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Case No: FD13P02390

Neutral Citation Number: [2014] EWHC 575 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/02/2014

Before:

MRS JUSTICE THEIS DBE

Between:

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- and -
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Applicant

Respondent

Mr Edward Devereux (instructed by **Dawson Cornwall**) for the **Applicant**
Ms Claire Renton (instructed by **Just Family Law**) for the **Respondent**

Hearing dates: 25th February 2014

Judgment

Mrs Justice Theis DBE :

1. This matter concerns an application by the applicant father dated 18 December 2013, seeking the summary return to Bermuda of the parties' only child, L born in March 2011, now age 2 years 11 months. The application is made pursuant to the Inherent Jurisdiction following the respondent mother's retention of L in this jurisdiction in October 2013, after an agreed holiday. The mother objects to L's return.
2. Both parties have filed extensive written evidence, which I have read, together with detailed skeleton arguments from both Mr Devereux on behalf of the father and Ms Renton on behalf of the mother.
3. It was unfortunate that, despite the case having been listed for a number of weeks, there was not only a late flurry of documents on the morning of the hearing, but also the need to refer the court to authorities that, although mentioned in the skeleton argument filed by Mr Devereux, had not been filed with the court as paragraph 4.2 Practice Direction 27A requires. As a consequence this judgment was delayed overnight.

Background

4. The father was born in Oxford in 1963 he is 50 years old. He has been in Bermuda for a number of years, since at least 1996. He has worked or studied there since. He was made redundant in 1999, undertook some general DIY work and over the last four years has been studying to re-qualify as an actuary. He has now completed his exams and is looking for a job but, to date, has not had any success.
5. The mother was born in 1971 and is now 42 years old. She is currently living in South of England with her parents and L. She is employed by a Bermudian Insurance Company called R R as an executive assistant. Although based in Bermuda they have offices in London where she has from time to time come and worked for short periods of time. She has been employed with them since 2010. She has been signed off work since the end of September 2013, first by the GP in Bermuda and more recently by the GP here. The medical certificate initially records the basis as being severe stress and more recently depression. She is signed off until 25 April 2014.
6. In a letter from her employers dated 30 October 2013 they said she was eligible to receive Short Term Disability which ended on 11 January 2014, since then she has been on unpaid leave, which she is entitled to for up to three months until 11 April 2014. Whilst on unpaid leave she is eligible to continue to receive her current private health insurance benefits.
7. More recently her employers have offered her a part time position here, three days a week, based at their offices in London at a salary of £33,000. The mother wishes to take this up, as she sees that as the only way she can maintain her earning position. She had requested part time work before in Bermuda in 2012 but that had been turned down, although she has not asked recently. She suffers from a painful arthritic condition that is exacerbated by her desk related job.
8. The parties first started a relationship in about 1996 but separated 2 years later.

9. They revived their relationship in 2008 and married on in November 2009 in Bermuda. L was born in Bermuda in March 2011.
10. The pattern had been that the mother and L would visit her family in this jurisdiction at least once a year for between 4 - 6 weeks as well as her parents visiting them in Bermuda. The father's mother lives in England and his stepmother has a home in England and Bermuda. According to the mother the father last came to England in December 2009.
11. It appears the parties relationship was in some difficulties in 2012/2013 with the mother seeking professional support from a psychologist Dr L. She also was seen by her GP Dr W, who describes seeing the mother in September 2013 with what she described as a '*severe reactive depression*'.
12. The father says the mother told him in August 2013 that she needed to go to London for about two weeks in October 2013 for her job and she intended to take an additional two weeks holiday to see her family. She wanted to take L with her. The father says he became suspicious about whether the mother was planning to return and he challenged her about this. The mother produced return air tickets showing they planned to return on 23rd October. The father agreed L could go.
13. The mother and L left Bermuda on 23 September 2013. It appears the mother sought a letter from her GP in Bermuda to the family GP in England on 14 September 2013 giving details regarding her medical and psychological condition. The letter was for the GP and '*other non medical persons*'.
14. In early October solicitors acting for the mother wrote to various doctors seeking medical reports in respect of the mother.
15. On 21 October the mother emailed the father and said that she was unwell and had been signed off sick by her GP. She stated that she and L would not be returning to Bermuda on 23 October and she would update the father as things progress. The father responded and they exchanged emails, the father was seeking a date when the mother and L would return otherwise he said he would need to explore his legal options. No such date was forthcoming.
16. On 14 November the father's Bermudian lawyers wrote to the mother asking her to provide a definite return date.
17. The father issued divorce proceedings in Bermuda by application dated 29 November 2013, although it appears for reasons that are not clear these proceedings were not served on the mother until 28 January 2014, some two months later.
18. The mother responded to the letter from the father's Bermudian lawyers on 3 December 2013 making it clear she would not return L to Bermuda.
19. The father issued proceedings here under the inherent jurisdiction on 18 December 2013 and the matter came before Mostyn J without notice. The mother was served with these proceedings on 27 December 2013. The letter accompanying the application from the father's English lawyers stated he was '*committed to the marriage*', although he had in fact issued divorce proceedings 3 weeks earlier.

20. The father issued custody proceedings in Bermuda on 29 January 2014 and that application is listed for hearing on 3 April 2014. Again the father has delayed informing the mother about this application, the first she became aware of it was when she saw his statement in these proceedings dated 12 February. In his short affidavit filed in support of this application in Bermuda the father seeks the full time care of L, but gives no practical details as to how he would manage that. It remains unclear how long the hearing is listed for on 3 April.

The Law

21. There is no real issue between the parties about the relevant legal principles, they are found in *In Re J (A Child)(Custody Rights: Jurisdiction)[2005]UKHL40*. Prior to that case there were two competing strands of authority as to how these cases should be approached. In particular whether the Hague Convention principles should be applied in cases where the Inherent Jurisdiction was invoked and the return was sought to a non Convention Country. The uncertainty was put to rest in *Re J* where Baroness Hale set out the approach to be adopted, which is neatly summarised in Mr Devereux's skeleton argument as follows:

- (1) Any court which is determining any question with respect to the upbringing of a child has a statutory duty to regard the welfare of the child as its paramount consideration. In non convention cases the court must act in accordance with the welfare needs of the particular child.
- (2) There is no basis for the principles of the Hague Convention being extended to countries which are not parties to that convention.
- (3) A power did remain in accordance with the welfare principle to order the immediate return of a child to a foreign jurisdiction without conducting a full investigation of the merits.
- (4) A trial judge had to make a choice, having regard to the welfare principle, between a summary return or a more detailed consideration of the merits of the parties' dispute.
- (5) In making that choice the focus must be on the individual child and the particular circumstances of the case.
- (6) It was wrong to say that there should be a 'strong presumption' that it is 'highly likely' to be in the best interests of a child subject to an unauthorised removal or retention to be returned to his country of habitual residence so that any issues which remain can be decided there. The most one could say was 'that the judge may find it convenient to start from the proposition that it is likely to be better for a child to return to his home country for any disputes about his future to be decided there. A case against his doing so has to be made. But the weight to be given to that proposition will vary enormously from case to case. What may be best for him in the long run may be different from what will be best for him in the short run. It should not be assumed...that allowing a child to remain here while his future is decided inevitably means he will remain here for ever'.

- (7) A number of factors were relevant, amongst all the circumstances of the case, in deciding whether to order a summary return or not
 - (a) The degree of connection of the child with each country – what is his home country?
 - (b) The length of time he has spent in each country
 - (c) Depending on the facts of the case, any differences in the legal system of this country and the other country, including whether the other country had an absence of a relocation jurisdiction
 - (d) Impact of any decision on the child’s primary carer
- (8) Any decision about whether to order a summary return or not should be taken swiftly.

22. I have also been referred by Mr Devereux to two other cases; *Re U (Abduction: Nigeria) [2011] 1 FLR 354* and the recent Supreme Court decision in *KL (a Child) [2013] UKSC 75* (in particular paragraphs 28 – 38 where Baroness Hale considered the Inherent Jurisdiction). The Supreme Court considered the ‘*crucial factor*’ in that case was that the child concerned was a Texan child who was being denied a proper opportunity to develop a relationship with his father and with his country of birth. This was against a background where the mother had been unenthusiastic about contact between the child and his father. The court concluded that the best chance the child had of developing a proper relationship with both his parents, and with the country whose nationality he holds, was for the Texas court to consider where his best interests lie in the long term. There were no issues on the facts of that case that the child would suffer any significant harm by returning to Texas on the basis proposed by the father. As has been made clear in *Re J*, these cases are fact sensitive.

Submissions

23. The father submits this is a paradigm case where the court should order the return of the child. The mother took unilateral action in the context of a relationship breakdown, with consequential emotional difficulties and until her unilateral action the centre of everyone’s life had been Bermuda which, he submits, is the correct and proper forum for the issues of divorce and welfare concerning L to be determined.

24. The father relies on the following factors:

- (1) Bermuda has always been L’s home and is his country of habitual residence. He was born there and apart from relatively brief visits to see the maternal family here has not been anywhere else.
- (2) Bermuda has been the parties’ home during their marriage; they were married in Bermuda and have spent all their married life living there.
- (3) There was an element of pre-planning by the mother prior to leaving Bermuda on 23 September 2013 which supported the father’s concerns that she did not intend to return. For example, in the letter from her GP in Bermuda dated 14 September 2013 written to the family GP here it refers to the letter being written to the GP and for the mother ‘*to pass on to other non-medical personnel as she sees fit*’. Also the

mother had clearly instructed lawyers soon after she arrived here as they were writing to Dr R on 1 October 2013, some 7 days after her arrival here.

- (4) Whilst Mr Devereux accepted on behalf of the father the diagnosis of the mother with depression, he referred to it as being '*low level*' to be expected in the context of a relationship breakdown. He submits the mother was receiving counselling prior to September 2013 and had access to GP support in Bermuda as well. The health care system in Bermuda remains available to the mother, as it was prior to her departure to the UK. She will remain in receipt of health insurance through her employers, although it is accepted that will cease if she is unable to return to work prior to 11 April 2014. The father has produced details of alternative health insurance. That would not only need to be funded but appears on the limited information the court has to be somewhat inferior to what the family currently benefit from.
- (5) The legal system in Bermuda effectively mirrors the English legal system in relation to divorce, issues of custody and relocation. It is based on the welfare of the child. The mother does not appear to dispute the jurisdiction of Bermuda to determine welfare matters regarding L as in her acknowledgment of service to the divorce petition she takes no issue as to jurisdiction. The first hearing regarding welfare is fixed for 3 April. During this hearing Ms Renton, on behalf of the mother stated that the mother has issued divorce proceedings here based on the mothers domicile and was ready to issue Children Act proceedings. According to Ms Renton the mother has instructed Bermudian lawyers to apply for a stay of the divorce proceedings there.
- (6) The father does not seek to separate L from his mother pending any inter parties hearing in Bermuda. He has offered undertakings to secure that position.
- (7) There is an issue as to the extent of the care provided by the father for L when the parties were together in Bermuda. The father submits he played a significant part as the mother was working full time, although it is accepted L has had a full time carer or been in nursery since the age of 4 months.
- (8) The father is being denied a relationship with L by him being retained here. If L remains here, it is submitted the father would be severely prejudiced not only in his relationship with L, which was contrary to L's welfare, but also in his ability to be able to effectively participate in proceedings here.
- (9) The father will provide the necessary undertakings to ensure there is a 'soft landing' for the mother in Bermuda, which includes depositing a sum of money prior to their return of \$5,200. The father submits the mother has considerable sums of money available to her. Her accounts disclose between early November and mid January she has made payments to her parents totalling £32,500, £22,000 of which Ms Renton said, on instructions from the mother, was to repay a loan of £50,000 made by them in 2007 to enable the mother to purchase a property in South of England prior to the marriage. It is submitted that this is very much a 'soft loan', which there was no need to repay and, together with the assets she has, the mother has more than adequate funds to contribute to hers and L's living costs should she return to Bermuda.

25. Ms Renton, on behalf of the mother, submits when the mother came to England in September she was suffering from depression and stress. She had consulted her GP in Bermuda and on arrival here consulted her family GP here. The mother was signed off work due to '*severe stress due to social circumstances*'. She is signed off as being unfit to work until 25 April 2014. The mother does not feel able to return to work in Bermuda. She considers she could work part time here with the family support that is available; her current employers have offered her part time work 3 days pw for £33,000 pa. It is submitted she cannot cope with more than part time work for the foreseeable future.
26. The father has not supported his child or the mother for the last 2 years, during which time they lived on the mother's savings and earnings as an administrator. There are minimal state benefits in Bermuda and rents are extremely high, she estimates in a list of expenses produced by her that she will need \$3,000 per month for suitable accommodation. The mother is certified unfit for work and is unlikely to be able to return to full time work in the foreseeable future. If the mother returns to Bermuda it is submitted her savings will be eroded at the rate of around £5000 per month, ignoring legal costs for a relocation application. The mother estimates such an application will cost in the region of \$80,000 in legal fees and will take about 9 months to determine, although it is accepted that an application for temporary removal to this jurisdiction could be determined sooner.
27. It is submitted the father seeks an order for L to go back to where the mother has no home, no job, no money, or family support for herself or for L. Such a position is likely to significantly increase the stress she will be under which will adversely impact on L. In England she is able to parent in a relatively stress free environment which is plainly to L's benefit. The father is voluntarily absenting himself from his child's life, the mother has done all she can to encourage the father to come over to visit L and has supported and encouraged Skype contact between L and his father every other day.

Discussion and Decision

28. As has been made clear *In Re J* the court must be guided by what is in L's best interest. Which order meets his best interests? That does not preclude the court from ordering an immediate return back to Bermuda without conducting a full investigation of the merits. However, in considering what to do the courts focus must be on the individual circumstances of the child and the particular circumstances of the case; these cases are by their nature fact specific. Is it in L's best interests to remain in this country so that the dispute between his parents is decided here or to return to Bermuda so the dispute can be decided there?
29. The points in favour of L remaining here is the fact that he is familiar with the environment here, he is attending nursery and, according to the mother, is thriving in the relatively stress free environment where the mother has full family support. Evidence as to his current home and situation here and what would be available in Bermuda would be available to a Cafcass reporter, although the assistance of a report from Children and Families Across Borders may be required. There are no significant witnesses of fact that would not be available to give evidence here, if required. Although the father has not visited here recently, there is nothing stopping him coming and both his mother and step-mother live here.

30. The factors that point towards L returning to Bermuda are he was born in Bermuda. He has lived there since then with his parents, who married there prior to his birth. Evidence as to his circumstances there and here would be readily available to the relevant authorities and the court there, as they would be here. If L was in Bermuda he would be able to have the opportunity to see his father and maintain his relationship with him.
31. I have found this case particularly difficult and finely balanced when considering what is in L's best interests. There are powerful welfare considerations on each side.
32. I have considered very carefully whether I should order a return of L to Bermuda and have reached the conclusion that, in the particular circumstances of this case, such an order would be in L's best interests. In reaching my that decision I have taken into account the following matters:
- (1) A matter that has weighed heavily in my balancing exercise is the adverse impact that not ordering L's return to Bermuda will have on his relationship with his father and his father's ability to be able to fairly participate in any proceedings in this jurisdiction. L was born and brought up in Bermuda. The mother's unilateral actions in retaining L here have denied him a proper opportunity to develop a relationship with his father, following the breakdown of the marriage. It is right the mother has encouraged Skype contact between L and his father and has sought to encourage the father to come over and see L here. The father has not come over. Mr Devereux submitted these were tactical moves by the mother. However, he did not submit the father could not come over and see L or participate in proceedings here although he did say to do so would be highly prejudicial to the father. I have to weigh carefully in the balance that if L remains here there will be an inability for L to be able to begin to develop a relationship with his father in the same way he would if they were all living in Bermuda, although the mother makes it clear that in the long and short term she wants to encourage future contact between the father and L both here and in Bermuda.
 - (2) Whilst I fully recognise the evidence has not been tested, it is apparent from the information I have read that the mother is in a fragile emotional state. She has been signed off work since the end of September, initially for severe stress and more recently for depression. The father accepts the mother is depressed but states that the medical support she had prior to leaving Bermuda is still available and she will be returning to a different situation, as she will not be living with the father. The mother states that her best chance of recovery, in the short and long term, is to remain in this jurisdiction, with the support of her family and hopefully return to part time work with her current employers. This is supported in part by the letters from the GP. The most recent one dated 31 January 2014 states the GP has had 5 consultations with her since 9 October 2013 where he has provided support and medication (anti depressants and sleeping tablets). Despite that medication and support he describes her as experiencing fluctuating levels of anxiety and depression characterised by insomnia, rumination on the possible outcomes of various forms of action and bouts of tearfulness and she has found the stress of dealing with ongoing proceedings difficult to manage. The concern expressed about the impact on her mental health of a return to Bermuda is prefaced on the basis that she would be entering back into a situation from which she fled where she was isolated. Mr Devereux submits the court should place limited weight on these letters

from the GP as they are untested, were not sought on joint instructions, are tainted by being reliant on self assertion, inconsistent in content as to whether the mother has depression, paint a somewhat dramatic picture, relies upon a report from Dr R that the court has not seen and only gives a possibility of a risk of deterioration if the mother returns to Bermuda. Whilst I, of course, factor in that the GPs opinion has not been tested in oral evidence it is clear on the face of the written material I have that a return to Bermuda, even if the mother is living separately from the father, is likely to be stressful for her. She has limited or no social support in Bermuda, her living situation will be very uncertain and there is a risk her psychological position may deteriorate. This could have an adverse effect on L's welfare as she is in reality his main carer. Whilst I recognise there is an issue between the parties as to the extent to which they had the care of L in the past, it is not disputed that even though the father has not been working L was with a full time carer or in nursery from the age of four months old and has not been in the sole care of the father overnight or for any extended periods of time. It is clearly in L's interests that his mother makes a full recovery as soon as possible and on the information I have that is more likely to take place if she lives here with the family and other support that is immediately available to her. It is also most likely to be the environment where she will be able to return to work and be financially independent in the long term.

- (3) Another factor is if the mother returned to Bermuda with L it would be to a relatively precarious financial situation. The father does not work and does not have any significant assets, he accepts as much in the document attached to his own statement where he describes his earnings and savings as nil/negligible. The mother is unlikely to be in a fit state to work if she returns to Bermuda and there is a real question mark as to whether any suitable part time work would be available for her. There was an issue regarding her immigration status and her ability to work in Bermuda following the filing of the divorce petition but that issue is now clear that if she was medically able to she would be able to work. The father submits that he has offered sufficient undertakings to tide the position over until there can be a hearing in the courts in Bermuda, although there is no information as to when a hearing could take place to deal with finances. He has offered to pay \$500 per week towards suitable accommodation, to pay L's nursery fees, \$150 per week support for L and to cover the cost of any medical insurance. During the hearing he gave instructions to Mr Devereux that he would be willing to deposit \$5,200 as a condition of L's return, which was the equivalent of 2 months of the payments he was proposing up front, to give additional security. The father relies on the mother's financial resources which consist of savings of £54,000 here (£40,000 of which she says are earmarked for L), \$8,000 in Bermuda and the £22,000 she paid to her parents as being, in reality, still available. This is in addition to rental income she could obtain from her property here. Whilst these resources would be available to help provide for the immediate financial needs they need to be factored in with the other considerations and that they are very likely to rapidly run out if the parties are unable to reach agreement, or there is any significant delay in court proceedings. The mother estimates her monthly expenses if she returns to Bermuda to be in the region of £5,000 per month, ignoring any legal costs for contested proceedings in Bermuda, which she estimates are likely to cost in the region of \$80,000.

- (4) The mother would be without the support of her wider family if she returned to Bermuda. However, it appears from the papers that her parents, in particular her mother, has been able to regularly spend time with her in Bermuda to provide support. There is nothing to suggest that support would not be available in the future until the parties have either reached agreement or the court in Bermuda has made an order. In addition, there is no evidence to suggest the medical and psychological support that was available to the mother would not be available again.
- (5) I have carefully considered the very powerful points made by the father that there was an element of planning in this move. This is supported by the letters written by the GP on 14 September 2014 and the mother's solicitor in early October.
33. Drawing these considerations together I have reached the conclusion it is in L's best interests that he should return with his mother to Bermuda so that welfare issues between the parties regarding L can be decided there. The factors that tip the welfare considerations in favour of such a course are the adverse impact on L's relationship with his father if he does not return to Bermuda; the mother will be returning to a situation that is different from the one she left in that the parties will be living separately, which is likely to reduce the stress a return will cause on her; she would be able to take up the medical and other support that was available to her before and is known to her; her parents are likely to be able to come and support her during this period; L is a child who was born and brought up in Bermuda. To date Bermuda has been his main home. The courts in Bermuda are best placed to be able to determine the welfare issues between the parties and a hearing is listed in a relatively short period of time. I accept the mother's decision to stay here did have an element of pre-planning, but that needs to be looked at in the context of her psychological state at the time. Her GP described her as being severely depressed when she saw her in September and she appears to have been at a very low point at that time.
34. The undertakings offered by the father at paragraph 64 of his statement should form part of the order and should include division of the basic items of furniture in their current rented property to assist the mother and L in rented accommodation, which is likely to be unfurnished. In relation to the issue of financial support a condition of the mother's return is that the father should make an immediate payment of \$7,500 which would secure the financial arrangements he proposes for about 2 months. I have increased the sum he proposed by just over \$2,000 as I consider on the information I have that a realistic rental for suitable accommodation for the mother and L is in the region of \$3,000 per month, to ensure the property is in a suitable area and has sufficient space for the maternal grandmother to come and stay if she is able to. There will need to be provision for an ongoing weekly sum to be paid by the father after 2 months until either other arrangements are agreed in writing by the parties or an order is made in the Bermudan courts in relation to financial support. There will need to be an undertaking to cover the position regarding payment by the father of medical insurance (if required) and nursery fees.
35. Although I have not been given an estimate of the legal costs expended by each party so far, they are very likely to be more than either party can reasonably afford. If the litigation continues to be contested the position will only get worse.
36. I hope that now this application is determined the parties will be able to step back, hopefully with the assistance of their respective legal teams and use their energy and

resources to reach an agreement about the future care of L. Continuing uncertainty is detrimental to his welfare and is very likely to delay the mother's ability to fully recover and be in a position to return to work. What L needs is for his parents to reach agreement about his future care which realistically recognises the respective roles his parents have played and will play in his life following the breakdown of their relationship. I sincerely hope they will endeavour to do this for L's sake and take up any suggestions of assistance to improve their communication with each other regarding L.

37. If the parties are unable to reach agreement I hope the courts in Bermuda will take such steps as are necessary to ensure there is no delay in dealing with any outstanding welfare issues in relation to L, in particular any application by the mother to return to this jurisdiction with L. The statements filed in these proceedings should be available in any welfare proceedings in Bermuda.
38. I will hear submissions as to the time frame for the return.