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IN THE HIGH COURT OF JUSTICE No. YO12P00430

FAMILY DIVISION

Royal Courts of Justice

Friday, 7th December 2012

Before:

MR. JUSTICE HEDLEY

B E T W E E N :

S Applicant

- and -

T Respondent

*Transcribed by **BEVERLEY F. NUNNERY & CO***

Official Shorthand Writers and Tape Transcribers

Quality House, Quality Court, Chancery Lane, London WC2A 1HP

Tel: 020 7831 5627 Fax: 020 7831 7737

Info@beverleynunnery.com

MR. S. BICKLER QC (Instructed by Simpson Millar Solicitors) appeared on behalf of the Applicant.

MISS J. JOHNSTON (Instructed by Dawson Cornwell) appeared on behalf of the Respondent.

J U D G M E N T

(As approved by the Judge)

MR. JUSTICE HEDLEY:

1. These are, first, applications by the mother for a residence order and specifically for permission to relocate permanently to **Russia**; and, secondly, consolidated applications by the father for a prohibited steps order and, as is it now put, for an order bringing about a shared care arrangement. These proceedings, because of the mother's application, were transferred to the High Court on 31st May 2012.
2. The father is thirty-seven and the mother is twenty-six. The father is from England and the mother is from **Russia**. They met on holiday in Portugal in June 2010. They began a relationship, which, in due course, became sexual. The mother visited the United Kingdom and on three occasions, the father visited **Russia**.

The relationship resulted in an unintended, but welcomed, pregnancy. The parents decided that they would have the baby in the United Kingdom. The parents agreed that they would marry, although there was no formal engagement as such and the mother lawfully entered the country on a fiancée visa. The parties were married in August

2011. A spousal visa was issued in November 2011 which is valid until 2014 unless earlier cancelled, for example, by the making of a decree in divorce proceedings.

3. The child with whom I am concerned, M, was born [in] December 2011, so that he is just one. The relationship between the parties was exceedingly short lived in that they separated in May 2012 and, in the event, [M] has remained with his mother in the former matrimonial home whilst the father has returned to live at his mother's home.

The father has regular visiting contact and once fortnightly staying contact. Those contact arrangements are partly as a result of agreement between the parents and partly as a result of the orders made by Her Honour Judge Finnerty on 13th July 2012.

These arrangements were confirmed and unvaried by order of Mr. Justice Moylan on 24th October 2012 and hence the present position of the applicant. Mr. Justice Moylan's order was made on the basis that the present position of the applicant was going to be very short term because significant changes one way or the other would occur.

4. Transnational parenting is an increasing phenomenon in the experience of family jurisprudence in England and Wales. It is important to remember that it is brought about by the choice of the parties concerns. It is necessary to recognise that transnational parenting brings a very high price to either or both in the event of a relationship breaking up. It is a fact, certainly in my experience, that the impact upon breaking up is devastating upon one parent or the other and sometimes both. But a system of private law in which responsibility is very firmly placed with parents - and the court interferes really only at their request - depends upon the court assuming that parties that go into transnational parenting agreements go in with their eyes wide open, fully alert to the consequences of it going wrong. Of course that is a somewhat artificial assumption, but it is one necessary to be made if transnational parenting is to be accommodated within the philosophy of parts

I and II of the Children Act 1989. Accordingly, the undoubted grave impact on parents will really only weigh with the court if and insofar as that impact has its effect on the child with whom the court is concerned.

5. The parties have helpfully drawn my attention to the three key cases in the Court of Appeal which now govern this area of the law. They are: *Payne v. Payne* [2001]

1 FLR 1052, *K v. K* [2012] FR 134 and *F* [2012] EWCA Civ.1364. In my judgment, these cases establish the following propositions. First, that the child's welfare remains the court's paramount consideration as prescribed by section 1(1) of the Children Act 1989. Secondly, in discharging the obligation to make the child's welfare paramount, the court is to have regard to the checklist applicable in section (1)(3) of that Act. Thirdly, in furtherance to the views of Lady Justice Black in *K* and Lord Justice Mumby in *F*, the court should not categorise cases in accordance with the concepts of primary or shared care, but should use the facts of the case and the answers arrived at in consideration of the checklist to describe the arrangements for care on the ground as they have been, as they are at date of the hearing and as the parties intended them to remain had it not been for the question of relocation.

6. However, the cases also establish that there are certain issues which are specific to an application for permission to relocate permanently, an application which has its own distinctive and far reaching consequences. Amongst those issues are principally these:

(1) To scrutinise the proposals of the applicant bearing in mind that in a going home case that may be a less arduous undertaking than if it is an entirely new venture.

(2) To scrutinise the motives of the applicant in making the application and, in particular, considering whether or not a significant motivation is to exclude the other parent from the life of the child.

(3) To scrutinise the motives of the left behind parent who objects, in particular to check that the reasons for objection are truly child centred and are not simply part of an adult battle about rights.

(4) The court must scrutinise the impact of relocation upon the left behind parent and his or her extended family whilst of course recognising that relocation may bring benefits in terms of widening the network of extended family by including the proposed country of return.

(5) The court should scrutinise the impact on the applicant of the order being refused or on the respondent of the order being granted, but, for the reasons I have given, this impact will be relevant generally only insofar as it impacts on the child.

This formulation was essentially uncontroversial within the context of this particular case.

The Parents

7. I am satisfied that, if one met both these parents outside the context of this litigation, one would be left with the clear and justifiable impression that they were both perfectly decent and concerned and straightforward people. But, of course, within the context of this dispute where each has so much to lose, it is inevitable that perceptions have been clouded and behaviour adversely affected when issues relating to [M] have arisen. I have no doubt that the father has been consistently demanding and assertive in relation to his position in relation to [M] and I am equally satisfied that the mother has from time to time been unduly awkward and over-reactive to issues that have presented themselves. But those observations, which are made only because the court has an obligation to be straight with the parents, are significantly qualified by two other matters: first, the orders and agreements made in this case have in essence held; and, secondly, there is not

a shred of evidence that [M] has in any way been harmed by these adult disputes any more than was inevitable in the essential decision to separate.

The Present Arrangements

8. [M] lives essentially with his mother in the former matrimonial home and has regular, if time restricted, contact with the father in addition to an occasion of overnight staying contact on a fortnightly basis. It is, as both parties recognise, inevitable that those arrangements will change. The father's plan is for the arrangement to become, in effect, a shared care arrangement in which the child spends four nights a week with the mother and three nights a week in the parental home - it being recognised of course that the paternal grandmother will have

a significant stake in care if and insofar as the father working. The parties recognise that there will be a need probably to sell the present accommodation and re-house or, alternatively, there will be a relocation to **Russia** as the mother proposes. Whatever approach is adopted, change and fairly substantial change beckons, so far as this child is concerned.

9. The mother's proposals amount to a going home arrangement. She proposes to relocate in a township outside Moscow in a flat in a tower block, the flat being one in which she has some equitable proprietary interest. It is her proposal to return to work. She holds a degree in logistics. She is effectively fluent in the English language. She has produced job offers and I have no reason to doubt the general nature of the employment which might be available to her. It follows from that that the extended maternal family would naturally have a role in the care of [M] in those circumstances. It is intended that he should attend local schools and enjoy local facilities.

10. It is the mother's proposal that [M] should be brought up bilingual, English and Russian. She makes contact proposals on the basis that she will come to England four times a year for nine or ten days at a time - that is to say effectively two weekends and the week in between - and she proposes that on four occasions the father may fly to Moscow and arrangements be made for contact there, and of course that there should be such further or other contact as the parties may agree

as [M] grows older and everyone's position changes.

11. The father has a number of specific objections to those proposals. He has objections to the physical surroundings of the property in which [M] will live and, in particular, concern about the common areas and the areas immediately around. Knowing what one does of tower blocks, even controlled entry tower blocks,

I strongly suspect there is something in those concerns. Secondly, given the involvement of the extended family, he has serious doubts as to whether there is

a serious commitment to [M] becoming bilingual since the parents speak little or no English. There is a dispute between the parties as to the quality of the applicant's sister's English, but there is no doubt that for [M] to develop English to the extent of being bilingual he will be fundamentally dependent on a combination of the mother, the school and the contact arrangements. Thirdly, the father has anxieties about what he perceived to be the hostility to foreigners in the township in which the mother is living. I suspect that perception is entirely justified. I do not think it possible for me to express any views about the objective basis of it, but that he should have such anxieties accords (I think) with other experiences. But the father goes further and says he has a general anxiety about his safety anywhere in **Russia** and even in **Moscow**. That, I think, is based essentially on the ability of the mother and the maternal family to activate the authorities against the father in circumstances which would leave him in very much the weaker position.

12. It is, I think, important to consider the motives of the parents and I am entirely satisfied that both parents are essentially genuine in their motivations. I am satisfied that the mother's fundamental motivation is to go home and I am satisfied that the

father's fundamental motivation is child centred with [M]'s interests as his chief consideration.

13. There is no doubt that the mother is currently isolated and unsupported, even if she has not yet exercised great effort to address those matters. I am satisfied that she feels frustrated in her aspirations for career, lifestyle and the like insofar as she is required to remain in that condition in this country. I have no doubt that her desire to return to **Russia** and there to care for [M] is wholly genuine. Of course, a return to **Russia** has the great attractive side effect from her point of view of reducing dramatically the stress of the current conflict being conducted on what is for her foreign soil. That said, although (as I have indicated) I think she has exhibited some rigidity and some tendency to overreact, I do not believe that there is any fundamental intention on her part to shut the father out from a relationship with [M] nor do I believe that she has any intention to exclude [M] from exposure to English and English culture. One of the factors that came across in the mother's evidence (and I have every reason to believe it is right) is that the mastery of English is both a strong suit in her career prospects and offers to [M] signal advantages for himself as he grows up in **Russia** and seeks (if he does seek to do so) to make his future there. By the same token, as I indicated, I am satisfied that the father's objections are entirely genuine and have to be given the full weight that they can bear. He has of course been through this all before with an older son, [B], who now lives in Australia with his mother. Whilst the father may not have handled the clash of personalities between himself and the mother terribly well, nevertheless, I have considerable sympathy with the objections that he has raised.

I believe them to have substance in relation to the general question of physical conditions and localised hostility. If I think him over-anxious in relation to the maternal family's commitment to English and his general anxiety about safety in **Russia**, it is only too easy to see why he should entertain both sets of anxieties.

Relocation

14. I have no doubt that the father will be devastated if permission to relocate is given; it will have significant impact on his contact with [M] and his capacity to develop the fullest possible relationship with him and that is so even if I regard, as I think

I do, his present proposals in the event of leave being refused as being both premature and somewhat optimistic. I also (as I have indicated) understand his anxiety about the mother's response to conflict in circumstances where she would be, as it were, in control. On the other hand, I have to recognise that this child is very young and I have to recognise the increasing numbers of children who, as a result of decisions made by their parents, have to accommodate one or in some cases both parents living overseas.

15. If permission is refused the mother, likewise, will be devastated. She will be left isolated and unsupported. I think she will probably do better than the gloomy prognostications advanced on her behalf by counsel. But she will find life much more difficult and much less satisfying here than she would so find in **Russia**.

On balance, from an immigration point of view, I would be surprised were she not permitted to stay in this country if she pursues the necessary routes to achieve that end. But, as I said, the question of impact upon the parties of making a refusal of an order is relevant really insofar as it has an impact on the child. It will have an impact on him because it will not be to his benefit to have either or both of his parents nursing long term disappointments. On the other hand, it has to be said to the credit of both the father and the mother, they have thus far successfully shielded [M] from the fallout of the intense dispute that has been raging between them.

16. I am satisfied that the adverse impact on [M] will be more acute in the short to medium term if his mother is refused permission to relocate, but in the medium to longer term the impact will be greater in respect of his relationship with the father in permission to relocate is given. It is recognised on both sides by the proposals that each has advanced to the court that [M] will be more dependent on care within the extended family whatever proposal the court finally adapts.

The Law

17. I have to set out the law and the matters that need to be taken specifically into account in a permanent relocation. I have to check against section 1(3) of the Act to see if there are any other matters that the court needs to take into account before reaching any conclusions. [M] is too young for wishes and feelings to have any relevance. His physical, emotional and educational needs are exactly the same as those for any other child of twelve months, save that in his case I accept that if he goes to **Russia** then becoming bilingual is an essential feature of his educational needs. I have to have regard to the impact on him of a change of circumstances. There is highly likely to be a change of circumstances whatever order the court makes, but, of course, that will be more profound if the court grants rather than refuses permission. It is

important to remember that, in relation to a child at the age of [M], the identity and proximity of a carer is very much more important than the place in which that care is offered. So one recognises that in saying that subparagraph (d) is also accommodated.

18. I am satisfied that the court ought to take seriously the question of risk of suffering harm arising out of a continuation of the dispute which has an impact on contact, but of course in considering that, one then has to consider the capacity of the parents to avert that risk of harm. I recognise immediately that in this case, as in so many others, no guarantees can be given and risks of error have to be recognised. The mother might become much more rigid or intransigent than the assessment presently made. The father may have less strength of purpose or less access to earnings than the present assessment suggests. But the reality, in my judgment,

as one considers the totality of this case, is that the character of both parties is stronger and more mature than might immediately have been discerned simply from listening to them giving evidence about the particular disputes between them.

19. Secondly, I am satisfied that the mother truly understands that [M]'s welfare stands to gain significantly by the component of English speaking and awareness and exposure to English culture, insofar as he chooses in the fullness of time to make his life in **Russia**. I am also impressed by the father's evidence about his dealings with [B] and, of course, one notices that he has an impressive work record.

20. I trust that I have now set out all the factors that I have to take into account and the legal framework within which that is to be done. It is clear that all those factors and those findings that I have made unsurprisingly do not all point in the same direction. The choices that these parents have made will undoubtedly bring some disadvantage to [M] whatever the court decides. I am concerned to minimise that, but I believe that that is also a concern shared by both parents and will guide their actions in the future.

21. I have given this case my closest and most anxious attention and have reserved overnight further to reflect on these matters, which are of course of momentous importance to the parents. In the end I have concluded that I should give the mother permission to relocate to **Russia** with [M] and my essential reasons for doing so are as follows: First, [M] was going to have his home essentially with the mother, although time with the father and his family would undoubtedly increase and become an increasingly significant part of [M]'s life. Secondly, when parties enter into transnational parenting then they are taken to be doing so with their eyes wide open and with an understanding that if their relationship broke down then going home was going to be a major issue. Moreover, if breakdown takes place whilst the child is very young then the child is likely to follow the one with whom he spends most of his time. If, of course (and this points the other way), the breakdown takes place much later in the child's life then it is far less likely that a child's position is going to be disrupted; a matter illustrated by my decision in

Re Y to which reference has been made in the argument. The pain of separation is part of the price of a choice to enter into this kind of relationship and there is simply nothing anybody can do to spare parties the price of that pain in the event that the relationship goes wrong. The fact of the matter is that the mother's plans are no more and no less than would have been obvious to the parties had they considered at the time that they agreed to be parents what would happen if there was an early breakdown in their relationship.

22. Although I accept that the mother will live in less desirable surroundings than perhaps she does at present, [M]'s education will be attended to, she has genuine reasons and motivation to advance his capacity to understand and speak English.

I am satisfied that, provided (and this is a big provision) the arrangements for direct and indirect contact are adhered to, [M] will have the opportunity of developing a proper relationship with his father and one which he will share with many other separated children.

23. Although I recognise that my assessments are not free from the risk of error, on balance I find that the mother is motivated to sustain contact; partly because she has done so thus far, though she has had reasons for doing so, partly because I am satisfied she does believe that [M] needs a proper paternal relationship and partly because I believe she sees advantages to [M] in maintaining his contact with all things English. Again, although this assessment too is not free from the risk of error, I find that on balance the father will strongly exert himself to maintain his relationship with [M]; that he will in due course visit **Russia**, even if he does not feel able to visit the area in which [M] actually lives; and that the father and mother will between them take steps to ensure that practical arrangements for such contact are put in place.

24. All things taken into account, in my judgment, the welfare of [M] will be promoted by this move (although as I have indicated it is not without its price or its detriments). The father is rightly concerned about enforcement problems based on the expert evidence that I have received in this case from the Russian lawyer and

I recognise that, if the mother adopted a stance of complete intransigence, it would at present be difficult to obtain truly effective enforcement. However, things are changing in that policies in **Russia** will lead to acceptance of the Hague Conventions of 1980 and 1996 and may, in due course, result in their admission to the Brussels II Revised jurisdictions. Be that as it may, essentially, I find that the mother is in fact unlikely to adopt such a stance whilst, nevertheless, appreciating the father's present anxieties as to whether that is unduly optimistic.

25. Where next? There are two matters to be dealt with. The first is the order which permits relocation. The mother makes two specific offers within the context of this order: the first is to obtain an order in **Russia** and the second is to charge her equitable interest, in effect as a bond, to support her performance of her obligations in contact. I am entirely satisfied that it would be in the interests of [M] and of benefit to the father for an order to be obtained in **Russia**. The expert evidence indicates that this may be obtained based on an agreement between the parties.

A draft schedule to an order has been advanced and is broadly accepted.

26. I note in passing for what it is worth that [M] will always be able to spend Christmas with both parents because the mother follows the Eastern Orthodox tradition in relation to Christmas which places it at an entirely different date by some two weeks to that which prevails in this country. Likewise, there will often not be coincidence between Orthodox and Western dates for Easter and it may be that accommodation can be found there which enables him to experience the same festival in two very different ways. His birthday will not shift and the parents,

I hope, will make an effort to ensure that, at the very least, he spends alternate birthdays with each parent and likewise with Easter if in fact there is coincidence.

27. The father has promised his best endeavours in making the agreement necessary to obtain the Russian order and to supporting the application for [M] to acquire

a Russian passport, though it will no doubt be in his interests to retain his UK passport as well. Those two helpful indications by the father should be recorded in any recital to the order. In my judgment, the obtaining of the Russian order should, at this stage, be a condition of permission to relocate. I propose to say that that permission can take effect on 31st January 2013 or the obtaining of the Russian order, whichever is the later.

28. In those circumstances, of course, there has to be liberty to apply to me in the event of any unforeseen difficulties arising and, if any such application were made, it is to be treated for technical reasons as a part-heard aspect of this hearing.

29. The mother is to be encouraged to provide the draft deed of which she spoke in respect of her equitable interest in her property and, if domestic law so permits, it is to be included in the Russian order.

Contact

30. Dealing with the position in relation to contact between now and any departure,

I am satisfied that that requires a significant increase in contact more radical than would normally be permitted because the circumstances are unusual and the time is short. In my judgment, between now and departure, [M] should stay with his father every weekend from 6pm on Friday until 5pm on Sunday with effect from the weekend after this (because time is very short this weekend). For this weekend, however, he should stay with his father from 10am on Saturday until 5pm on Sunday. Moreover, on one occasion before the mother departs with [M], the father is to have four consecutive nights staying contact from 4pm on day one to 4pm on day five. The parties are at liberty to make any further or other arrangements about contact and, if they agree, they may vary any of the conditions that I have suggested. My position is purely a default arrangement; it is not an attempt to usurp the parents' parental responsibility, which I encourage them to use insofar as they can reach agreement about matters.

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