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ROYAL COURT

(Matrimonial Causes Division) 104A.

13th July, 1990

Before: Mr. V. A. Tomes, Deputy Bailiff
Jurat D. E. Le Boutillier
Jurat E. W. Herbert

Between D Petitioner

And W Respondent

Advocate R. J. Michel for Petitioner
Respondent in person

This was a Summons brought by the respondent seeking a variation of the Order of this Court of the 21st August, 1989, which was itself a variation of the Order of this Court of the 9th January, 1989.

Background

The parties were married on the 11th October, 1977, and the marriage was dissolved by decree absolute of the 31st October, 1983.

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

At the time of the divorce the ancillary matters were dealt with in a memorandum of agreement made between 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.

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 of , the home of the petitioner, and this part of that injunction remains in force.

A further, but interim injunction was obtained by the petitioner 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..."

On the 17th August, 1988, the petitioner issued a summons, returnable on the 28th and 29th November, 1988, requiring the respondent to show cause why the Memorandum of Agreement ratified by the Court on the 16th September, 1983, should not be varied so that the respondent's access to the child should be limited only to school holidays and that such access be only exercised in Jersey; also that the custody of the child be vested in the petitioner.

The respondent also issued a Summons, returnable on the same dates, actioning the petitioner to show cause why the respondent should not be granted regular access including staying access to the child upon such occasions and for such periods as the Court should consider just; also why the Court should not order the petitioner to allow the child to correspond and communicate with the respondent on a regular basis and to allow the child to receive telephone calls and correspondence from the respondent to the child.

The two summonses were indeed heard on the 28th November, 1988, before Commissioner Ralph Vibert, O.B.E., and two Jurats; judgment was reserved and was delivered on the 9th January, 1989, when the Court ordered that:-

(1) The interim injunction dated 25th April, 1988, restraining the respondent from molesting the petitioner or her family be rescinded;

(2) The child should, until further Order of the Court, remain in the sole legal custody and care and control of the petitioner, but the education of the child should not be outside the British Isles without the written consent of the respondent or by order of the Court;

(3) All telephonic communication between the respondent and the child should cease forthwith;

(4) (Arrangements for immediate access on two occasions)

(5) (a) During the school holidays, commencing at Easter, 1989, the respondent would have access to the child at his home in London or wherever else within the British Isles the respondent might prefer.

(b) This right of access would 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 would be selected by the petitioner and written notice of not less than one month would be given to the respondent indicating the period chosen;

(d) The petitioner would also inform the respondent in good time of the airflight on which the child would be arriving in London. He would be met by the respondent at the airport or at such place in Central London as the petitioner might designate. The respondent would ensure that the child would be safely in the care of the aircraft authorities at the airport for his return flight unless the petitioner had made other arrangements for his return; and

(e) The petitioner might notify the respondent in writing of the cost of the return airflight of the child but not of anyone accompanying him,

should the petitioner consider this necessary, and the respondent would reimburse these costs to the petitioner as soon as notified;

The whole until further order.

On the 28th July, 1989, the petitioner issued a further summons, returnable on the 15th August, 1989, actioning the respondent to show cause why the Order of the 9th January, 1989, should not be varied to delete the provision granting the respondent staying access to the child at his home in London or elsewhere in the British Isles; to provide that the periods of access should take place in Jersey and be selected in accordance with the provisions of sub-paragraph 5(c) of the Order; and to delete sub-paragraphs 5(d) and (e) of the Order. The application was supported by an affidavit sworn by the petitioner.

The latter summons was heard on the 21st August, 1989, before the learned Bailiff and two Jurats, when the Court ordered that:-

1. The provisions of paragraph 5 of the Order of the 9th January, 1989, granting the respondent staying access to the child at his home in London or elsewhere in the British Isles, was deleted;

2. The periods of access were to take place in Jersey and were to be selected in accordance with the provisions of sub-paragraph 5(c) of the Order of the 9th January, 1989;

3. Sub-paragraphs 5(d) and (e) of the Order of the 9th January, 1989, were deleted;

(4. dealt with access in August/September 1989 only).

5. Before access was exercised the respondent was to notify the Greffier and the petitioner's advocate and/or the petitioner of the address in Jersey where access would take place;

6. The respondent was to be at liberty to take the child to any of the other Channel Islands during such access.

The present application

By Summons dated the 11th June, 1990, returnable yesterday, the Respondent seeks variations of the Order of the 21st August, 1989, as follows:-

1. That the provisions of paragraph 5 of the Order of the 9th January, 1989, granting the respondent staying access to the child at his home in London or elsewhere in the British Isles be reinstated;

2. That staying access should alternate between the respondent and the petitioner with regard to the festive days so that the child should enjoy Christmas and Easter alternately with each parent.

3. That flexible access be granted and defined by the Court with regard to half-term periods and when amicably agreed by the respondent and petitioner when the respondent is in the Island covering a Saturday or Sunday.

4. That further and better communication be granted between the respondent and the child and that the injunction with regard to telecommication be rescinded.

5. That the respondent be fully informed with school reports, progress and suggestions with regard to the child's education. And

6. That the petitioner pay the respondent's costs of and incidental to the present application.

Evidence and Decision

We were most impressed by the evidence given by Mr. Christopher Hawkes, a Probation Officer of the Jersey Probation Service who is the Divorce Court Welfare Officer. Mr. Hawkes had prepared a report, dated the 5th May, 1988, which had been of considerable value to the Court at the hearing on the 28th November, 1988, and was cited in the judgment of the 9th January, 1989.

He had also prepared a report, dated 10th July, 1990, to be read in conjunction with the substantive report of the 5th May, 1988, to assist this Court, as indeed it has done. It appears that Mr. Hawkes was not involved in the hearing of the 21st August, 1989, which we think is unfortunate, although we appreciate that there was a degree of urgency at that time. In addition to his reports Mr. Hawkes spent some time with the child in the late afternoon of the 11th July, 1990, preceding this hearing. Had it not been for the excellent report and evidence of Mr. Hawkes the Court might well have decided to see the child in Chambers itself. The Court prefers the procedure adopted by Mr. Hawkes.

Mr. Hawkes, who saw the child for 45 minutes alone, on the tennis court at home, away from the main house, left us in no doubt as to the child's wish to see his father; he did not much care where, as long as he could see him and as frequently as possible. We are sorry, but fully appreciate, that the child is experiencing a fundamental emotional conflict in that he loves both his parents, does not wish to act in such a way as to upset his mother and yet is torn by his natural desire, as a growing boy, to enjoy a regular and increasing relationship with his father. It is not to the credit of either parent that the child finds himself in this situation of emotional conflict, which could so easily have been avoided.

The Court fully appreciates the factors which motivated the court on the 21st August, 1989, to restrict access. The circumstances had changed from those which existed at the November, 1988, hearing. The respondent had been evasive. The relationship with Mrs. U appeared to have altered. There had been the death of the respondent's father and of the child's half-sister, L, and there was evidence that the child should remain in Jersey to get through the grieving process. There was a lack of stability in the proposed arrangements.

However, circumstances have changed again; Mr. Hawkes was left with a very strong impression that this case is moving into a new chapter; the child is eleven years of age and is reaching a stage in his development where his own identity is beginning to emerge and, in our opinion, he should not feel prevented from regular contact with his father.

The Court very much welcomes and admires Mr. Hawkes' offer to mediate between the parents to ensure that any precise order which this Court may make will be adhered to. We intend to make a precise and detailed access arrangement to form, as Mr. Hawkes put it, a contractual basis between the parties and the Court. Mr. Hawkes has kindly said that he will be involved following access periods as well as before - before, to ensure that arrangements are adhered to and after in order that the child may express directly to Mr. Hawkes and, hopefully, to his mother, the many unvoiced feelings he has about the whole situation. The Court is convinced that in so doing, it will be acting in the best interests of the child which is, as everybody agrees, the paramount consideration. As Mr. Hawkes put it, the access arrangements should be consistent, reliable and predictable.

Mr. F , the child's new Headmaster, but who has known and taught him over a period of two years, could see no reason at this stage to alter the existing access arrangements whereby staying access took place in Jersey and would worry about an eleven year old being unstabilized by unfamiliar environments. He agreed that the arrangements must be consistent, predictable and reliable, but also said that access should be in an ordinary, family type home. We are not persuaded that the access should remain restricted to Jersey - but Mr. F was not aware that there had been one successful period of access in London - nor that access need to be in an ordinary, family type home. For example, school trips are successful albeit that the pupils are in an unfamiliar environment because the teachers provide the consistency and reliability that is required. The parents rely on the integrity of the teachers to provide that link.

We have re-read, very carefully, the judgment delivered by Commissioner Vibert on the 9th January, 1989. We are not persuaded that the main basis of the Court's decision was the availability of a stable home base in London although, obviously, it was a factor. It was important that nothing about the home or environment into which the child would be taken caused Mr. Hawkes any concern. The overriding consideration, in this Court's opinion, is to be found in the following passage of the judgment:-

"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."

This Court agrees with that statement and we too consider that it is in the best interests of the child that he be allowed to stay with his father, whether in Jersey, London, or elsewhere, according to what is most practical at any particular time. The periods of access comprise four nights and eight nights. Those periods are of the character of "short breaks" or, in the longest instance, a short holiday, and we are not persuaded that a stable home base rather than, for example, a hotel, is an essential element. The stability will be provided by the respondent and we have no reason to believe, and no evidence has been adduced to suggest, that he will act irresponsibly in his care of the child during periods of access.

The problems in this case arise not from the access but from the parents themselves and the unfortunate acrimony which continues to exist between them. As Mr. Hawkes put it, this was a power dispute between parents; the parents on both sides go to extraordinary lengths to be one up on the other. The respondent has had very little power and his last-minute information, apparent obstructiveness, and insistence on communicating with the petitioner direct, have been attempts to exercise some power. Mr. Hawkes, as mediator, will try to remove the power struggle. These were, as he put it, "warring parents".

There was very little in the evidence of either of the parties to assist the Court, except that it confirmed to us the accuracy of Mr. Hawkes' observations and the wisdom of the course he proposed.

Commissioner Vibert, having delivered the Order of the Court on the 9th January, 1989, went on to say that "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". It seems that even that amount of detail has proved insufficient

and we shall try to include even greater detail, in the knowledge always that Mr. Hawkes will be there available as mediator to cover the unresolved areas that, inevitably, will remain. We go further to say that, if necessary, Mr. Hawkes may return to the Court for directions, albeit there is no Summons by either party.

Accordingly, we now order:-

1. That the provisions of paragraph 5 of the Order of the 9th January, 1989, granting the respondent staying access to the child at his home in London or wherever else within the British Isles the respondent may prefer are reinstated, subject to the following additional provisos:

(i) sub-paragraphs (d) and (e) will not apply whenever the respondent elects to exercise access within the Channel Islands, in which event the child will be delivered to and collected from such address in Jersey as shall be notifed by the respondent to the petitioner and to Mr. C. Hawkes, Divorce Court Welfare Officer.

(ii) in sub-paragraph (c) the words "and to Mr. C. Hawkes, Divorce Court Welfare Officer" will be inserted after the word "respondent" in the third line. (This will require the petitioner to notify Mr. Hawkes of the selected dates, as well as the respondent).

(iii) reimbursement of the cost of the airflight referred to in sub-paragraph (e) by the respondent to the petitioner shall be effected within seven days of demand, whether before or after the access period has commenced, and failure to do so will not nullify the access arrangement but will constitute a breach of this Order to be notified to the Court for punishment as contempt.

(iv) in every case where access is to be enjoyed, the respondent will notify both the petitioner and Mr. C. Hawkes, Divorce Court Welfare Officer, of the address or addresses at which he and the child will stay overnight during each night of the access period, at least seven days before the commencement of the access period.

2. That in addition to the access during school holidays referred to in paragraph 5 of the Order of the 9th January, 1989, the respondent will have staying access to the child on alternate festive periods, i.e. Christmas and Easter - because the child was with the petitioner throughout Easter, 1990, and, indeed, Christmas, 1989, the respondent will have staying access from 2.30 p.m. on Christmas Eve, 1990, until 2.30 p.m. on the day following Boxing Day, 1990, the arrangements for delivery and collection to be decided by Mr. Hawkes after consultation with both parents. In 1991, the respondent will have similar access from 2.30 p.m. on Good Friday until 2.30 p.m. on Easter Monday, subject to like arrangements. In 1992, the respondent will have similar access from 2.30 p.m. on Christmas Eve until 2.30 p.m. on the day following Boxing Day; and so on in subsequent years.

3. That on one weekend in every four week period commencing on Saturday, 21st July, 1990, the respondent will have daytime access to the child from 11.30 a.m. to 5.30 p.m. on either the Saturday or the Sunday; he will notify Mr. Hawkes at least one week in advance of his wish to take up such access; Mr. Hawkes will have the power to refuse if the commitments of the child in school, sporting or social activities make the exercise of access difficult or impossible, in which event the respondent will be entitled to nominate an alternative day within the same four week period. Any failure on the part of the respondent to give the required notice will lead to a forfeiture of his right of access for the four week period in question.

4. On the 9th January, 1989, the Court ordered that all telephonic communication between the respondent and the child should cease forthwith; sadly, we remain of the view that, having regard to the acrimony between the parties, reluctantly we should prevent the respondent from telephoning the child at will. However, we see no reason why the child should not telephone the respondent from time to time between periods of access in order to maintain contact with his father. Of course, this will require the utmost co-operation on the part of the respondent who has been elusive in the past and who must provide telephone numbers and times when he will be available. We order, therefore, that the child should be entitled to telephone his father on one occcasion in each week on a day and time to be agreed by Mr. Hawkes who will be the sole judge of reasonable notice of availability of the respondent and who will notify the child of the day and time when he might telephone. This will retain regular contact between Mr. Hawkes and the child which we consider to

be beneficial to the child.

5. The Court agrees that the respondent should be kept fully informed as to the child's progress at School and should receive copies of school reports. We order that the respondent will keep the school informed of an address at which he may be contacted from time to time by the school, if the Headmaster thinks fit, and to which school reports may be posted. In the event that the respondent should fail to keep the school informed of an up-to-date address, he will forfeit his right to progress or school reports during the period of his failure. In all cases, the contact should be direct between school and respondent and neither the petitioner nor her legal advisers should be involved. Because the petitioner has sole custody of the child, she alone will decide the child's scholastic future, subject to the proviso, contained in the judgment of the 9th January, 1989, that the education of the child may not be outside the British Isles without the written consent of the respondent or order of the Court.

6. The issue of costs is reserved for further submissions after delivery of this judgment.

In its admirable judgment of the 9th January, 1989, the Court expressed the hope and expectation that the parties, as reasonable people, and in their love for the child, would do their best to ensure that the arrangements then made were harmoniously carried out so that the child might gain the greatest possible benefit from them.

We reiterate that wish and expectation. Some years ago, Mrs. V. A. Mason, the predecessor in this matter of Mr. Hawkes, advised that the parties should bury their differences. In our view this is more important than ever, as the child develops towards a greater degree of maturation. Of necessity, there will have to be changes in the arrangements that we have spelt out, in particular from September, 1991, when the child will become a boarder at School and again from September, 1992, when the child will become a boarder at a school, hopefully a Public School, in the United Kingdom. It is our hope that the relationship between the parties, aided as they will be by Mr. Hawkes, will so improve, that refinements to our Order to suit the boarding conditions in September, 1991, can be agreed without further recourse to the Court except for a consent order. 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. At worst, it may be necessary

before September, 1991, and, again before September, 1992, for the Court to review the arrangements on a Summons by one or other of the parties.

No authorities.