in its determination. The report was to be filed on or before 30th April 2018.

[10] The matter next came on for continuation of the trial on 8th October 2018, the evidence of MF was concluded but EF's was not. The matter next came on for continuation on 4th March 2019. On this day the evidence of EF was concluded. The Court's decision was reserved, and the Parties were to file closing submissions on or before 25th March 2019.

[11] EF filed his closing submissions on 25th March 2019, and MF having sought an extension of time within which to file her submissions and with the leave of the Court she filed her closing submissions on 15th April 2019.

[12] Before the Court could render its judgment and so the matter being sub judice, on 23rd August 2019, EF filed an application supported by his affidavit seeking the following orders:

> 1. The application be heard in the Court vacation as an urgent application.
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> 2. That MF return the Minor Child to Antigua and Barbuda from British Columbia, Canada.
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> 3. That MF deliver all travel documents of the Minor Child into the custody of EF.
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> 4. That MF do all things and execute all documents necessary to return the Minor Child to the jurisdiction of Antigua and Barbuda.
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> 5. Further or alternatively, that MF deliver the Minor Child into the custody, care and control of EF.

[13] MF filed her affidavit in reply to the application on 17th September 2019.

[14] EF's application filed 23rd August 2019, first came on in the afternoon of the said 23rd August 2019. It was adjourned to 19th September 2019, to provide MF with an opportunity to respond to the application and due to 2 weeks scheduled vacation of the Court. On 19th September 2019, when the application came for hearing, the Court stated to the Parties that at the root of the application were the matters/issues of custody, care and control and relocation and they were matters already before the Court and the subject of the pending judgment. The Court undertook to render its judgment by 31st October 2019.

The Evidence

[15] On 17th November 2009, the Parties married at Tobago in the Republic of Trinidad and Tobago. MF was 30 years of age and EF was 37 years of age. It was the first marriage for both Parties. After marriage the Parties lived together at Jolly Harbour, Bolans in the parish of St. Mary for approximately 5 years 3 months before separating in February 2015. EF says that separation was at May 2015, but nothing turns on the 3 months difference. There was one (1) child of the marriage, the Minor Child who was born on 30th October 2011, at Guadeloupe.

[16] Despite seeking professional counselling during the marriage, the Parties were unable to reconcile their differences and so separated. It was approximately 2 years later that MF filed her petition for divorce.

[17] Much of the evidence received from EF and MF was accusatory of: (i) what the Court saw as perhaps each of their natural characteristics, and (ii) each other's interaction and respective approaches to raising the Minor Child. Contrary to the evidence before the Court, Ms. Peters in the social inquiry report stated that neither of the Parties had any concerns regarding how the other functioned in their respective role as mother and father of the Minor Child.

The Minor Child

[18] Both EF and MF gave the Court evidence on matters occurring with the Minor Child at his birth and very early years and which included who gave him his first bath, who changed the most diapers, his first sunburn, sunstroke and sleeping with a parent beyond what might be considered a reasonable period etc. for a small child. While important, those were early days of parenting and a steep learning curve no doubt for both Parties as first-time parents.

[19] As stated prior, the Minor Child was born 30th October 2011. According to both Parties, although the Minor Child was born in Guadeloupe and is eligible for a French passport on his 18th birthday, he was through EF is entitled to hold citizenship for Antigua and Barbuda, and the United Kingdom, and through MF is entitled to hold citizenship for the Republic of Trinidad and Tobago and Canada.

[20] Prior to the separation of EF and MF, from birth until he was approximately 3 years 4 months of age, the Minor Child had the undisputed joy and full benefits of living with both of his parents under the same roof. Following the separation of EF and MF at or about February 2015, the Minor Child's primary residence was with MF. There was some dispute about visitation and sleeping over by the Minor Child with EF after the separation. The Court by interim order of 15th June 2017, scheduled access arrangements until final order.

[21] At 2 months short of his 5th Birthday, September 2016, the Minor Child started school at Island Academy and he was there until July 2019. Island Academy offers an international school curriculum.

[22] By nature, the Minor Child according to the evidence appears to be a little shy until he "warms up" to his surroundings. He enjoys both outdoor and indoor activities. He was generally exposed to a vast array of activities by both EF and MF. Activities included those connected to the sea and the more structured such as music lessons, craft, science experiments and experimental projects. He experienced no problems at school and was a good student.

[23] The Court ordered social inquiry report was prepared by Ms. Kendra Peters, a senior welfare officer (counselling duties), who met with the Parties and the Minor Child and was filed on 17th July 2018. The report followed 4 meetings held between 9th to 24th May 2018. There were three (3) meetings with EF and MF comprising of one individual meeting with each on 9th and 10th May

2018, and one joint meeting on 17th May 2018, and one (1) meeting with the Minor Child on 24th May 2018. The Minor Child was 6 years at the time.

[24] Ms. Peters amongst other things stated that the Minor Child's best interests was paramount during the discussions at the meetings and so the areas of focus were the Minor Child's stability including the physical and emotional, the importance of maintaining a parent-child relationship and other factors affecting the co-parenting relationship. There was also discussed the possibility of the Minor Child's relocation to Canada with MF and the possible impact it would have on the 'father-son' relationship.

[25] Ms. Peters recorded as changes to the dynamics of the family: (i) the separation of the Parties, (ii) the matter of challenging communication between EF and MF, (iii) the shifting roles of the Parties after the birth of the Minor Child, and (iv) prior intervention sought to assist with problems within the marriage. She recorded that on separation while EF remained in the family home that MF with whom the Minor Child resided fulltime moved approximately 4 times. She recorded the shared time spent by the Minor Child with each of the Parties and that the back and forth between the 2 homes, was also another adjustment the Minor Child had to make.

[26] EF and MF description of the Minor Child to Ms. Peters was that he was "shy" but nonetheless a well-rounded child who enjoyed the outdoors especially fishing and he socialized well with his peers. He performed well academically at the Grade one (1) level.

[27] With reference to extended familial support or network, Ms. Peters said that it appeared that most of the Minor Child's physical interaction was with the paternal extended family as most of EF's family members resided in Antigua as opposed to MF's whose family resides in Canada and the Republic of Trinidad and Tobago. The last physical contact between the Minor Child and his maternal family members was in the summer of 2017, when he spent three (3) weeks in Canada.

[28] Ms. Peters said that relocation of the Minor Child to reside at Canada was vehemently opposed to by EF. His objection was based on the premise of the importance of having a consistent father figure during the formative years as he had experienced similar separation of his parents at the Minor Child's age. Further, EF was firmly of the belief that the following areas of the Minor Child's life would be negatively impacted: (i) the dynamics of the father-son relationship, (ii) connection with the paternal side of his family, (iii) friendships formed with peers, and (iv) the Minor Child's opportunities for fishing and other sea adventures would be significantly reduced. EF also stated the possible difficulties that MF could encounter if she migrated to Canada with the Minor Child as the family support or network was allegedly limited in comparison to what was available in Antigua. EF also viewed the option of relocating as a form of control by MF.

[29] Ms. Peters said that on the other hand MF's rationale for relocation was largely based on the lack of financial security at Antigua. She had not been able to secure adequate employment for the past few years which would adequately sustain the Minor Child and herself. As a result, her family at Canada provided financial assistance for her to meet her financial obligations at Antigua. She said that should relocation to Canada occur, that EF would not be limited in maintaining a father-son relationship with the Minor Child as there would be opportunities for him to visit the Minor Child and the Minor Child to visit with him in Antigua if he so chose. MF also said that EF's presence in the Minor Child's life had always been supported by her.

[30] MF indicated to Ms. Peters that while relocation would bring some obvious changes to place of abode, family and peer relationships, she placed much value on the Minor Child's resilience, his capacity to adapt to changing circumstances at his age and the positive family support at Canada. MF opined that EF's view that the Minor Child ought to remain at Antigua was limited and based on fear. The possible relocation to Canada was an avenue for financial security, opportunity for quality life and for the Minor Child to thrive and continue to engage in the outdoor recreational activities which he enjoyed such as boating and fishing.

[31] According to Ms. Peters, MF and EF as far as general parenting and care of the Minor Child was concerned, they "lauded" each other in this regard and both presented positive reports in respect of the other's ability to parent the Minor Child. They agreed that the best interests of the Minor Child rest with stability, routines and consistent involvement of both parents and these were all matters vital for his holistic development.

[32] Ms. Peters met with the Minor Child who was 6 years old at the time. She found him to be very interactive and cooperative throughout their meeting. From her interaction with the Minor Child, it appeared to her that he was very interested in nature and the outdoors. The specific activities that he enjoyed were fishing and swimming. The colors, textures and the scales of the various fish fascinated him. He was happy when he went fishing. He was also intrigued on reading about the ocean, tigers, dinosaurs and fossils intrigued him. Regarding academics, the Minor Child shared with Ms. Peters that his favourite subject area was science of which he would like to know more. He liked physical education because he liked to be outdoors.

[33] In regard to time shared with EF and MF, the Minor Child appeared to enjoy the moments shared at both of their residences and appeared to adore EF and MF equally. EF and MF appeared to have maintained some semblance of consistency regarding the Minor Child's love for the outdoors as according to the Minor Child, he continued to engage in fishing and swimming activities whether he was at EF's or MF's residence. Some other activities the Minor Child enjoyed were doing craft and playing with his cat at MF's house and at EF's house he engaged with his pet turtle, iguana and snuggled with and walked the dog.

[34] According to Ms. Peters, it appeared that the Minor Child had conceptualized the visiting arrangements when asked to complete a drawing of his family as that "we live in separate homes" and on certain days he is with either his mother or his father. Results from the drawing of his family in chronological order included his father, himself and six (6) other paternal family members.

[35] Ms. Peter's assessment and recommendations were as follows:

> "Considering the aforementioned, the primary factors to be considered include the physical and emotional stability of Skye and the consistent involvement of both parents in his life. From all accounts by Mrs. Fuller and Mr. Fuller, there have not been any concerns regarding how the other functions in their respective role of mother or father to Skye.
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> Currently, it appears that Skye has a good relationship with both his parents and had seemingly adjusted to the routine as it pertains to the access arrangement stipulated by the Court which allows for time shared with the non-resident parent; Mr. Fuller.

> From observation, Skye has had a few disruptions to his life over the past few years that range from the separation of his parents in 2015, which resulted in him moving from one residence to another on at least four different occasions and also having to adjust to the access arrangement. However, the likelihood of Mrs. Fuller migrating to Canada with Skye due to alleged financial instability could become an added disruption to the child's life at the age of six (6). Such a move would create hundreds of miles between Skye and his father; the physical interaction that Skye currently has with his father will be affected.
>
> On the other hand, ease of transition to Canada for Skye is also dependent on his resilience, capacity to adapt and more so, on the co-parenting relationship. Further, of utmost importance is the opportunity for continued involvement of both parents to participate in Skye's upbringing irrespective of whom he resides with. Mrs. Fuller has given the assurance that opportunities for travel will be granted to Skye and similarly Mr. Fuller is welcomed to visit as he sees fit."

[36] Today, according to the evidence and Ms. Peter's report, the Minor Child does not suffer from any health issues, have any special needs, allergies or disabilities of any kind. The Minor Child appears to be healthy, bright and outgoing and a child who likes outdoor activities with EF as well as indoor activities as organized by MF. He was doing well academically at Island Academy. At date of judgment the Minor Child will be 1 week short of his 8th Birthday.

EF and MF

MF

[37] MF was born at Scarborough, Tobago on 5th July 1979. She holds a master's degree in coastal and marine management and is by profession a practicing environmental consultant of 17 years' experience in various capacities. At Antigua and Barbuda, she has been employed by various organizations on fixed term contracts. At May 2017, she had a contract with Environmental Awareness Group as a Project Co-ordinator and under this contract she earned $3500.00 per month.

[38] On the matter of expenses, MF said that both during the marriage and after separation, her expenses were a matter of dispute between the Parties notwithstanding her producing written documentation to support her claim for them to EF.

Spousal Support

[39] After the birth of the Minor Child in 2011, EF requested of MF that she assume the role of fulltime mother and it was agreed between the Parties that she would cease employment and devote her

time to caring for the Minor Child. She returned to work in April 2015, when the Minor Child was approximately 3 ½ years. During the years that she devoted herself to caring fulltime for the Minor Child, EF as the sole breadwinner of the family provided for all the needs of MF and the Minor Child.

[40] On MF returning to work at April 2015, she was responsible for contributing towards the living expenses of the family in the sum of $3000.00 - $3500.00. Her expenses included food and daily expenses while EF was responsible for the Minor Child's school expenses, medical insurance, and her car payments. At 2015, when the separation occurred, additional expenses which included rent for separate housing for her and the Minor Child were first supported by funds held in a joint account with EF and thereafter starting in 2016, EF made deposits of between $4000.00 - $6000.00 per month to cover the living expenses of MF and the Minor Child.

[41] As to her personal expenses, MF said that her monthly expenses averaged $4,897.66. She was of the view that EF ought to pay her a lump sum to assist her in achieving economic self-sufficiency. This had been discussed between the Parties against the background that she had not been able work and save any money during the 31/2 years that she remained unemployed and looked after the Minor Child fulltime. She stated that she ought to become self-sufficient within 2 years of the dissolution of the marriage

[42] MF was of the view that a lump sum of $120,000.00 would be reasonable in all circumstances. In the alternative, she proposed to the Court that EF pay her $5000.00 per month. (She did not say for duration.)

Maintenance for the Minor Child

[43] According to MF, the Minor Child's monthly expenses averaged $11,286.37 and of this she accepted that she would be responsible for 25 percent i.e. $2,821.50 and EF would be responsible for 75 percent i.e. $8,464.77.

Custody, Care and Control

[44] On the issue of custody of the Minor Child, MF said that it was not her intention to deny EF of any of his rights to share custody, however, she feared that when decisions had to be made and which required EF's input that he would unreasonably withhold his consent and this may not be in the best interests of the Minor Child.

[45] One major decision which had to be made surrounded whether she wished to migrate from Antigua and take the Minor Child with her to Canada. EF had stated to her that he would not agree to relocation of the Minor Child.

[46] According to MF, as it related to sleepovers, the Minor Child had multiple sleepovers at his paternal grandmother's house and other houses. Her problem was that on occasion, EF would fail to inform her that a sleep-over was occurring.

[47] MF says that she never had any problem with EF's family looking after the Minor Child and points to the fact that there continued to be regular contact between the Minor Child and EF's family and which in some instances was initiated by her. She also issued invitations for EF's family to attend the Minor Child's participation in events such as gymnastics, Christmas concerts, drama productions etc. In addition, the Minor Child's weekly private guitar lessons, which she arranged, all occurred at the Minor Child's paternal grandmother's house.

[48] MF says that EF makes assertions about the Minor Child's development being hampered by her. To the contrary, the Minor Child had a wonderful and varied network of friends and was enrolled in various out of school activities to enable him to socialize with other children. There were also pre-arranged play dates, spontaneous meet ups with children in their neighbourhood and car-pooling to activities. She did not always accompany the Minor Child at these activities. Many of the Minor Child's social activities were arranged through her social networks.

[49] To her, a disadvantage, if one could call it that, was that when the Minor Child was with EF, he socialized exclusively with EF's family. She admitted that EF did communicate with the Minor Child's friends but he always excused himself from attending invitations which she extended for him to participate in activities with the Minor Child and his friends.

[50] On a personal note, MF says that over time she had made and lost friends as they migrated from Antigua but she continues to make new friends. After the separation, EF and herself moved in different social circles and so he knew very little about her social life and what she brought to the Minor Child by way of her friendships.

[51] MF said that while EF acknowledged that interaction with other children was important for the Minor Child's development, almost all of the wider social interactions outside of EF's family were initiated by her. She did not believe that if EF were to have primary care and control of the Minor Child that the social interactions and relationships that she had created and nurtured for the Minor Child would continue. EF's view was that only he could make the best choices for the Minor Child and that only his family circle could provide entertainment for the Minor Child.

[52] MF said that while the Minor Child was a quiet child who often times needed time to come out of his shell, EF perceived this to be a negative and deficient characteristic of the Minor Child's personality. Having noted his shyness, she had made an extra effort to foster relationships with the people he connects with and provide him with a safe and varied social environment. In any event, he was only 5 years (at the time of her affidavit) and so he was still developing his own personality.

[53] According to MF, being the Minor Child's mother was one of the greatest joys of her life. While she was a fulltime mother and since returning to work, she made sure that all of the Minor Child's basic needs were met, including nourishing meals, a safe and supportive home environment, a wide and varied social life and the best educational opportunities. She had seen to all of Minor Child's healthcare needs including regular health check-ups, maintaining up-to-date immunizations and had nursed him through every illness.

[54] As to EF's concerns about MF's parenting approach, she said that they were completely baseless and he had not provided the Court with any evidence of the negative effects that the Minor Child had suffered as a result of her parenting style. Historically, early in her career she had: (i) worked as an educator developing curriculum materials and resources for schools, from kindergarten to Grade 6, (ii) provided teacher training classes through the Antigua State College, (iii) designed and hosted primary school children on interactive nature-based field trips and other school activities between 2000-2005, (iv) worked as a literacy teaching assistant, and (v) been a swimming instructor for children between the ages of 2 to 12. She was passionate about childhood development and learning. Her education and work experience had proved to be a useful parenting resource with the Minor Child.

[55] She compared her approach with that of EF. She said that on occasion he exercised poor judgment. She recalled that when the Minor Child was 3 years at September 2015 (approximately 1 month short of his 4th Birthday), EF took the Minor Child on an Extreme Circumnavigation tour, and which is where a speedboat goes around Antigua for a day. It was an extremely hot time of the year and the boat had no shade cover for its passengers. She expressed concern about the Minor Child going on such a trip especially because of the heat. EF in response told her that he "knew how to take care of his child" and that he knew about putting on sunscreen and proceeded to take the Minor Child with him on the tour. The Minor Child suffered a heatstroke and it was several days before he recovered. EF never addressed his lack of judgment in this regard with her.

[56] As to EF's availability, MF agrees that EF appears to have unlimited free time. However, for most of the Minor Child's life, his schedule was always dictated by his recreational activities rather than family responsibilities. Being so dictated, the net result was that EF's schedule was erratic and spontaneous with priority given to his immediate interests. MF says that although after separation the Parties had established overnight visits on weekends, when this became inconvenient to EF, then he sought variation. She was resistant to variation as she considered that this was disruptive to the Minor Child's routine. It was of great concern to MF that EF's spontaneous schedule and active lifestyle often appeared to conflict with his routine childcare responsibilities. This she said resulted in many cancellations of visitations by EF with the Minor Child.

[57] According to MF, when the Minor Child was a baby, EF made it clear to her that the matter of childcare was her responsibility and that he would not be held accountable for keeping a regular schedule to assist with childcare. Since the Parties' separation, EF had consistently sacrificed visitation with the Minor Child in favour of his recreational activities, even while claiming that he did not have enough time with the Minor Child. He rarely attended school assemblies and events where parents were invited to watch the children perform in music, singing, drama, and so on. While she had a busier work schedule than EF, she attended almost every school assembly and attended to all of Minor Child's daily needs as her first priority.

[58] Of concern to MF were EF's recreational activities which often took him offshore and out of mobile phone range for long periods of time. He participated in numerous regattas and other boat races that could span 3-7 days each. On those occasions when he was out of mobile phone reach, he reminded her that she was and had always been treated between them as the primary caregiver of the Minor Child.

[59] In addition to the 3-7 days trips, there were also lengthy trips by EF outside of Antigua with little notice or discussion between the Parties as to the implications on care of the Minor Child. His lengthy trips would see EF away from the Minor Child without communication. A prime example was that EF enrolled and took part in the Talisker Whisky Atlantic Challenge 2017, and which is a long-distance ocean rowing race that was to take him away from Antigua for 2-3 months. His participation was in so far as to its implications on the Minor Child and care of the Minor Child were never discussed with her. In addition to rowing, EF participates in free diving, windsurfing and other sports. While these activities were impressive, they presented an extraordinarily high level of risks of injury or death that would prevent EF from continuing to care and support the Minor Child.

[60] There was often conflict between the Parties. MF says that she sought to shield the Minor Child from the conflict and continually pleaded with MF to treat her with decency and respect in front of the Minor Child who was becoming old enough to understand their interactions. EF had, she says a pattern of hostile behaviour towards her and it was not unusual for him to engage in cursing, insults and disrespectful exchanges with her. He showed no restraint even in the presence of the Minor Child and his family.

[61] MF complained that EF sought on an occasion to host a Birthday Party for the Minor Child with his family without her present although she had been pushing for just such a joint celebration before scheduled travel for the Minor Child and herself. On another occasion, EF sought to almost deny her the opportunity to spend "Mother's Day" with the Minor Child.

[62] MF denies that she ever intentionally failed to organize for the Minor Child to communicate with EF while he was hospitalized at the United Kingdom. The Minor Child spoke with EF on an occasion and on another occasion, the time difference between the Antigua and the United Kingdom was the hindrance.

[63] After the breakdown of the marriage, the Parties held discussions about acquisition of a home for the Minor Child and MF. EF had initially spoken about construction of a house for them. He expressed it to her this way: "I have to put you somewhere." On another occasion, he said to her: "You will go where I put you." MF says that she was not given any say in the matter. The proposal was for the house to be constructed in the vicinity of the matrimonial home. From discussions between the Parties, MF did not believe that she was to have any permanent interest in the house. She believed that she would only be allowed to live in such a house until the Minor Child completed high school. It was her view that such a house near to EF would be under his control and so she would not acquire long term independence.

[64] As to the 4 times that she moved house following her departure from the matrimonial home, MF cited what she considered to be good reasons for doing so. The Court is not about to sit in judgment about this.

[65] MF asserts that she had done much to consistently and actively foster a father-son relationship between the Minor Child and EF.

[66] It was against this background, that she was of the view that it was in the best interests of the Minor Child that he reside with her.

Relocation of the Minor Child

[67] MF's reasons for wishing to relocate to Canada were: (i) she was not Antiguan and had no family at Antigua save for EF and the Minor Child, (ii) Antigua offered her limited career opportunities and professional growth, (iii) limited income and so there were no savings or investments at Antigua, and (iv) there was the fact of the very high cost of living at Antigua. At Canada she perceives: (i) family support, (ii) access to a much wider pool of employment options, (iii) opportunities for professional growth, and (iv) a much lower cost of living. This combination she said would afford her the ability to independently provide for a higher quality of life and standard of living for both the Minor Child and herself.

[68] On expanding, she said that at Canada, she had an established family base, and which included her mother, an aunt and uncle, 3 first cousins by her aunt and uncle and there was 1 grandchild of her aunt and uncle, age 8 years and who would be a companion for the Minor Child. MF had previously resided at Canada for 6 years during which time she attended university and held jobs. Prior to attending university, she also spent most of her summer vacations in Canada attending camps. Canada was always her second home. The family and historical ties with Canada she says will support and encourage the integration of the Minor Child and herself into the community at Canada. In addition, her family were extremely keen on taking an active role in the Minor Child's life and he had developed a close bond with them over the past summer and Christmas vacations spent with them. Her family resided in relatively close proximity to MF's mother, in a large family home with an excellent environment for children as it borders a national park and a beautiful beach.

[69] As primary caregiver she wished to take the Minor Child with her. EF would be free to visit the Minor Child at any time he chose and she would allow the Minor Child to return to Antigua and visit with EF. She said that given EF's flexible schedule, unlimited free time as he asserts, as well as his financial resources, he had the freedom to spend extended periods of time abroad and so continue to have an active presence in the Minor Child's life at Canada.

[70] MF raised the issue of possession of the Minor Child's passport and said that EF was in possession of the Minor Child's only valid passport and it was needed in order to renew his expired Republic of Trinidad and Tobago passport and for travel with her. This matter seems to have been overtaken by events since the Minor Child travelled to Canada with MF.

[71] Following EF's application on 23rd August 2019, seeking an order for the return of the Minor Child to Antigua, MF filed a further affidavit in reply. She repeated much of the evidence previously set out in support of her application including that for relocation. She was of the view that the nature of EF's application for custody was to eliminate her altogether from" the picture" and give the Court the impression that she was not allowing EF access to the Minor Child. This was false.

[72] In regard to her move to Canada, she stated that it was no secret that she wished to do so and her final decision all came down to timing. As things unfolded at August 2019, EF had recently returned with the Minor Child from an overseas trip and she returned to Antigua to collect the Minor Child for travel to Canada the following day. When EF asked her about a permission letter for the Minor

Child to travel with her, she asked him if he had prepared one and he responded that he had not. He suggested that she prepare it and she told him that she had no ink in her printer. On the way to their airport, they wrote up the consent on a piece of paper which EF signed. It was exhibited.

[73] MF admits to telling EF by email on 16th August 2019, that over the next few weeks that she would be putting arrangements in place to stay on in Canada and that she had made the decision to keep the Minor Child with her. She says that her decision was made for a number of reasons and which included: (i) her responsibility as mother and provider, (ii) it was not healthy for the Minor Child and herself to continue to be dependent on EF and her relatives for their needs including housing, (iii) it was not healthy for the Minor Child to continue to witness her struggling financially, (iv) isolation from her family and it was important for the Minor Child to know of his support on the maternal side of his family, and (v) she believed that it was equally important for her to show that she as a parent could equally provide for the Minor Child's needs. EF on the other hand had all of these things available to him at Antigua.

[74] MF says that with relocation, the Minor Child would be afforded access to free high quality education and he would be able to participate in the healthcare system at Canada. Both of these items are prohibitively expensive or inaccessible at Antigua.

[75] After her email of 16th August 2019, there followed 2 visits by a member of EF's family to see the Minor Child at the address which she had provided to EF.

[76] On 20th August 2019, EF sent her an email wherein he simply demanded the return of the Minor Child to Antigua.

[77] There followed discussions between the Parties, but the issue of the Minor Child relocating was not resolved. Legal advice was sought. EF filed his application 1 week later on 23rd August 2019.

[78] MF said that after EF filed his application, he telephoned the school where the Minor Child was registered and alleged that she had abducted the Minor Child. The school was obligated to contact the Police and did so. In the end, the Police determined that she had not committed a crime and so the Minor Child's schooling was not disrupted.

[79] MF said that she was deeply saddened by EF's focus only on the "amazing" experiences and fun activities that the Minor Child would have with him whereas while she valued the Minor Child's experiencing outdoor activities, she strongly believed in a more steady and balanced approach to raising the Minor Child. His education, his interaction with friends outside of EF's family, his interaction with EF and her, his interaction with her family were all equally important. Most of the activities of which EF spoke, could all be done during school vacations. The Minor Child will visit Antigua to be with EF to share those experiences.

[80] MF repeated that her move to Canada would not in any way prejudice EF's access to the Minor Child and made mention of the availability of technology to aid with this.

[81] MF has registered the Minor Child in the Sir James Douglas Elementary School, Victoria, British Columbia and he has been assigned to Grade 3.

[82] There were repeated statements about variation being made to the Court's visitation order of 15th June 2017, to accommodate EF's recreation schedule and particularly so on weekends. She said that the Minor Child was routinely delivered to EF's mother on Saturday afternoons for the Court ordered visits.

[83] As to MF making the unilateral decision to keep the Minor Child permanently at Canada while the judgment was pending, she said that she did not see nor understand how her stay in Canada was a refusal to allow the Court to determine the issue of custody. She was advised by her Attorney-at-Law and believed that the Court having heard all the evidence had to make a decision based on the evidence. She was not aware that she was to "put her life on hold" until whenever the decision was made. She had filed the petition and made the application to the Court and so would submit herself to the jurisdiction of the Court. Her decision was based solely on what was best for the Minor Child and herself as the parent with whom the Minor Child resides.

[84] There was reference to a third party. The Court takes no notice of this since the third party is not a party to this suit and the statements connected thereto raise the issue of hearsay evidence.

[85] MF states that she is deeply concerned about the Parties ability to co-parent since EF has shown that his only concern is having the issues of custody, control and care his way and further he engages everyone in disparaging her. She received an email from EF's mother on 2nd September 2019, and wherein his mother made accusations against her. That email saddened her because of the many negative assumptions made about her rather than encouraging all parties involved to attempt to gain an understanding of her need to play a meaningful role in the Minor Child's life and which she was unable to do while at Antigua. In reply, she had issued a respectful response on 5th September 2019. She does not wish for the Minor Child to be raised in a divided manner. Copies of the emails exchanged were exhibited.

[86] MF is of the view that EF and some of his family would be happy to watch her give up her maternal role just so that EF could be comfortable and happy. Her understanding is that foremost it is the Minor Child's happiness that matters.

[87] MF repeated that the Minor Child had lived with her since birth, she had been his primary caregiver as agreed from his birth when EF asked her to be and she had agreed to stop working to take care of the Minor Child fulltime. She had devoted her life to the Minor Child in his early years and willingly made sacrifices for the Minor Child believing that EF would take care of their financial needs.

[88] MF believes that EF's access to the Minor Child should be during the school recesses when the many fun and adventurous opportunities that EF can offer can be enjoyed together by EF and the Minor Child. She repeated that she hoped that EF would utilise his flexible schedule to visit the Minor Child in Canada and become familiar with his life there.

[89] MF said that she was still not opposed to an order for joint custody although it now appeared that EF by his application of 23rd August 2019, wished full custody. She did not believe the latter would be in the Minor Child's best interests whilst an order for joint custody with primary care to her and visitation of all recesses to EF would afford the Minor Child with access to both parents.

[90] Following MF's decision to keep the Minor Child with her at Canada, she says that the Minor Child's adjustment to the changes has been very positive and encouraging. He has enthusiastically welcomed starting at a new school and quickly started making friends in his class. His teacher informed her that she was very happy with the Minor Child's transition into his class. He spends time daily with his Canadian family, including sharing most meals as a family. He is energetic and chatty, openly talking with the family about all his new experiences. MF feels assured that the Minor Child is receiving the support and stability he needs to make a smooth transition into Canada.

EF

[91] EF was born at Westminster, England on 23rd August 1972. According to EF, he is part of a large and extremely supportive family which includes siblings, parents, cousins and they mostly all reside at Antigua. His family are all ready and willing to help him in any way possible with the Minor Child.

[92] EF is a businessman employed with Adventure Antigua Limited (the Company). He is the majority shareholder of that Company but to date he has not earned any dividends from the Company. The Company employs 16 persons. He is secure in his job and finances from month to month. Under cross-examination he said that he earns a salary of approximately $15,742.00 per month.

[93] According to EF, he has many hobbies and has carefully designed his role within the Company to allow him to have as much free time as he wishes. The Company offers boat cruises and adventure tours. He no longer works on the boats but leads the adventure tours. He organizes schedules, conducts online marketing and manages the Company's staff. His is a very leisurely "work life" and one which enables him to spend as much time as he wishes with the Minor Child and to take as much time to enjoy his hobbies as he wants. He hopes that the position of flexibility and free time will continue for a long time so that Minor Child's childhood and teen years will be filled with the same amazing experiences that he had as a child growing up on the coast of Antigua. He says that windsurfing, boating, sailing, horseback riding, waterskiing diving, snorkeling and all other active fun activities bolstered his confidence and sense of independence. These are things available to the Minor Child even more so today than they were to him when he was growing up.

[94] EF described himself as a quite a sociable person and a person who enjoyed meeting new people. MF on the other hand he said, always had difficulty with meeting new people and making new friends. Before he met her she had been living in Antigua for a few years and had only a very small social circle. During the time that they were together before marriage, this was often a topic she discussed and the situation had not changed after marriage. He described MF as a loner and a person who was happiest when alone. She hardly went out and very rarely attempted to meet new people. He had absolutely no problem with MF's way as it extended to herself but it often appeared to him that the Minor Child's social development was hampered by her in this way.

Spousal Support

[95] EF agreed that MF had stopped working and taken on the role of fulltime mother at the birth of the Minor Child upon his request. But today, MF was a professional environmental consultant who worked in her field and was secretive about her income since she resumed working. She was now capable of working and maintaining herself and so did not need spousal support but was willing to pay her $1700.00 (in another instance he said $1500.00) and if such payment was ordered he asked that it be capped at 1 year.

[96] He spoke of the Parties joint savings account at the Eastern Caribbean Amalgamated Bank and which at time of separation he said had $60,000.00 on deposit.

Maintenance for the Minor Child

[97] EF said that MF had given him a monthly budget of over $17,000.00 per month. He viewed this sum as "ridiculous". He asked the Court to have regard to his alternative budget. He noted his payments of $5700.00 and responsibility for education and medical expenses up to date of trial.

[98] EF is willing to pay $4000.00 per month maintenance in addition to paying the medical and education expenses for the Minor Child.

Custody, care and control

[99] EF said that from the date of separation that he had always proceeded along the line that the Parties had joint care and control. He had no doubt that MF loved the Minor Child. The best interests of the Minor Child lay with him being with caring parents under the same roof. He had tried for years to achieve this position but after years of effort, sacrifice, emotional despair, dedicated marriage counselling, it was obvious to both Parties that their marriage was over.

[100] EF's view was that one of the reasons that the Parties separated was MF's inability to compromise. The controlling nature of her relationship style damaged their relationship beyond repair. He feared that her controlling nature was already affecting the Minor Child's development. He did not think that MF's approach was healthy for the Minor Child's development. He found her parenting approach troublesome.

[101] As to his relationship with the Minor Child, EF said that from the moment of birth there was nothing that he did not do to show that he cherished and cared for the Minor Child. He enjoyed being a father every second within the family unit before the Parties separated. MF on the other hand felt that she was the only person who knew how to care for the Minor Child and so for the first 2 years of the Minor Child's life, he struggled to remind her that he had been there every step of the way with her in caring for the Minor Child. While the Parties were together, MF never stopped instructing him on how to feed, what to feed, how to bathe, how to dress, where to play and how to play with the Minor Child. The instructions on how to perform the tasks continued after the separation of the Parties. Some other instances of MF's control by instructions were in regards to

alleged food allergies, spending time at the paternal grandmother's house because of alleged mosquito threats, and so forth. All of which were baseless.

[102] EF's view on raising the Minor Child was that caregiving was something that a "village" did for a child. MF on the other hand, felt that only she could care for the Minor Child. As a result, MF would not agree to the Minor Child being looked after by his family and would find various reasons to prevent anyone other than either him or her from looking after the Minor Child. She would not let the Minor Child play at other children's homes unless she was present and this only happened on pre-arranged play dates planned days in advance.

[103] EF was also of the view that the Minor Child needed to learn to interact with other children and people in general to develop good social skills. When the Minor Child was with him, he met more people and he had social interaction with people of all ages and children of his own age. His brother and cousins had children the same age as the Minor Child, and they were are all very close to him.

[104] EF believes that the social interaction he offered the Minor Child was incredibly important and more so for a child without siblings. That he ought to get out and play with other children as much as possible. This, he said would happen if he had have primary custody and care of the Minor Child.

[105] EF said that his flexibility work schedule would allow him to pick up the Minor Child from school and play with him before dinner. He cooked big meals for the Minor Child.

[106] EF disputes MF's version of how visitation occurred. He related matters as they occurred before the Court's order of 15th June 2017. It is his view that MF had shown a very clear unwillingness to be fair about custody of the Minor Child during their separation.

[107] EF complained that MF rarely telephoned him to allow him to speak with the Minor Child when he is with her, and on some occasions in excess of 1 week would pass without contact. He referenced 2 hospital stays in the United Kingdom between 2015 and 2016 (the Minor Child would have been 4 and 5 years old at the time). He also complained that when MF travels with the Minor Child that there is usually a lack of contact and one such instance was when she took the Minor Child with her to Tobago for Christmas 2017.

[108] EF's view is that the only way that he and MF would have equal time with the Minor Child is if he were granted care and control of the Minor Child.

[109] As to housing of MF and the Minor Child after separation, EF said that he had prepared at great costs, architectural plans for construction of a luxury three (3) bedroom house at Jolly Harbour. MF refused to consider this as an option for housing the Minor Child and herself.

[110] EF cited in support of him being given primary care and control the fact that the Minor Child had 5 changes in residence with MF after the separation and such actions ran contrary to MF's statement about stability in the Minor Child's life and schedule.

[111] EF reiterated the reasons why he should be granted care and control as: (i) at the Island Academy, the Minor Child would have the best education at international level, (ii) an incredible after school

life, (iii) wonderful social support network, and (iv) he would grant MF equal access. He described the Minor Child's life at Antigua as being an awesome life and which should not be risked.

Relocation of the Minor Child

[112] EF says that it was unknown to him that MF was planning to move to Canada. They held several months of discussions following their separation and relocation to Canada was not a part of them.

[113] When MF eventually spoke to him and his family about relocating to Canada with the Minor Child, it was all about making "her" happy as she said: "I deserve to be happy" and "if I am happy then Skye will be happy". This was not a reason to take the Minor Child away from his life, school, family, friends and father at Antigua.

[114] If MF were granted care and control of the Minor Child then she would migrate to Canada. He would worry about the isolation that the Minor Child would feel at being away for his paternal family and friends at Antigua. He would also worry about the social interaction or lack thereof the Minor Child would face in Canada living with MF.

[115] MF had a very small family unit at Canada. It was comprised of an uncle, his wife and her soon to be retired mother, Mrs. Clovis who had plans to retire at Canada. As far as he knew, it was MF's plan was to live with her mother.

[116] EF said that while he was happy that the Minor Child would finally be able to spend more time with his maternal grandmother, that judging from what he had seen of Mrs. Clovis' interaction with the Minor Child, and heard from MF about her own childhood, he did not perceive Mrs. Clovis to be the greatest of caregivers to a small child. Mrs. Clovis' retired brother, MF's uncle was in his 60s and he and his wife would be the only other family at Canada. There were no young children in MF's family unit at Canada. He was 100 percent certain that the Minor Child would have a better and more fulfilled life being based in the Caribbean, as he had been doing since he was born.

[117] EF said that were he to be given primary care and control of the Minor Child that he would not just ensure that the Minor Child's life was full of exciting and fun activities and varied social interaction with other children but more importantly, he would ensure that he got to school properly prepared and on time. In this regard he referred the Court to noted late occasions on the Minor Child's school records. This lateness he said was a result of MF's tardiness.

[118] Aside from his family, the Minor Child was well-known to EF's friends and employees, who had known him from birth. EF was sure that if the Minor Child were removed from Antigua, that he would miss and suffer the lack of this larger circle of adult reference figures.

[119] As to visiting with the Minor Child at Canada, EF said that commuting to visit either way for both him and the Minor Child would take several days of travel and be at great expense both emotionally and financially.

[120] Following MF's email of 16th August 2019, and wherein she stated that she would not be returning the Minor Child to Antigua, EF filed a further affidavit to support his application filed on 23rd August 2019.

[121] EF's version of how events unfolded before 16th August 2019, were that at 2017, MF had raised with him her intention to take the Minor Child to Canada with her for a vacation. At 2017, through his Counsel, he had communicated his concern that MF might abduct the Minor Child and not return him to Antigua. MF's Counsel sent an email to his Counsel on 25th July 2017, stating that MF understood that it would be illegal to take the Minor Child abroad and not return him, and that in any event Canadian Courts would return the Minor Child. Based on the emails exchanged he had agreed in writing to allow the Minor Child travel with MF in 2017, and she returned to Antigua with the Minor Child.

[122] On 28th July 2019, MF left Antigua for Canada with the Minor Child on a scheduled vacation that the Parties had orally agreed upon. He offered to put his consent in writing as he had done on the previous occasion, but MF said that she was fine without it. His consent to the trip was on the agreed premise that MF would be returning the Minor Child by 31st August 2019, and so in time to resume school.

[123] On 16th August 2019, he received an email from MF stating that she would not be returning the Minor Child to Antigua. She provided an address at which the Minor Child would be living. One of his cousins and her husband visited with MF and the Minor child at the said address.

[124] According to EF, MF's unilateral decision to not return the Minor Child to Antigua had torn his world apart and the emotional trauma of the separation had been quite painful. After composing himself he wrote an email to MF asking her to return the Minor Child to Antigua.

[125] EF repeated matters about his very leisurely "work life" and that the Minor Child was part of a large family which now included a recently born half-brother.

[126] EF viewed MF's actions as controlling and being deliberately carried out with a view to deprive him of access to the Minor Child.

[127] EF referred to the matter of spousal support. He said that he had paid MF spousal support for over 2 two years and she had now absconded with the Minor Child from Antigua and refused to return him. He asked the Court to suspend his obligations to pay MF spousal support.

[128] EF referred to MF's initial decision to limit his access to the Minor Child to one (1) day per week after their separation (this would be before the Court's order of 15th June 2017) and now her refusal to allow the Court to determine the issue of custody by refusing to return the Minor Child to Antigua. Her actions caused him great alarm and to believe that she had absolutely no intention of returning the Minor Child to Antigua and that she could disappear with the Minor Child so as to live beyond the reach of the Court.

[129] EF referred to an alleged relationship between MF and a third party. The third party was not part of the proceedings and statements connected thereto raised the issue of hearsay evidence.

[130] EF was unaware of what travel documents the Minor Child used to depart Antigua and enter Canada.

[131] As to the matter of maintenance while the Minor Child was at Canada, EF said that he was willing to pay any maintenance for him into an account at a commercial bank in Antigua, in the name of the Registrar of the High Court, and standing to the credit of the suit until the Minor Child was returned to Antigua.

[132] According to EF, should the Minor Child be living with him at Antigua, he would not want for nor miss anything. He could not begin to imagine what would happen if the Minor Child was living away from him and his family. He believed that it was in the best interests of the Minor Child if he was returned to Antigua.

The Law

[133] The **Divorce Act 1997** provides:

> "2.(1) In this Act,
>
> 'child of the marriage' means a child of two spouses or former spouses who, at the material time,
>
> (a) is under the age of sixteen years, or
>
> (b) …;
>
> 'custody' includes care, upbringing and any other incident of custody;
>
> 13.(1) ….
>
> (2) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring one spouse to secure or pay or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums as the court thinks reasonable for the support of:
>
> (a) the other spouse;
>
> (b) …;
>
> (3) ….
>
> (4) The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.

(5) In making an order under this section, the court shall take into consideration the condition, means, needs and other circumstances of each spouse and of any child of the marriage for whom support is sought, including:

(a) the length of time the spouses cohabited;

(b) the functions performed by the spouse during the cohabitation; and

(c) any order, agreement or arrangement relating to support of the spouse or child.

(6) In making an order under this section, the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

(7) An order made under this section that provides for the support of a spouse should –

(a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

(b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above the obligation apportioned between the spouses pursuant to subsection (8);

(c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

(d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable amount of time.

(8) An order made under this section that provides for the support of a child of the marriage should

(a) recognize that the spouses have a joint financial obligation to maintain the child; and

(b) apportion that obligation between the spouses according to their relative abilities to contribute to the performance of the obligation.

14. (1) A court may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, any or all children of the marriage.

(2) Where an application is made under subsection (1), the court may, on application by either spouse or by any other person, make an interim order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage pending determination of the application under subsection (1).

(3) …..

(4) The court may make an order under this section granting custody of, or access to, any or all children of the marriage to any one or more persons.

(5) Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child.

(6) The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.

(7) Without limiting the generality of subsection (6), the court may include in an order under this section a term requiring any person who has custody of a child of the marriage and who intends to change the place of residency of that child to notify, at least thirty days before the change or within such other period before the change as the court may specify, any person who is granted access to that child of the change, the time at which the change will be made and the new place of residence of the child.

(8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

(9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.

(10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such conduct." (My emphasis)

[134] At Antigua and Barbuda, the single test that the Court must apply on the issues of custody, care and control, and relocation as seen at section 14(8) is that of what is in the "best interests" of the Minor Child. Some 23 years ago **Gordon v. Goertz**[1] a case concerning an application to vary an earlier custody order and where a central issue was relocation, the matters for consideration in determining "best interests" in those circumstances were discussed. The headnote reduced the discussion and itemizes the matters for consideration. It states:

"In assessing the best interests of the child, the judge should more particularly consider, inter alia: (a) the existing custody arrangement and relationship between the child and the custodial parent; (b) the existing access arrangement and the relationship between the child and the access parent, (c) the desirability of maximizing contact between the child and both parents; (d) the views of the child; (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child; (f) disruption to the child on a change in custody; and (g) disruption to the child consequent on removal from family, school, and the community he or she has come to know. The "maximum contact" principle mentioned in ss. 16(10) and 17(9) of the Divorce Act is

[1] [1996] 2 SCR 27, 1996 CanLII 191 (SCC) pgs. 2-3

mandatory but not absolute and the judge is only obliged to respect it to the extent that such contact is consistent with the child's best interests. As set out in s. 16(9) of the Act parental conduct does not enter the analysis unless it relates to the ability of the parent to meet the needs of the child. In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

Where, as here, the child enjoyed frequent and meaningful contact with the access parent, a move that would seriously curtail that contact suffices to establish the necessary connection between the change and the needs and circumstances of the child. Further, since the terms of the previous order were premised on the child's residence remaining within a reasonable distance of the access parent, the move to Australia would clearly breach this provision. The judge was thus required to embark on a fresh appraisal of the best interests of the child. While he failed to give sufficient weight to all relevant factors, when all these factors are taken into account, the judge was correct in continuing the mother's custody of the child, despite her intended move to Australia. There is no support in evidence, however, restricting the father's access to Australia. Access in Canada would have the advantage of making the father's limited time with the child more natural while allowing the child to maintain contact with friends and extended family. Accordingly, the custody order should be upheld and the access order should be varied to provide for access to be exercisable in Canada."

[135] In **Brixey v. Lynas**[2] Lord Jauncey said:

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

[136] A recent case in assessing a request for relocation is **Re KAC v. DJC**[3]**.** There Mostyn J said:

> "The legal framework
>
> 10. The foundation of the jurisprudence in this field is the well-know case of Poel v. Poel [1970] 1 WLR 1469. Although there were many other subsequent decisions of the Court of

[2] 1996 SLT 908 at 911

[3] [2013] EWHC 292 (Fam)

Appeal the next milestone was the case of Payne v. Payne [2001] EWCA Civ. 166… It was reconsidered in 2011 in the case of K v. K (Children: Permanent Removal from the Jurisdiction) [2011] EWCA Civ. 793, …, and the entire jurisprudence was recently summarized, 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.

11. 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 present governing principles derived from them for a relocation application:

i) 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.

ii) 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.

iii) 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.

iv) 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?

v) Since the circumstances in which such decisions have to 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.

vi) 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 reflections of the reality of the human condition and the parent-child relationship.

vii) 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.

....

18. To my mind these observations all capture precisely my function here. They explain irrefutably to my mind why presumptions have no place in a relocation application. I therefore start with a blank sheet. There is no presumption in favour of the applicant mother. My determination will involve a factual evaluation and a value judgment. I will ask myself and answer as best I can the questions in paragraph 11 (iv) above but their answers will not be determinative or even necessarily tendentious (in the true sense of the word). They will merely be aids to my determination of the ultimate single question, which is, of course: what is the best interests of these children."

Findings and Analysis

[137] While the Parties appear to have different natural characteristics with for example one being outgoing and given to participate in all things outdoors, and the other more being more conservative, reserved and protective, there is the Minor Child whom from all accounts was clearly loved by both of his parents and is doing well in all spheres contemplated on the raising of a young child. Because of the age of the Minor Child the Court did not think it wise to seek his opinion as to with which of his parents he wished to reside.

Spousal Support

[138] The marriage was not a long one, it was of approximately 5 ½ years before the Parties separated. For approximately 3½ years of those 5½ years, MF was a fulltime mother without personal income of her own but EF it was agreed provided fully for the family. MF, an environmental consultant, returned to work once the Minor Child was 3 ½ years.

[139] There was no evidence of assets or savings held by either Party before marriage or during marriage save the majority shareholding held by EF in the Company. The Court did observe on EF's

alternative statement that he pays a monthly premium of $ 364.71 for life insurance. Both Parties had monthly salaries, with MF's salary resuming when she returned to work. As to the shareholding, EF said that he had not received any dividends on his shares.

[140] MF seeks spousal support on the ground that while she was a fulltime mother, she was denied the opportunity to earn an income which would have allowed for savings.

[141] When MF did return to work after the Minor Child entered playschool, her income averaged $3500.00 per month. She provided no evidence of her income prior to her period as a fulltime mother. The Court therefore assumes for the purposes of this decision that it was within the same range. According to her list of the Minor Child's expenses and what she considered to be on average her responsibility and which was in the amount of $2832.50 and her own personal expenses and which on average she described as being $4897.66, it appears to the Court that her average income of $3500.00, would not have afforded her any room for savings even before the marriage or in the early days of the marriage given that her personal expenses exceeded her income.

[142] The Court believes that given the short duration of the marriage, that both Parties worked save for the 3 ½ years when MF was a fulltime mother but fully supported by EF, and there being no evidence of savings, that at most, the amount of spousal support that it can order to enable MF to find her footing after the breakdown of the marriage is $50,000.00. The Court will order same.

Custody, Care and Control and Relocation – Application of the Best Interests Test

Custody

[143] At filing of the petition and up to immediately before the filing of EF's application of 23rd August 2019, it appeared to be the consensus that there would be joint custody to the Parties. However, EF in his affidavit to support his application of 23rd August 2019, appeared to retreat from the position of joint custody and sought sole custody.

[144] The Court after consideration the evidence of both Parties could find nothing to sway it from the Parties first inclination and which was that there be joint custody of the Minor Child. It is the Court's view that while to some extent MF and EF may disagree on certain matters, ultimately they have each done a good job in their own way so far in raising the Minor Child and who from their own evidence, the interview with Ms. Peters and school records is a healthy child who enjoys school, his friends, family on both sides and the activities provided by both of EF and MF.

[145] The Court will order joint custody.

Care, Control and Relocation

[146] Because of MF's application for an order for relocation, the 3 matters of care, control and relocation are now for consideration as one topic as clearly the Court could not say order relocation while ordering care and control elsewhere.

The Permanent Removal of the Minor Child without EF's Consent

[147] It is a fact that having left Antigua on 28th July 2019, with the consent of EF to take the Minor Child on a vacation at Canada, a mere 2 ½ weeks later on 16th August 2019, MF notified EF by email that she would not be returning the Minor Child to Antigua. Since EF had not consented to the Minor Child taking up residence at Canada, MF's decision to keep the Minor Child at Canada beyond what was agree between the Parties – that is a vacation with return in time to commence school at the beginning of September 2019, was a unilateral decision. The fact that the email was sent in such short time after MF and the Minor Child arrived at Canada strongly suggest to the Court, that the decision was not a last minute one but rather one that was planned beforehand. The Court observes that in short time the Minor Child was able to be enrolled in school and was stated to be in Grade 3. This suggest to the Court that school records from Island Academy were procured so as to enable such determination. The Court bears in mind that there are many international child abduction cases[4] arising out of identical circumstances such as these and with serious and dire consequences for the abducting parent. Indeed, at Antigua, the **Offences against the Person Act** section 54 addresses the issue of child stealing as it is therein described.

[148] Perhaps the only savings grace for MF was that it appears that, at least for the time being, that EF and his family knew MF's physical address at Canada and his family visited with MF and the Minor Child at her family's home on 2 occasions.

[149] The Court has noted that MF says that she was not aware that she was supposed "to put her life on hold" while awaiting the Court's decision. Neither the Court nor from the evidence of EF was MF asked "to put her life on hold". The Minor Child had a fully capable parent at Antigua and so she could have moved on as she saw fit and left the Minor Child in the care of EF until the decision of the Court.

Secondly, it has been the practice of Counsel, where they would like the Court to consider assisting parties in having their judgment at the earliest, to write to the Registrar with a "gentle" reminder that the parties are awaiting the decision or the decision has become urgent. The Court often will reorganize its writing schedule where it can, to accommodate parties even at the cost of perhaps other parties whose decision was due first in time.

[150] The Court must put on record that it finds the unilateral action of MF to keep the Minor Child at Canada without the consent of EF or order of the Court to be extremely deceitful and untenable. MF's actions in this regard are now a matter of public and permanent record.

[4] See Cretney & Masson, Principles of Family Law, 5th ed. p. 581. Removal of a child from the United Kingdom by a person connected with the child without the appropriate consent is an offence under the Child Abduction Act 1984. A parent may also commit the Common Law offence of kidnapping if he takes the child without consent.

[151] Moving on, the Court however, is called upon to consider the best interests of the Minor Child with a clean slate – **Gordon v. Goertz**. In addition, the **Divorce Act** section 14 mandates that the Court shall not take into consideration the past conduct of a party unless the conduct is relevant to the ability of a party to act as a parent of the Minor Child. There is no issue about MF's ability to act as parent of the Minor Child. Therefore, the Court must not allow the actions of MF at August 2019, to colour or influence its considerations in determining what is in the best interests of the Minor Child.

[152] When parties separate, there will always be several ramifications to follow. Some of which are understood at the time of separation and some not apprehended or foreseen. The situation can be further complicated as the Parties move on with their lives by either relocating or adding a new partner or partners into the mix. And whereas here, each Party would like the Minor Child to remain with them for reasons stated and the Court must say at the outset that they were all valid reasons, the situation is further complicated by MF's desire to have the Minor Child relocate with her to Canada. It is either the Minor Child will have his primary residence at Canada or at Antigua. There is no middle ground here. In this instance, the Court is called upon to make a decision which will displease 1 of the 2 Parties or perhaps even both.

[153] The Court finds very useful the considerations laid out in both **Gordon v. Goertz** and **Re KAC v DJC** and will apply the considerations set out in them.

[154] The first consideration is who is the existing custodial parent? This is MF. What is the existing arrangement and relationship between the child and EF? There was ordered visitation after complaint that EF's access was being restricted to 1 day per week. MF in reply complained that even with agreed access, EF put his many hobbies and activities which would take him away from Antigua in priority to caring for the Minor Child.

[155] As to the consideration of maximizing contact with both MF and EF, section 14(10) of the **Divorce Act** mandates the Court to give effect to the principle that the Minor Child ought to have as much contact with both Parties as is consistent with the best interests of the Minor Child and to consider the willingness of the parent with custody to allow consistent contact with the Minor Child. The Court believes that both MF and EF love and care for the Minor Child and wish for an opportunity to nurture him in their own way. The Court sees no reason to deny either EF or MF the opportunity to have the maximum or near equal as far as possible opportunity to have access to the Minor Child. However, the reality is that EF lives at Antigua and MF is proposing to live at Canada and so either way the Court rules, there will be the challenge of a great distance for one or the other of the Parties. The day to day available physical contact for 1 of the Parties would not be possible. British Colombia, Canada is not exactly a distance that would favour a weekend trip. But in answer to this consideration, the Court has noted that both Parties have said that they would grant the other access.

[156] On consideration of MF's reasons for wishing to locate, the reasons all appear reasonable to the Court. It is important for the Minor Child to also have exposure to MF's family no matter that it might be a much smaller family; it is still her family and no less important as part of the Minor Child's family on his maternal side. Tipping the scale however, on the reasons the Court believes, is MF being given an opportunity to earn an income which would level the playing field in providing for the Minor

Child's needs and her own without having to resort to either EF or her family for financial support. EF indeed has stated that MF being a professional consultant he expects her to fully support herself.

[157] On the consideration of disruption of the Minor Child's custody, the Minor Child was in the control and care of MF. She was his primary caregiver.

[158] On the consideration of the disruption should there be a move to Canada by the Minor Child, to use the language of Ms. Peters, it will bring yet another change to the dynamics of the Minor Child's family. There will indeed be a loss of physical contact, daily or whenever necessary between EF and the Minor Child, loss of frequent contact with the extended paternal family, loss of friends with whom the Minor Child would have started school, and no doubt loss of the general community at Antigua of which he was a part from birth. To counter some of this loss, it is a fact that the Minor Child knows MF's family and so that may help with some adjustments which he necessarily has to make in his new situation.

[159] According to **KAC v. DJC** the first question for the Court is whether MF's application for an order allowing relocation is genuine and not motivated by a selfish desire to exclude EF. The Court accepts MF's evidence that she has a need to become financially independent, grow in her profession, and ensure that the Minor Child has more exposure to his maternal side of the family but at the same time that is it is not her intention to exclude EF from the Minor Child's life and she is prepared to give liberal access on visits by EF to Canada and to allow the Minor Child to return to Antigua for vacations. She states that EF can have access during all vacations.

[160] The second question is whether MF's application for relocation is realistically founded on practical proposals that are both well researched and investigated. It appears to the Court that while MF's family proximity and the comfort such offers are important, that a major consideration for her was her opportunity to become financially self-sufficient and grow in her profession. She provided proof of the level of income she earned at Antigua. Self-sufficiency and growth in her profession were 2 things absent for her at Antigua. The Court would agree that on a professional scale, a salary of $3500.00 appears low. On the matters of better education, costs of living, and medical care, the Court believes that it would need the assistance of an expert to make those comparisons. Financial security for MF and the Minor Child, tips the scale on the Court saying that this question is answered in the affirmative.

[161] The third question is what would be the impact on MF, as a single parent, of a refusal to allow to relocate. The Court having determined above that her application for relocation is realistic, it appears to the Court that a refusal to allow the opportunity to relocate would condemn MF to continuing to earn a relatively low salary as a professional environmental consultant and deny her the opportunity for growth in her profession and to become self-sufficient for the benefit of the Minor Child and herself.

[162] The fourth question is whether EF's opposition was motivated by genuine concern for the future on the Minor Child's welfare or was it driven by an ulterior motive. The Court believes that EF's opposition to relocation of the Minor Child is driven by a genuine concern for the Minor Child's future. EF emphasized the 'father-son' bond and relationship and alluded to having gone through

similar experience of his own parents separating. He spoke of the love and nurturing afforded to the Minor Child and how he was an equal participating parent in caring for the Minor Child before the Parties separated. He also spoke of the love and nurturing by his large extended family. MF suggested that EF's application of 23rd August 2019, and the matter set out in his affidavit suggest that he was seeking to exclude her from the Minor Child's life. The Court does not believe so. The Court believes that the nature of the application was triggered and was a direct response to MF's own unilateral decision to keep the Minor Child at Canada without the consent of EF or a Court order.

[163] The fifth question for the Court is what would be the extent of detriment to EF and his future relationship with the Minor Child were a relocation order made. On the evidence before the Court, the Court has no doubt that after having the Minor Child around him for nurturing and love, physically available minutes away, available for sleepovers and able to participate with him in chosen outdoor activities, that the impact of any absence of the Minor Child from EF's life would be equally as great on EF as it would be to MF. As to the future relationship between EF and the Minor Child should a relocation order be made, while admittedly the Minor Child will be several thousand miles away from Antigua, technology for communication, EF's flexible schedule would permit visits, and the Court's order on visitation and access could assist it believes in minimizing the impact for both EF and the Minor Child.

[164] The sixth question is to what extent would that detriment be offset by extension of the Minor Child's relationships with the maternal family and homeland? From all accounts, the maternal family are persons known to the Minor Child from vacation visits with them at Canada. A relocation order would provide an opportunity for the Minor Child to be with his maternal grandmother and MF's side of the family. It is equally important for him to know his maternal family.

[165] The Court believes that it is a well-known fact that studies have shown that the active participation of a father in a child's life averts many problems that a child may suffer and which include lack of family ties, social development, and failure to build stable relationships, attachment and education to name a few[5].

[166] In summing up the evidence on this issue, the Court is called upon to make a most difficult decision in circumstances where both parents clearly love the Minor Child very much. The Court will, bearing in mind that MF has put forward good and reasonable reasons for relocation and that she has always been the primary caregiver of the Minor Child, will make an order to allow relocation with care and control.

[167] The Court has no doubt that the physical interaction between the Minor Child and EF will be affected. However, the same would hold equally true were the Court to order care and control to EF.

[168] To offset some of the loss of proximity and physical contact that EF and the Minor Child will suffer, the Court will order that the Minor Child shall spend <u>each and every calendar school vacation</u> with EF. A search of the internet finds that the Canadian school year is comprised of on average 36 weeks per year with the rest of time, being 16 weeks (4 months) vacation time. The Court will also order

[5] See for example the 2019 study published in The Journal of Child and Psychiatry.

that EF shall have access to the Minor Child should he choose to visit the Minor Child at any time before a school vacation occurs.

[169] The Court also believes that with the Minor Child getting older, that with technology, that he will to some extent take control of his communication, be it daily or otherwise with EF.

Maintenance for the Minor Child

[170] It is a fact that the Minor Child is presently at Canada with MF. That necessarily means that the Minor Child's present expenses would be in Canadian dollars. This is a situation arising after the trial and before the Court could render its decision. The Court has no evidence as to Canadian costs and none were argued before the Court.

[171] MF has said that cost of living at Canada is less than it is at Antigua. That being so, the Court will leave the sum of maintenance to be paid for the Minor Child at $4000.00 inclusive of housing. The Court recalls that the additional $2000.00 which was paid per the interim order of 15th June 2017, recognized that MF and the Minor Child (i) were in separate housing and so there was an increase in expenditure, and (ii) due the limited income expectation of MF.

[172] The sum of $4000.00 per month is representative of approximately one-quarter of EF's salary, and so a reasonable chunk of EF's salary. EF has stated that he now has a second son and so he too would be equally entitled to be supported by EF in the same manner.

[173] The Court bears in mind that it is the responsibility of both Parties to contribute to the Minor Child's welfare and so it is anticipated, as put forward by MF, that she will be gainfully employed and able to contribute an equal sum for the maintenance of the Minor Child. .

[174] Under this assessment, the Court notes that it will order certain described periods where the Minor Child will be with EF. Should EF access the Minor Child for the duration of those periods (approximately 16 weeks) then there will be little costs to MF for the Minor Child and so there will in effect be some roll-over of maintenance to the following month/s that the Minor Child is with EF.

[175] In relation to school expenses, MF has said that the Minor Child will have access to "free" high quality education and healthcare. Such situation is of course a benefit to EF who would ordinarily have had to share the education and medical costs. Notwithstanding MF's statement, the Court nevertheless feels that there should be some buffer for any additional school expenses that arise outside of fees and books and so will order that EF make a contribution of EC$2000.00 per school term to cover participation in school events and any other extracurricular activities that the Minor Child may choose to participate in.

[176] Court's order:

1. That EF do within 120 days of the date of this order pay to MF a lump sum of $50,000.00 in full and final settlement of her claim for spousal support.

2. That there shall be joint custody of the Minor Child to EF and MF until he is 18 years of age.

3. That MF shall have daily care and control of the Minor Child with full access to the Minor Child by EF until he is 18 years of age.

4. MF is at liberty to remove the Minor Child from the State of Antigua and Barbuda and relocate with the Minor Child at Canada. At all times, MF must keep EF informed of the residential and school addresses of the Minor Child. Should MF decide to change residence or school of the Minor Child or both, then she must notify EF 30 days in advance of doing so (**Divorce Act 1997**, sections 14(5) and 14(7)). No Country other than Canada is permitted for the purposes of this relocation order. Should MF decide to relocate to any country other than Canada, then she must first seek the permission of the Court to do so.

5. EF shall have access to the Minor Child for the full duration of all school vacations per the yearly school calendar of whichever school he is attending up to the age of 18 years. EF has leave to remove the Minor Child from Canada during these school vacations and for the Minor Child to be with EF wherever he is for the duration that the Minor Child is with EF during school vacations. Should EF travel to Canada to visit with the Minor Child, then full access to see the Minor Child is to be granted.

6. EF shall pay periodic payments to MF for the benefit and maintenance of the Minor Child from the date of this order at the rate of EC$4000.00 per month and same is payable monthly until the Minor Child attains the age of 18 years or ceases tertiary education to the end of a first degree[6].

7. That EF shall pay $2000.00 at the beginning of each school term towards the Minor Child's participation in school events and activities, and any extracurricular school activities.

8. Each Party shall pay their own costs of these proceedings.

Rosalyn E. Wilkinson
High Court Judge

By the Court

[6] Same having been pursued immediately following high school and not at some other time.

Registrar