

IN THE ROYAL COURT OF JERSEY

(Matrimonial Causes Division)

9th January, 1989.

Before: Commissioner Ralph Vibert O.B.E.
Jurat P.G. Blampied
Jurat D.E. Le Boutillier

Between	M	Petitioner
And	W	Respondent

Advocate R.J. Michel for the Petitioner
The Respondent appeared in person

Background

The parties were married in October, 1977, and the marriage was dissolved by decree absolute in October, 1983.

There is one child of the marriage, C, born in March, 1979, who is the subject of these proceedings.

At the time of the divorce the ancillary matters were dealt with in a memorandum agreed by the parties and confirmed by the Court. That agreement provided, inter alia:-

1. That custody of the child would remain vested jointly in the parties and that the Petitioner would have care and control of the child.
2. That the Respondent would have access to the child during certain specified hours in school time and holiday time.

No reference was specifically made in the Memorandum as to the costs of maintenance and education of the child, but it appears to have been understood by the parties that the Petitioner, who is the beneficiary of a large trust fund, would be solely responsible, and she and the trust directly have in fact since paid all such expenses.

After the filing of the Petition for divorce, but before the decree nisi, the Petitioner obtained an injunction against the Respondent, restraining him, inter alia, from entering any part of the property 'AM', the home of the Petitioner, and this part of that injunction remains in force.

The Petitioner has since remarried, and continues to live at AM with her husband, L, with the child of the marriage, and with her two daughters, children of two previous marriages. We were glad to learn that it is a happy marriage, and that C has a very good relationship with L.

The Respondent remained in Jersey for two years after the dissolution of the marriage, and during that time regularly exercised his rights of access to C .

The Respondent has not remarried, but has formed a relationship with V , and together they left the Island in 1985, to reside in Portugal, where they remained until October, 1987, when they took up residence in London. There they now reside, with V's two daughters by a previous marriage.

Since the Respondent left Jersey, he has not exercised his right of access to C save on one occasion in September, 1985, when he was living in Portugal, but visited Jersey to see C . At the time of the hearing, he had not met C for over three years, though he had written and telephoned from time to time.

The issues before the Court have been raised by:-

1. A summons, issued by the Petitioner, seeking sole custody of C .
2. An Order of Justice, issued by the Petitioner seeking confirmation of a further, interim, injunction restraining the Respondent from molesting the Plaintiff or her family.
3. A summons, issued by the Respondent, seeking revised conditions of access, namely the right to have C stay with him from time to time.

Sole or joint custody

We have adopted in Jersey the practice of the English Courts in distinguishing between the custody of a child, and his care and control, and when care and control is granted to one party, joint custody is often given to both parents. There is however no rule in the matter. Article 25 of the Matrimonial Causes (Jersey) Law, 1949, empowers the Court to make such provision as it thinks just, and the interests of the child are the paramount consideration.

It was accepted on both sides that the only practical consequence of the distinction between the Petitioner having a) care and control with joint custody or b) care and control with sole custody, lay in the field of education. There may be other consequences in other cases, such as the religious denomination of the parents and child, but education was the only issue raised in this case.

C is now at a School in Jersey, and we heard evidence from the Headmaster and from a psychologist specialising in the choice of schools, who had twice been consulted by the Petitioner. It was hoped by both parents that he would succeed in obtaining entrance to a public school in England. The Headmaster stated that he was in touch with three such schools which were considered suitable. Decisions had to be made in good time. Schools had to be inspected, interviews held and correspondence exchanged. The Petitioner contended that to have to consult the Respondent on the choice of school added complications and delays which could be detrimental to the child's interests.

The Respondent did not wish to be deprived of his right of joint custody. He elicited the fact that both husbands of the Petitioner's previous marriages had the right of joint custody. He wished to take an active part in visiting the possible schools, and in deciding which was the best.

Mr. Christopher Hawkes, Divorce Court Welfare Officer, in his very helpful report, expresses the view that the joint custody order in this case "appears to have little merit". We agree. We consider, in the circumstances of this particular case, where the Petitioner has care and control, and is going to great lengths to obtain the best possible advice on the child's education, that to grant the Respondent joint custody creates a complicating and unhelpful factor.

X Sole custody is therefore granted to the Petitioner. The education of the child may not however be outside the ~~United Kingdom~~ without the written consent of the Respondent or the order of the Court. *2/10/88*

The Interim Injunction

An interim injunction was obtained by the Plaintiff on the 25th April, 1988, in the following terms:-

"THAT service of this Order of Justice upon the Respondent shall operate as an immediate injunction preventing him, otherwise than in exercising in Jersey the access to C as prescribed by the Memorandum of Agreement, from contacting, telephoning, approaching, or otherwise molesting the Petitioner, her present husband or C, until further Order;...."

The Petitioner was moved to seek this injunction following an incident which occurred on the 16th April, 1988. With her husband and C, the Petitioner had booked into a London Hotel, in order to take C to see one of her daughters who was ill in a London hospital. The Respondent learned that the family was there, and visited the hotel in the hope of seeing his son. He was denied the opportunity by L, and an argument ensued in the course of which L alleges that the Respondent butted him in the head. The Police were called, and a note was taken by one of the officers in which it is stated, presumably on the information of L, that the Respondent "tried to butt him". No action was taken.

The Respondent was at best over optimistic, and at worst foolish, to expect that the Petitioner would agree to him seeing C. And we can understand the Petitioner being alarmed at his unexpected arrival, though it seems to us that many persons, in like circumstances, would have agreed to a short meeting between father and son, as this was so easily and immediately possible.

What is clear is that this incident does not justify a non-molestation Order by the Court. The incident cannot be regarded as molestation. The injunction against the Respondent visiting AM is in force and will remain. The interim injunction of the 25th April, 1988, is rescinded.

We are however concerned by what we have heard regarding the telephone calls between the Respondent and C. The Petitioner stated that they caused C distress. The Respondent contends that this distress was caused by the reaction of the Plaintiff to the calls. This may explain but does not remove the distress. A recording of one such call was produced by the Respondent, and we have to say that it did not impress us. It can have done the boy no good at all. We see nothing but aggravation to the Plaintiff and her household and distress to the boy resulting from these calls and, as part of the revised conditions of access, we order that they cease. Written communication may continue.

Rights of access

The present arrangement entitles the Respondent to see the child in Jersey twice a week during school time and somewhat more frequently during holidays. This was designed for the situation which obtained when the Respondent was living in Jersey, and clearly needs revision now that he lives in London.

Having moved from Portugal to London in October, 1987, the Respondent issued a summons in January, 1988, seeking "staying access". This is opposed by the Plaintiff on the grounds

- a) that the long delay of three years during which the Respondent had not seen his son indicates that he is not genuine in his desire that access be re-established;
- b) that C has ceased to know his father, and should get to know him before there can be any question of staying with him; and
- c) that while the Respondent had care of the child during his regular period of access, he did not take proper care of him.

These complaints of inadequate care are specified in a report by Mrs. V.A. Mason, a Probation officer, who advised the Court on a previous similar application, made while the Respondent was living in Jersey. The report is dated the 24th January, 1985. The complaints were as follows:-

- "1. The father's 2 convictions for driving under the influence of drink.
2. An incident of the child returning from his father's home with an unexplained burn mark on his arm.
3. Knowledge that the child is taken to licenced premises during access, once having returned with cigarette burns in his hair.
4. An incident when the child was taken out of the jurisdiction (on a day trip to Guernsey, by air) without the prior knowledge or consent of the mother.
5. The fact that the father shares a house with other bachelors and the lifestyle and atmosphere there being unsuitable for a young child."

In relation to each of these, we note that:-

1. The Respondent was sentenced to three weeks' imprisonment for a second drunk in charge offence. Evidence given by the Respondent, V and Mr. C. Hawkes, present Divorce Court Welfare Officer, satisfies us that drinking no longer presents any bar to the Respondent having access to the child.
2. This was an accident which doubtless should not have happened, but which could happen to any child.
3. The licensed premises were a very respectable restaurant.
4. The Respondent took C for what he thought was a treat, in a private aircraft. He should not have done so, as this contravened the condition of access, which was limited to Jersey.

5. These conditions no longer apply.

Mrs. Mason found that the Petitioner was "adamantly adverse" to the Respondent having C stay overnight, because the Petitioner felt she could not trust him to exercise proper care, a fear based largely on the examples specified above. Mrs. Mason concluded the report with the following paragraph:-

"I would respectfully suggest that if the Court were to consider the father's application favourably, then staying access should be introduced cautiously at this stage; on an interim basis, one weekend during each main school holiday. I would further suggest that if it were granted, the first staying access should take place during the Easter school holiday, April 1985, during a weekend mutually agreed by the parents. It would be hoped that between now and that time, the father would exercise his day time access in such a way as to increase the confidence of the mother in his ability to be responsible in every aspect concerned with the child's welfare. Should the Court decide not to grant staying access at this time, I would suggest that the matter be reviewed after a period of 6 months of day time access i.e. July, 1985, with the above being applied for the same reasons."

The application at that time proceeded no further, partly because of this recommended delay, and because the Respondent left for Portugal.

The present Court Welfare Officer, Mr. Hawkes, has gone to a great deal of trouble in looking into the matter; he has visited the Plaintiff at home three times, and the Respondent in London, twice. He has prepared an excellent report, as we have said, and he has given evidence.

The following paragraph of his report appears to us to be of particular importance;

"6. W .

The Respondent is thirty three years old, he impresses as someone with a lively and determined personality who is both articulate and aware. For the past three years he has lived with V and her two daughters aged twenty and fifteen. W and V have known each other for fifteen years and now describe their relationship as being permanent. They live in a second storey flat which is large, spacious, and well appointed. It contains all of the basic amenities and would more than adequately serve as a place for C to stay. I was impressed by the relationship between W and V which appeared to be caring, concerned and in which a high degree of open communication exists. I do not feel that either party was more dominant than the other and that theirs is an equal relationship. Nothing about the home or environment into which C would be taken, causes me any concern.

There is no doubt that W could have behaved differently over the last three years and in so doing, may have prevented the necessity of today's hearing. However, this does not detract from the genuine enthusiasm with which he is now seeking staying access to his son. I feel that his motivation is to do with concern for C and of course also, for his own right as a father.

It is unfortunate that this apparent genuine concern for C, which no doubt could be beneficial to his emotional wellbeing, should be undermined and sullied by the other factors observed during this enquiry."

The other factors to which he goes on to refer are the degree of acrimony which has undoubtedly existed between the parties; and what he describes as the Respondent's "over zealous attempts to contact C without the approval of M". It appears to us that the latter factor has largely caused the former. He also refers to the hotel incident to which we have referred and the importance of which, in our view, has been exaggerated by the Petitioner.

Mr. Hawkes concludes his report, on staying access, with the following paragraph:-

"9.

From this enquiry and assessment there is no obvious practical or material reason why should not visit his natural father in London. There is however, ample evidence to support the view that for such access to occur would not, at the present time, be in the child's best interest. The state of the relationship between mother and father is such as to guarantee that the child would be continuously placed in an impossible emotional position of being divided between parents. Whilst this state of affairs exists there is no conceivable way that staying access could be a complete and happy experience for the child. This is not to say that W would be in any way inadequate in his care or concern of C. Indeed I expect C would enjoy being in his father's company. However the transition between parents' homes would be far too difficult to expect any child to cope with.

It can only be hoped, in the best interests of C that both of these parents recognise the importance of being seen by their child as responsible and mature adults who are able to work in harmony out of their mutual concern for their child. Only when this is achieved will satisfying and satisfactory access occur."

We can understand the feeling of Mr. Hawkes that, for a visit by the child to be completely satisfactory, harmonious goodwill should exist on both sides. The Petitioner however has made it clear to us that she considers that, as her marriage to the Respondent is at an end, and she has a new happy home for C, it would be better for the child if he ceased to have anything to do with his father. So long as she feels this, it will not be possible to obtain the harmonious agreement sought by the Probation Officers, but we cannot accept the feelings of the Petitioner as the conclusive factor.

We consider that the desire of the Respondent to have access to C reflects a natural and genuine wish of a father to be with his son. And we do not consider that the opposition of the Petitioner is well grounded. The relationship of a father is important to a son, as well as to the father, and we consider that it is in the best interests of the child that he be allowed to stay with the Respondent, this now being the best and only practical form of access.

We do however agree with the contention of the Petitioner, supported as it was by the Headmaster, that C should first have the opportunity of getting to know his father. A step has already been taken in that direction, in that arrangements were made for C to meet his father on the day following the hearing.

Accordingly we now order:-

1. On Saturday, ~~1st~~^{19th} January, 1989, and on Saturday, ~~1st~~^{18th} February, 1989, the Respondent will have access to C, in Jersey, from noon to 5.30 p.m. The Petitioner will cause C to be taken to the Respondent, and taken from him, at such place as the Respondent will in writing indicate to the Petitioner
- 2(a) During the school holidays, commencing at Easter 1989, the Respondent will have access to C at his home in London or wherever else within the British Isles the Respondent may prefer.
- (b) This right of access will be for the following periods:-
 - during the Easter and Christmas holidays in each year for a weekend consisting of four nights; and
 - during the summer holidays for eight nights.
- (c) The period of four nights or eight nights within each holiday period will be selected by the Petitioner, and written notice of not less than one month will be given to the Respondent indicating the period chosen.
- (d) The Petitioner will also inform the Respondent in good time of the airflight on which the child will be arriving in London. He will be met by the Respondent at the airport or at such place in Central London as the Petitioner may designate. The Respondent will ensure that C is safely in the care of the aircraft authorities at the airport for his return flight unless the Petitioner has made other arrangements for his return.
- (e) The Petitioner may notify the Respondent in writing of the cost of the return airflight of C but not of anyone accompanying C, should the Petitioner consider this necessary, and the Respondent will reimburse these costs to the Petitioner as soon as notified.

We have considered it desirable to spell out this Order in rather more detail than would normally be found, because we hope thereby to avoid the necessity of discussion which could lead to undesirable argument. We hope and expect that the parties, as reasonable people, and in their love for the child, will do their best to ensure that these arrangements are harmoniously carried out so that C may gain the greatest possible benefit from them. And in saying what we have about the importance of the father/son relationship, we do not wish to suggest that the position of L in relation to C, is otherwise than of the highest value and significance. Indeed we look to L as a major source of affection and guidance for this boy.

Should it be agreed by the parties at any time that different arrangements are desirable, it would, of course, be a simple matter to obtain a revised Order by consent.

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