In The Supreme Court of Bermuda

DIVORCE JURISDCITION

2016 No: 6

BETWEEN:

T.A.

Petitioner

and

D.A.

Respondent

JUDGMENT

Application for Shared Care and Control; Overnight Access; Telephone Access; Joint Decisions on extra-curricular activities, school clubs and summer camps; Mediation

Date of Hearing: 25, 26, 27 and 28 February; 1, 6, 8, 12 and 13 March 2019
Date of Ruling: 12 July 2019

Georgia Marshall of Marshall Diel & Myers Limited appeared for the Petitioner
Katie Richards of Chancery Legal Ltd appeared for the Respondent

JUDGMENT of Acting Puisne Alexandra Wheatley

Introductory

1. The Petitioner and Respondent were married on 25 December 2004. The parties separated in October 2015. Decree Nisi was pronounced on 26 May 2016 and made

absolute on 31 January 2017. There are two children of the family aged 7 and 5 years old respectively at the time of the hearing.

2. The Respondent/Father made an application on 20 December 2017 ("the Application") whereby he is seeking, *inter alia*, shared care and control of the children, an expedited hearing for overnight access and the parties be required to agree extra-curricular activities prior to the children being enrolled. During the hearing it became evident the Respondent also desired to have input into the camps the children are enrolled in for each of the school holidays.

3. On the first date of the hearing, the Respondent confirmed whilst his application is seeking shared care and control, at this time he is only seeking for the Court to implement the recommendations of the Court Social Worker, Mr Sijan Caisey, which are set out in the Social Inquiry Report dated 1 October 2018 ("the SIR"). The SIR supports the Respondent desire for increased access which includes a further increase in access after a three-month period.

The facts

4. The Respondent's Application was rigorously contested by the Petitioner which resulted in the hearing which was initially set down for a period of 3 days to be heard over a period of 9 days, the Petitioner giving evidence over 3 of these days.

5. The Petitioner presented several concerns in her evidence; both in her Affidavit sworn on 28 March 2018 ("the Petitioner's Affidavit") and in her *viva voce* evidence given during Examination in Chief as well as Cross-Examination. A great deal of the concerns the Petitioner raised in her *viva voce* evidence neither had been raised at all nor in such detail in either her Affidavit evidence or in correspondence between Counsel (or in correspondence from the Petitioner herself prior to her representation by Counsel and/or her previous Counsel). This is concerning and inconceivable given the severity of some of the allegations being made against the Respondent in her *viva voce* evidence. I will address each of the Petitioner's concerns in turn; however, I will do so in brevity due to much of the evidence being unhelpful due to its historical nature and, in my view, is inconsequential to the issue of the wellbeing of the children.

6. Overall, the Petitioner does not support the Social Worker's recommendations for overnight access being given to the Respondent. Mrs Marshall's overall submission for the Petitioner is that given the age of the children and the Petitioner being the primary care-giver, overnight access would be detrimental to their wellbeing at this time as well as taking into consideration the concerns raised. The Petitioner was also not agreeable to the Respondent participating in the decision making as it relates to the selection of the children's holiday camps and extra-curricular activities.

7. The Respondent relied on his Affidavit sworn on 5 February 2018 ("the Respondent's Affidavit") as well as provided brief updating in his Examination in his Chief. Mrs Marshall also rigorously cross-examined the Respondent.

Petitioner's particulars in contesting overnight access

Respondent's Wife

8. Throughout the hearing much emphasis was placed on the way in which the Respondent allegedly introduced his new wife, the children's step-mother ("the Wife"), to the children. The Petitioner also raised allegations of illegality of the Petitioner's marriage to his wife due to the Decree Absolute not being granted. Firstly, it should be noted the Respondent has been married for over two years and has been co-habiting with the Petitioner at least on a part-time basis since in or around November 2016. Whilst I agree the Respondent may have approached the way of introducing the children as well as the Petitioner to his new wife differently, this cannot be changed. In any event, it is not for the Court to dictate to parties how such issues are dealt with. The Petitioner also raised concern with the children calling the Wife by her first name, averring this is disrespectful.

9. Furthermore, Mrs Marshall attempted to use the alleged "*dishonesty*" surrounding the Respondent's marriage to his Wife as to the veracity of his evidence. The Respondent was clear in his evidence that his marriage to his Wife as well as these other issues raised by the Respondent were irrelevant to the application. He further stated in his cross-examination one reason he was not as open with the Petitioner regarding his marriage and did not make attempts to discuss the matter with the Petitioner was due to their tumultuous and acrimonious relationship.

Care of Respondent's older child and delegation of care of children

10. The Petitioner raised concerns about how the Respondent parented his older child who is now 25 years old and was 15 years old at the time the Petitioner refers to. She made references to the Respondent allegedly "*delegating*" his older child's care to others. The Petitioner also criticized how he dealt with a traumatic event the older child experienced. The Petitioner reiterated the relevance of this evidence was that it showed a pattern of behavior of "*delegating*" the care of his children to others as the Petitioner stated she cared for the older child on many occasions throughout their marriage. In the Petitioner's Affidavit at paragraph 60 she addressed this notably historical accusations:

> "*60. The Respondent has evidenced irresponsible decision-making in respect of his older daughter and his nieces and nephews which have placed them in vulnerable situations, and I fear the same for the two children of the family. I repeatedly expressed this concern to the Respondent during the marriage, who was unreceptive to my concern….*"

11. The Petitioner also gave extensive evidence of her being the primary caregiver for the children throughout the marriage and how the Respondent participated minimally. She alleged a great deal of this was due to his work commitments which required him to travel extensively as well as his work commitments on island. Paragraph 45 of the Petitioner's Affidavit declared as follows:

"*45. In addition, I am concerned with the Respondent's travel schedule and the impact his frequent travel may have on his access to the children, particularly as it relates to overnight access and to third parties having the care of the children…*"

12. The general theme was that the Respondent was not an overly involved parent during the marriage and at paragraphs 34 and 35 of the Petitioner's Affidavit she stated as follows:

"*34. I am saddened to state that the Respondent has been an uninvolved and detached parent from very early on…*"

…

35. The Respondent also has a history of being uninvolved in the day to day needs of the children….and in missing their activities (e.g. parent teacher conferences including absences on 10 September 2015, 1 February 2016…..and failing to assist the children with their school work (for example, on 9 September 2016 I asked the Respondent and the Respondent's sister to provide family pictures for a family tree that [younger child] had to prepare for school, and the Respondent never responded)."

13. In respect of the events referred to that the Respondent did not attend, the Respondent did not accept the Petitioner's allegations and asserted the majority of the events the Petitioner referred to were due to the Petitioner not communicating with him regarding the children's events, their medical care as well as other activities the children participated in. He also confirmed that on one of the occasions he missed a parent teacher meeting; he organized and met with the teacher on a different day. Mrs Richards submitted it was unreasonable to expect parents to attend every event for their children and reiterated the insignificance any of these concerns had to the issue of overnight access.

14. Towards the end of the marriage the Respondent's evidence is that the Petitioner spent a great deal of time at her parents' home which directly resulted in the Petitioner being as involved with the children's daily lives. The Respondent further asserted his oldest daughter spent the majority of her time with the mother and other members of his family as the Petitioner insisted the oldest child should not spend as much time at the former matrimonial home as she was.

15. Again, Mrs Richards echoed the irrelevance of the historical events relating to the Respondent's oldest child which were over 10 years prior as well as it related to the care of the children during the marriage as the parties separated in October 2015 which is almost 4 years ago now.

<u>Respondent's extensive travel for work and work commitments</u>

16. During cross-examination the Respondent was very clear that given his current position in the family business he would not have to travel extensively and would also not have to be "on-call" as these are tasks which he can now delegate. The Petitioner was adamant

the Respondent would continue to be required to travel extensively which would hamper his ability to have overnight access and/or require that he "*delegate*" the care of the children to third parties. She asserted the same would be the case if he were to be on-call.

17. The Respondent was cross-examined extensively regarding his work and he was steadfast in maintaining he would neither be required to travel as frequently as he had in previous years nor be required to be on-call. He also confirmed he would not travel whilst he had access with the children. Additionally, if there was a rare occasion when he would be required to travel during his access periods with the children, he would give the Petitioner as much notice as possible and agreed the children should stay with the Petitioner should this occur.

"*Traffic*" and "*adult things*" in Respondent's family homes and place of business

18. There were several references to "*traffic*" in the homes of family members the Respondent visited with the children. My understanding of "traffic" was simply that a number of people were continually entering and exiting the home. Perhaps my naivety got the best of me, but it was not until the Petitioner was re-examined that she explained to the Court the reference to "*traffic*" and "*adult things*" are analogous with things such as the smoking of marijuana, sex, adult television programs and adult video games which depict violence. Again, these specific accusations were in no way detailed in the Petitioner's Affidavit. In her *viva voce* evidence she did not provide any attestation the children had been exposed to these alleged experiences either during the marriage when they attended the Respondent's family home or since the parties have been separated.

19. Allegations of "*traffic*" in the family home and the business were referenced extensively in the Petitioner's Affidavit as well as in her *viva voce* evidence. The Petitioner raised concerns of the Respondent's sister's relationships with men who had criminal records and averred the Respondent maintained relationships with people (some of who are his family members) who have criminal records. Further, she criticizes the persons present at the Respondent's business who could hypothetically have "*'unstructured access' to the children*".

20. In the Petitioner's Affidavit at paragraph 42 she supported these concerns as follows:

> "*42. The general, the more persons that have access to any child, the greater the risk of assault becomes. In 2017 a study conducted by the Bermuda Health Council and Saving Children and Revealing Secrets (SCARS), it was found that one in three Bermudians have been the victim of child sexual abuse before the age of 18…*"

21. The Respondent did not accept there being an issue of "*traffic*" in either his family's homes or at his place of business. In any event, the Respondent stated he does not frequent the family homes and his place of business as often as the Petitioner purports. He further confirmed the children are not left in the care of his family members without him being present and the same is the case in respect of his place of work.

22. Unsurprisingly, Counsel for the Respondent continued her submissions of the irrelevance of these assertions in the determination of the application, particularly as alleged concerns being presented are merely hypothetical. Mrs Richards again restated that despite these concerns being raised during these proceedings, the Petitioner has made no attempts whatsoever to prevent or decrease the Respondent's access to the children. Her assertion being these are not true concerns regarding these issues.

Location of Respondent's family home and alleged criminal associations

23. Despite the Petitioner accepting she visited the Respondent's family homestead throughout the marriage, as did the children, yet again, it was only in her *viva voce* evidence she raised concern regarding the gang affiliated location of the homestead. The Petitioner went as far to purport she feared for her son as he looked like one of his older cousins who is 19 years old there could be a possibility of mistaken identity if there were ever some form of gang retaliation in the area.

Adjustment concerns

24. In her evidence, the Petitioner presented evidence that whilst the youngest child was attending her last year at nursery school she had some difficulties. She alleged this was as a result of the children having access with the Respondent. However, the report from the nursery which is referred to and was considered in completing the Social Inquiry Report confirms these difficulties were experienced during "*the months of May through July of this year*". The Social Worker confirmed the reference to this year is to 2018. Whilst the mother attributed this to access with the Respondent, the report from the nursery states: "*The school was not able to say for sure the exact cause of the shift in behavior; it was explained they were only able to report what they had been told*" by the Petitioner.

25. Moreover, the report also confirmed in that there was a "*visible difference*" in the younger child and had returned to normal. Mrs Richards, in her cross examination of the Petitioner, again raised the point that despite this, the Respondent continued to have access with the children as was agreed back in 2015 and has been continuing since. This was accepted by the Petitioner.

26. The Petitioner also submitted the oldest child would display symptoms after access with the Respondent, but this was approximately 2 years ago. However, she continued that she had concerns with the oldest child currently as he had become more "*clingy*" and would become "*tearful*" the morning after access occurred. The Petitioner further purported that additional the children having additional access with the children would not remedy these concerns. The Petitioner was unable to provide any solid evidence that the changes in the children's behaviour were strictly attributed to their access with the Respondent. Mrs Richard's challenged the Petitioner in her cross-examination that the divorce, the change of environment in the children's new school could potentially explain changes in the children's behaviour.

Lack of involvement in extra-curricular activities

27. During the Petitioner's evidence and in the Petitioner's Affidavit she raised her concern of the Respondent having little to no participation in the children's extra-curricular activities. One example she presented was of the Respondent not attending the older child's football training sessions and games. She further criticized the Respondent for his financial contribution of purchasing bibs for the team instead of being fully involved and present in this activity. However, in cross-examination the Petitioner accepted the Respondent not attending extra-curricular activities does not go to the principle of him having overnight access with the children. The Petitioner expressed this behavior shows the Respondent's "*lack of accountability, both emotionally and physically*" for the children.

Respondent's excessive drinking and smoking

28. She referred the Respondent's drinking as being a "*generational issue*" in the Respondent's family, but gave no evidence whatsoever as to how this related to the Respondent's care for the children. The Petitioner referenced him purchasing alcohol from duty free when they would travel overseas and drinking it as well as made one allegation of a physical altercation during the marriage.

29. An allegation was made in the Petitioner's Affidavit of the Respondent showing up at a training session intoxicated, but this information was obtained from third parties and the Petitioner could not confirm herself if this was true. On cross-examination the Petitioner admitted this alleged incident occurred "*at the very least prior to 2017*" and agreed that despite this incident she allowed the children access to the Respondent since 2016 without raising this as a concern.

30. No examples were put forward by the Petitioner of where the Respondent had potentially or actually placed the children in a position to be harmed due to his alleged excessive drinking. Furthermore, in the Petitioner's cross-examination, she accepts she is not aware if the Respondent is currently a smoker and also agreed this issue is not relevant to overnight access.

Disputing joint decision making for extra-curricular activities and holiday camps

31. In respect of joint decision making for the choices of extra-curricular activities and camps, the Petitioner was quite frank with her assertion that the Respondent does not have the "*emotional intelligence*" to participate in making these decisions. The Petitioner fully accepted she does not involve the Respondent in this decision making:

> "*32. In relation to the decision-making as it relates to the children's extra-curricular activities, the reality is that I have not involved him because we cannot and have never been able to make joint decisions about the children's welfare. He is cynical about any decision I make. Further, the Respondent doesn't have the experiential backdrop to make these decisions. As a child he never did extra-curricular activities. He didn't*

involve his [older child] in them and generally doesn't see much utility in extra-curriculars. Selecting camps and extra-curriculars is a responsibility that I take very seriously, and spend much time selecting the best activities for [the children] in consideration of their personalities and selecting environment in which they will best thrive. I attend summer camp fairs, coordinate with the parents of [the oldest child's] friends, get testimonials from other parents, access the age/qualifications of the camp counselors, access whether the camps are sun safe/ scars certified, pop in to observe etc. The Respondent has never and is unlikely to commit to this level of diligence. I am not prepared for the children to attend camps or extra-curricular placements that have not been suitably vetted…"

32. The Respondent was clear in his evidence that it was not the case he did not want to be involved in the decision-making process in respect of the children's camps and activities, it has been something the Petitioner has simply taken on unilaterally even during the marriage. He wishes to participate in the decision making and it should not be just a matter for the Petitioner to determine without consultation with him.

Validity of Respondent's Application

33. Counsel for the Petitioner raised a point in relation to the relief set out in the Respondent's Application as only being that of seeking "*shared care and control*" as well as determining "*the principle of the children staying overnight with the Respondent*". Mrs Richards submitted this argument was incredulous as the Court has wide powers to make orders in children matters and challenging the wording of the Application had no validity. Moreover, it was clear to me in the completion of the SIR the Social Worker was clear in his role of considering whether the Respondent should have more access with the children.

Challenge of SIR

34. The Petitioner was also not in agreement with the recommendations made by the Court Social Worker, but I will deal with all the disputed facets of the report under separate head below.

SIR

35. The Court appointed Social Worker, Mr Sijan Caisey, prepared an eighteen-page SIR dated 1 October 2018 to assist the Court in the determination of the Respondent's Application. Mrs Richard's confirmed the Respondent's support of the recommendations made in the SIR. The Petitioner, however, did not accept all of the recommendations, particularly in relation to overnight access. As such Mrs Marshall raised a number of issues in an attempt to invalidate the recommendations made by the Mr Caisey.

36. The following recommendations are made in the SIR:

a) [The Respondent's] Application for increased access should be granted.

b) Alternate weekends from Saturday at 8:00 AM until Sunday at 7:30 PM, and; Tuesdays and Thursdays after school until 7:30 PM.

**Alternate weekend access should increase to Friday after school until Sunday 7:00 PM after a three (3) month period.*

c) To avoid further miscommunication, the family should utilize a Family Planner Mobile App to assist in scheduling access arrangements, activities, homework, meals, etc. (Our Family Wizard, Cozi, Apple Calendar, Google Calendar, are highly recommended).

d) The children should have daily or every other day telephone contact when not in their father's care. It would be most appropriate to schedule a specific time these calls should occur.

e) The parents should alternate holidays and special events.

**Unless the holiday and/or special event falls on an overnight access period this access should be from 10:00 AM until 6:00PM.*

f) To avoid any further conflict/resentment, transitions should occur at a more neutral location or by a mutual third party.

g) The parties should attend Mediation to address further changes in the access schedule and travel.

h) The parents should read Isolina Ricci's book, "Mom's House, Dad's House: Making Two Homes for Your Child." Copies may be purchased on www.Amazon.com for $9.30.

37. It should be noted that Mr Caisey had the benefit of observing the entirety of the hearing which allowed him to further consider his recommendations. Mr Caisey was thoroughly examined by both Counsel and was unwavering in his evidence. In fact, Mr Caisey was even more adamant in supporting his recommendations having heard the evidence of both parties. Moreover, Mr Caisey made further recommendations given the apparent discord and animosity based on the evidence given by the parties throughout the hearing.

38. Mr Caisey's additional recommendations after hearing the parties' evidence is as follows:

i. Both parties attend individual counseling to address the breakdown of the marriage, the past and co-parenting.

ii. Mediation to address the breakdown of the marriage, the past, co-parenting and general communication.

iii. Co-parenting classes.

39. Mrs Marshall submitted the lack of clarity in the Respondent's Application as well as the letter sent by the Court to the Department of Child Services ("DCFS") confirming the request for an SIR to be completed did not allow the Court Social Worker to properly address the relief being sought in the Respondent's Application.

40. Mrs Marshall further criticized DCFS of their general practice not to review the court files which contained the parties' affidavit evidence as a source of information for compiling their reports. Mr Caisey was clear that this practice was the norm and was generally deemed unnecessary for the purpose of compiling a report. He stressed his position as a Social Worker is to be as objective as possible. He also reiterated the interview with the parties as well as the parties' completion of the questionnaire gave each party ample opportunity to raise all of their respective concerns.

41. During the Petitioner's examination in chief she gave evidence that the SIR did not assist her "*in getting to know [the wife] more*". She clarified this as wanting to learn more about her "*character*" and "*how she corrects the children*" as these are aspects which are "*very important to [her]*". Mr Caisey was clear in his evidence when being examined by Mrs Marshall that the Wife would have been interviewed separately had he determined the need to do so after observing the children in the Respondent's home with her. It should be noted Petitioner did not raise in her evidence (by Affidavit or in her *viva voce* evidence) she had any concerns of the Wife which would impact the welfare of the children.

42. Mrs Marshall also challenged Mr Caisey's recommendation of the parties participating in mediation and counseling as to what benefit this would have. Mr Caisey clarified that whilst individual counseling was not a pre-requisite to mediation, it would greatly assist and could provide the parties a certain skill-set to participate in the mediation process. He reiterated that mediation would only be beneficial if this were something both parties are willing to do; however, he stressed that even if the mediation process was not pursued that individual counseling would still be beneficial to both parties. Mrs Marshall also asserted to the Court had no jurisdiction to order mediation in any event. Mr Caisey reiterated the mediation process could assist with addressing the parties' communication which would no doubt benefit the children given the current state of acrimony.

The law

43. Section 46 (1) of the Matrimonial Causes Act 1974 ("the Act") provides me with the jurisdiction to determine this matter. The powers vested in this section are wide reaching. Counsel did not dispute this, so there is no need to expand on this further. It should be noted Mrs Marshall did make several submissions throughout the hearing the Court had no jurisdiction to require the parties to attend mediation. However, upon questioning Mrs Marshall during her final submissions, she conceded that given the breadth of the Court's jurisdiction, I could indeed make an order requiring the parties to attend mediation.

44. Whilst Counsel relied on different case law in their final submissions, Counsel agreed any decision made in relation to child custody, care and control and access, the primary focus is what is in the best interests of the child(ren). This is the position whether

proceedings are brought under the Act, the Children Act 1998 and/or the Minors Act 1950. Rayden and Jackson, Sixteenth Edition at page 1008, confirms the wide jurisdiction of the court and defines "Family Proceedings" as follows:

> "***40.11 Family Proceedings.*** *In any family proceedings in which a question arises with respect to the welfare of a child the court may make an order under section n8 of the Children Act 1989 or another order which may be appropriate. The term 'family proceedings' is define and means any proceedings under the inherent jurisdictions of the High Court, which included wardship, and any proceedings under the following enactments:*
> *…*
> *(b) the Matrimonial Causes Act 1973…*"

45. At page 1004 of Rayden, reference is made to what principles apply to cases regarding children:

> "*…The welfare principle is universal in its application and applies to disputes not only between parents but between parents and strangers and between strangers and strangers. But the welfare of the child is only to be regarded as the court's paramount consideration where the child's upbringing or proprietary interest are directly at issues: the principle does not apply to a case where such matters are not directly in question. The word 'welfare' must be taken in its widest sense. It has been said that the welfare of the child is not be to measured by money only nor by physical comfort only; the more and religious welfare of the child must be considered as well as his physical well-being; nor can the ties of affection be disregarded. The rights and wishes of parents must be assessed and weighed in their bearing on the welfare of the child in conjunction with all other factors relative to that issue. The questions for the judge to ask are not what the essential justice of the case requires but what the best interests of the child require.*" [Emphasis added]

46. The most recent Court of Appeal case of *KAB* v *AG and another (Re T and K (Children)(Abduction: Children's Objections)* [2019] CA (Bda) 8 Civ, 12 July 2019, the Learned Justices of the Court of Appeal stated at paragraphs 47 and 48:

> "*47. These directions, which implicitly reveal the learned judge's concerns about the situation into which the girls would be returned, are only consistent with her acceptance nonetheless, of an obligation to return the girls, and to do so in deference to the protocols of the Convention.*
>
> *48. In light of the settled case law which acknowledges that in Convention cases, as in all cases dealing with the custody and care of children, the welfare of the child is the primary consideration[12], such an approach is erroneous.*" [Emphasis added]

47. Both Counsel invited me to consider a number of cases to support their respective positions; however, none were of a great deal of assistance given the nature of child cases. This is by no means a criticism of Counsel. Child cases must turn on their own respective facts and circumstances and as such it is extremely difficult to find a previous case which checks all the boxes. It is abundantly clear the legal principle to apply in this case must be relief which is in the best interests of the children.

Findings

48. At the outset of the Petitioner giving her *viva voce* evidence, I informed Mrs Marshall I did not believe the evidence to be pertinent (this was specifically in relation to the issues surrounding the Wife), but Counsel and the Petitioner were steadfast in emphasizing the relevance of these issues. I do not accept the issue of his remarriage and the Respondent's misunderstanding of the full divorce procedure supports any reason why I should find the Respondent to be an unreliable witness. I will reiterate again, my strong belief that these issues raised were not helpful in deciding this matter and only prolonged the length of the hearing. The unease the Petitioner feels about the Wife are simply not relevant to this application and certainly do not raise any concerns for the welfare of the children. Undoubtedly, had the Petitioner truly been concerned about the lack of knowledge surrounding the Respondent's Wife, the alleged validity of the marriage and the introduction of her to the children, the fact that she neither made any attempt whatsoever to restrict access since 2016 nor raise these concerns prior to these proceedings discredits this position.

49. I continued to raise my concerns of the relevance of the evidence to Mrs Marshall and the Petitioner during the days where the parties were giving their evidence in relation to many of the other concerns being raised and challenged. Whilst I allowed the Petitioner a great deal to leeway in the giving of her evidence, there were many occasions where I had to interject as she was providing overly lengthy responses which had no relevance to the questions being asked by Mrs Richards.

50. In the Petitioner's re-examination she explained that her affidavit was very difficult to draft as she has a good relationship with the Respondent's family. She said, had she been asked to particularize further and more detailed examples of her concerns she would have done so. I do not accept this depicts an authentic picture. Any parent with serious concerns regarding the wellbeing of their children, being a parent myself, I find it very difficult to fathom omitting such important details which go to the heart of her concerns. Whilst I have little doubt it was difficult for the Petitioner to produce the Affidavit and even give evidence, as it was clear she is very emotional when it comes to the issue of her children, but the resentment and animosity clearly demonstrated throughout the proceedings obviously blinded her reasonableness. The omission of detailing serious allegations in her Affidavit makes me query the veracity of her evidence particularly given the children have continued to have access with the Respondent since 2016 despite these allegations. As such I have placed little weight on them and in any event do not find the concerns raised are of such a nature to prohibit the children from having overnight access with the Respondent.

51. The Respondent was steady and unwavering in his evidence and I fully accept the evidence he presented to the Court. I, however, must reiterate that whilst I preferred the Respondent's evidence, it was clear the Petitioner is extremely emotional regarding any issue surrounding the children which I strongly believe hindered her ability to see the forest for the trees. This is not a criticism of the Petitioner, but merely a situation that occurs in many matrimonial matters where children are involved.

52. I can fully sympathize with the Petitioner in her fear; however there is no basis to support the proposition that (1) the children are unsafe at the family homestead; and (2) that the children spend such a significant amount of time there for any endangerment concerns to be raised.

53. The submissions made by Mrs Marshall in an attempt to raise a technicality regarding the relief sought in the Application was merely an attempt to muddy the waters as the Court has wide powers in respect of care and control and access; further, any alleged lack of specificity in the Court's letter to DCFS neither denigrates the evidence given by Mr Caisey nor does it sway me to discount his evidence altogether. Moreover, there is no requirement for the Social Worker to review the court file and sift through the parties' evidence, that is a matter for the Court. I fully appreciate the Petitioner's concerns regarding having a new person introduced into the children's lives who will play an integral role; however, it is not a matter for the Court Social Worker to "*investigate*" this person.

54. I accept there was no requirement or obligation of Mr Caisey to "*investigate*" the Wife and entirely accept that had Mr Caisey had any welfare concerns he would have taken further action to address these. In any event, the Petitioner at no point raised any welfare concerns in relation to the Wife's caring for the children which further supports Mr Caisey's position.

55. I do not find there are any welfare concerns which were raised during the proceedings which should prevent the Respondent from being denied overnight access. This position was supported by the Court Appointed Social Worker. Having made this finding, it is clear that any hinderance of overnight access or the extending of additional access to the Respondent would not be in the best interests of the children.

56. During Mrs Marshall's final submissions, she made proposals as to (what I will refer to as restrictions) should be put in place should I determine overnight access should occur as it would be in the children's best interest. These restrictions are as follows:

    a) The Respondent will not take the children to his sister's residence or [his place of business].
    b) If the Respondent if off-island, access is to be suspended until his return.
    c) The Respondent is not to leave the children in the care to any third party if work obligations arise.
    d) If the children are unhappy and indicate a desire to be return to the Petitioner, they should be returned.
    e) The Respondent will not drink alcohol whilst he has care of the children.

f) The point of drop off is to be at the top of the driveway of the Petitioner's residence and the Respondent will walk the children down. The Wife is to remain in the car during the time the Respondent is dropping off the children.

57. Having heard evidence from the parties over a period of seven days, including a thorough examination of the Court Social Worker as well as having found there are no issues raised which give rise to the children's well-being being jeopardized in the care of the Respondent, I find all of these restrictions are wholly unreasonable and unnecessary. The Respondent and the Petitioner are adults who need to start conducting themselves in such a way that their animosity towards each other does not continue to spill into the daily lives of their children. I will not address these restrictions in turn as I do not find any evidence produced to substantiate them. Furthermore, whilst the Court does have a wide jurisdiction in children's cases, I do not accept it has the jurisdiction to impose restrictions on the intake of alcohol and/or imposing restrictions on a third party.

58. Furthermore, suggesting that a 7 and 5 year old child should be able to call the Petitioner at any time to collect them is far reaching and a tool which can become very much used to manipulate the parents. For example, if one of the children has been told they cannot have something at the Respondent's house, they should simply be able to ask to go back to the Petitioner? When I queried Counsel about the Respondent not leaving the children in the care of a third-party if a work emergency arises at 3 p.m., the response was even then the children should be returned to the Petitioner. There is another responsible adult in the house, the Respondent's Wife, and should such an emergency ever arise after the children are sleeping it is truly incomprehensible to propose the children should be ripped from their beds to be returned to the Petitioner. Even if this were to happen in waking hours, I do not believe this is in any way reasonable or justifiable and would in fact be detrimental to the children.

Conclusion

59. During Mrs Richard's final submissions, the parties did indicate some agreement in relation to the recommendations made in the SIR. The parties agreed the following arrangements:

a) The Respondent shall have access with the children each Monday as follows:

i. Collecting the youngest child of the family from school at 2:40 p.m. or such other time as the youngest child which may be designated to be dismissed for the respective school year the said child is enrolled. In the event the said child is enrolled in camp the said child shall be collected at the earliest dismissal time.

ii. The oldest child of the family shall be collected from school at 3:00 p.m. or such other time as the oldest child which may be designated to be dismissed for the respective school year the said child is enrolled, unless the parties agree the oldest child is enrolled in a club during each respective term. In the event the

said child is enrolled in camp the said child shall be collected at the earliest dismissal time.

iii. Both children shall be returned by the Respondent to the Petitioner's home at 7:30 p.m.

iv. In the event, the oldest child is enrolled in cricket, the Respondent shall return the children to the relevant cricket training location between 6:30 and 6:45 p.m. For the avoidance of doubt, the Respondent's access with the youngest child of the family shall continue at the training location until 7:30 p.m.

b) The Respondent shall have access with the children each Thursday as follows:

i. Collecting the youngest child of the family from school at 2:40 p.m. or such other time as the youngest child from school which may be designated for the respective school year the said child is enrolled. In the event the said child is enrolled in camp the said child shall be collected at the earliest dismissal time.

ii. The oldest child of the family shall be collected from school at 3:00 p.m. or such other time as the oldest child which may be designated to be dismissed for the respective school year the said child is enrolled, unless the parties agree the oldest child is enrolled in a club during each respective term. In the event the said child is enrolled in camp the said child shall be collected at the earliest dismissal time.

iii. The Respondent shall transport the oldest child of the family to Sanshou at 4:30 p.m. and collect the said child by 5:30 p.m. in the event he does not remain at the premises.

iv. Both children shall be returned by the Respondent to the Petitioner's home at 7:30 p.m.

c) The parties shall alternate statutory public holidays and special events should access not occur on these days. The Respondent shall have the children on these alternating holidays and special events by collecting the children from the Petitioner's home at 10 a.m. and returning them to the Petitioner home at 6 p.m.

d) The Respondent shall have unlimited daily telephone access to the children between the hours of 7:30 p.m. and 8:15 p.m.

60. Given the parties agreement to these arrangements, I see no reason to diverge from them. I trust and hope these have been honoured since the hearing of this matter.

61. Therefore, the only substantive issue to address is that of the Respondent having overnight access with the children. The issues stemming from this are two-fold: (1) How and when will the overnight access occur; and (2) how should overnight access progress as the children become older.

62. Having found it would in the best interests of the children to not only have more access with the Respondent (as set out and agreed between the parties above), but also as it relates to the children having overnight access with the Respondent, the following overnight access schedule shall commence forthwith:

    (1) The Respondent shall have overnight access with the children on alternating weekends from Saturday at 8:00 a.m. until Sunday at 7:30 p.m.

    (2) After three months of this overnight access schedule, overnight access will increase on alternating weekends by commencing on Friday after school (or camp whichever is relevant) and returning the children at Sunday at 7:30 p.m.

63. The Respondent shall also be given the opportunity to participate in the decision making as it relates to the holiday camps and extra-curricular activities the children are enrolled in throughout the year. The parties are simply going to have to put aside their differences and communicate in a respectful manner to facilitate an agreement being reached.

64. For the avoidance of doubt, it had been suggested the parties return to the Court for a review before there is any further increase in overnight access in the event it was granted, but I see no need for this to occur. The parties should commence to work towards a shared care and control arrangement should no issues of welfare be raised and I encourage them to start co-parenting and not be reliant on the Courts for resolution. Having said this, either party is fully able at any time to make an application to the Court in respect of the children should any issues arise in respect of the access schedule ordered herein.

65. I will not make any order requiring the parties to attend mediation as I believe both parties need to be in a place where their pasts are set aside. I do not believe the parties in this case are there yet, so it would be fruitless to force them to be put in position where there will likely be very little if any success. This is unfortunate, but I encourage to parties to continue to consider using the mediation process when they are both in a space to do so.

Costs

66. It is unfortunate this matter had to proceed to hearing and for such a lengthy period which was not proportionate to the concerns raised by the Petitioner. With this in mind and given I indicated to Counsel at the end of the hearing I would hear them as to costs following the handing down of this judgment, I will reserve costs and require Counsel to appear before me on a date to be agreed. Available dates should be submitted within seven days from the date hereof for the months of July and August 2019, save for the period 1 July to 12 July 2019.

Afterword

67. It is regrettable that a case such as this had to be determined by the Courts over period of nine days (initially set for three days). Undeniably, the costs to both parties are extensive and, in my view, disproportionate to the nature of the concerns raised.

68. This is a clear case where divorced parents need to set aside their differences and resentments which undoubtedly increased over the years and ultimately lead to the irretrievable breakdown of the marriage. This is not a case where parties have such grave concerns about the wellbeing of their children that an agreement could not have been resolved either through mediation or an alternative dispute resolution process.

69. The unfortunate position is that the parties will likely now have further built up resentments having to have this matter adjudicated by the Courts. Ultimately, it is only the children who will be negatively impacted by the possible further deterioration of the parental breakdown, a position which may make it extremely unrealistic to co-parent now and in the future. I implore both parties to fully participate in the mediation process and attend counseling if necessary to assist in resolving their issues from the marriage. This is the only way they will be able to effectively co-parent to ensure the best interests of the children are met. If divorced parents are unable to co-parent, it is the children who will suffer both in the short and long term.

12 July 2019

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ALEXANDRA WHEATLEY
ACTING PUISNE JUDGE OF THE SUPREME COURT