Judgment Book
SUPREME COURT
KINGSTON
JAMAICA

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN DIVORCE

SUIT NO. D. 507 of 1970

BETWEEN	NICOLA ADLYN HOHN	PETITIONER
A N D	WOLFGANG SEIGWART HOHN	RESPONDENT
A N D	JANE ROBINSON	WOMAN NAMED

SUMMONS FOR LEAVE TO TAKE CHILDREN OUT OF THE JURISDICTION

Edward Ashenheim for Petitioner

D. Muirhead, Q.C., and A. Rae for Respondent

Heard: November 24, 1978

March 26, 1979

CAMPBELL,J

The Petitioner by her Summons filed on October 20, 1978 sought an order that she be at liberty to remove Gabriela Emmi, Andreas Richard and Christina Barbara, children of the marriage, out of the jurisdiction of the court for the purpose of permanent residence in the United States of America.

The Summons was strenuously opposed by the Respondent and was heard by me on November 24, 1978. After hearing arguments from learned Attorneys for the parties based on their respective affidavits and submissions on the applicable principles of law governing these matters I refused leave to the Petitioner to remove the children out of the jurisdiction of the court for purpose of permanent residence in the United States of America. I promised to put my reasons in writing. This I now do.

The Petitioner and the Respondent then aged 25 years and 27 years respectively were married at Saint Jude's Church, Stony Hill, St. Andrew on March 12, 1959. There is no complaint that the marriage was other than a happy one, at least until about 1970 when the Respondent committed, so far as the Petitioner was concerned the unforgiveable sin of adultery consequent on which she obtained a decree absolute of Divorce against him in 1977.

The Decree Nisi ...../

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The Decree Nisi was obtained on October 30, 1970. Gabriela Emmi, Andreas Richard and Christina Barbara born respectively on June 14, 1963, April 14, 1965 and August 29, 1968 are the children of the union.

Following on the Decree Nisi the Petitioner obtained an order in Chambers for custody of the children on January 11, 1971. This order was in substance and as recited a consent order.

The Petitioner, described in her marriage certificate, as a Stenographer, had her schooling in England from the age of 14 years as was fashionable in her time. She later attended the University of Lusanne in Switzerland for a year. She completed a year's French language course and has a certificate to that effect. She thereafter attended Mayfair Secretarial College in London. She holds a Pitman Certificate as also the Mayfair College Diploma evidencing the successful completion by her of her course of studies. No doubt the exposure of the Petitioner to life and schooling abroad during the formative period of her life has been a major consideration under-scoring her view that "it would be in the children's interest to be given the opportunity to live abroad and thereby expand their horizons and be unrestricted in their educational opportunities." The supreme welfare of the children so far as the Petitioner is concerned finds summation in this statement. The Petitioner, is desirous of broadening her children's horizon and making available to them "unrestricted educational opportunities". These can only be secured by their living and attending school abroad. The Petitioner therefore desires to migrate with the children. The Petitioner realises and accepts that the Respondent will not be able to make available to her in the United States of America, American dollars for her maintenance and that of the children, her hope of overcoming this formidable financial impediment

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resides in the assumed free schooling facilities for non-citizen permanent residents, assumed availability of free boarding and lodging for her and her children in her mother's home, assumed additional financial assistance to be given by her mother and assumed continuing offer to her of a job as Secretary/Accountant in a Law firm.

The Respondent in opposing the Petitioner's application does not dispute the broadening effect which living abroad could have on his children. He does not, however, accept the import of the Petitioner's statement as to "unrestricted educational opportunities" as implying that at the present stage of his children's education they are suffering due to restricted educational opportunities in Jamaica; He desires that Andreas and Christina should continue their education here in Jamaica.

The Respondent is German by birth but has been a naturalised Jamaican since 1974. He desires the children to be brought up as Jamaican nationals in a Jamaican setting wholly identified with Jamaica and as the product of a Jamaican education at least up to O'level. He is profuse in his praise of the quality of education at Campion College and Queen's High School which Andreas and Christina attend respectively. He says these school are among the best in Jamaica and the quality of their education is better than that provided at public schools in the United States of America.

He admits that he agreed to Gabriela attending school in England but this was at a time when there was little or no foreign exchange constraints. Both he and the Petitioner were permanently resident in Jamaica hence the holidays of Gabriela were all spent in Jamaica so preserving her identity with Jamaica her country of birth. The position would be different if the Petitioner were to be granted liberty to take the children to the United States of America for permanent residence.

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The Respondent contended that on a further and even more fundamental ground the welfare of the children would be seriously impaired due to lack of adequate finance in the United States of America to maintain them. He said the Petitioner having been schooled in the manner befitting a gentle-lady has not acquired any specialised skill or profession which is in demand in the United States of America. She has to date enjoyed a comparatively easy paced job experience and job exposure. She has been working for only 3-4 hours each day usually in the mornings for the past 17 years. Her work has been in the congenial atmosphere of the Respondent's business.

She does not enjoy relatively constant good health, she often suffers from lowered vitality necessitating rest periods daily above the normal. Due to her moderate educational attainment, absence of specialised skill or profession, uncertain health, and sheltered work experience she is ill-equipped to cope with the thrust and bustle of life in the United States of America. The competitiveness of the work environment would overawe her especially as her first full exposure to work in the United States of America would be at a time when she no longer had the resilience and adoptability of the young.

The Respondent says that consequent on these disabilities the Petitioner will be totally incapable of earning a salary sufficient to maintain her and the children at a reasonable living standard, much less to maintain the children in keeping with their accustomed living standard in Jamaica.

The Petitioner in her supplemental affidavit sought desparately to meet and repel the thrust of the Respondent's testimony in this she was not successful. She admitted that the quality of education at Campion and Queen's High School was among the best in Jamaica she was unable to show that the schools in Seattle provided equivalent or better quality education;

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She admitted that the Respondent was permitted considerably more access to the children than was provided in the consent order of the court. She admits that on occasions she has suffered from iron deficiency.

The factual situation disclosed in the affidavits as elaborated in the arguments of learned Attorneys point unmistakedly to the welfare of the children - at least their economic and social - residing in Jamaica but Mr. Ashenheim for the Petitioner submits that while the welfare of the children is the sole consideration in matters concerning custody and access this is not necessary so in matters concerning the removal of children from the jurisdiction of the court. He submits that on the basis of the authorities cited, namely, P v. P [1970] 3 All E.R. P.659; T v. T [1970] Sol. Jo. P.909 and Nash v. Nash [1973] 2 All E.R. P.704 the undermentioned principles of law are deducible as applicable to the issue before me, namely:-

(i) That a party granted custody by the court is entitled to exercise parental care which involves not only the exercise of a discretion regarding the upbringing of the child but also as regards the place of abode of the child.

(ii) That where a party having custody of a child decides to live abroad he is entitled to take the child with him since it is in the interest of a child that the parent having custody should not be deprived of his freedom of choice as to where he makes his home.

(iii) That it was a strong thing for a court to make an order the effect of which

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would prevent a parent having custody of a child from following a chosen career. This ordinarily should not be done.

Mr. Ashenheim's submission is that the principles stated above provided the authorative basis for the order which the Petitioner seeks. She ought not to be frustrated in her choice of permanent residence in the United States of America. She will be frustrated if she is not permitted to take the children with her as she does not desire to go without them.

Mr. Muirhead for the Respondent accepted the cases cited by Mr. Ashenheim as relevant to the determination of the issue before me, he however submits and rightly so in my view, that the cases merely show the application of the cardinal and immutable principle by which a court is guided when determining matters involving and or affecting children in civil and quasi civil cases.

This cardinal and immutable principle is that the welfare of the child is paramount. The constituent facts proved in each case will determine whether the welfare of the child will be better protected and enhanced by permitting the party having custody of the child to remove him from the jurisdiction of the court to reside elsewhere. The welfare of the child as the supreme and exclusive consideration is echoed by Winn, L.J. in P. v. P [1970] 3 All E.R. at P. 660 in these words:-

> "It seems to me that in approaching this very finely balanced problem which involves a difficult and a sad decision the court should have regard primarily to the welfare of the child. Just as in disputed custody cases, so in cases which substantially is concerned with the subsequent issues resulting from the making of a custody order. It seems to me personally that the welfare of the child is the primary consideration which should weigh with the court".

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AND at Page 661

> "In a sense the child has been since February 1970 one of the family comprised in the family of the stepfather. He has a legitimate motive in going to Newzealand .....so far as can be seen he has no bad motive in wishing to go and in going he must wish to take the mother and the child who is already there and the child who is coming. His right to do what he chooses with his life and to live where he chooses is of course in conflict as the matter stands at the moment with the view of the court expressed by ..... since that order will prevent freedom for the stepfather in this particular respect. If it is justified and more clearly if it is necessary for the proper protection of the child to forbid the step-father and the mother to do what they want to do then of course the court must impose that prohibition".

It is not doubted that subject to the overriding considerations of the welfare of the child, the party having custody should enjoy reasonable freedom as to his place of residence choice of a career and the pursuit thereof and that he should not be prevented from doing so merely because this would involve taking the child out of the jurisdiction of the court. This is what the cases cited each decided, in each case the welfare of the child economic, social and moral was adequately provided for in the contemplated migration.

The Petitioner in this case is not seeking to migrate in pursuit of a career which cannot be pursued here, she is seeking to migrate because of her view that the children should be given the opportunity to live abroad because they will thereby expand their horizons and enjoy unrestricted educational opportunities. In sofar as this is the sole consideration, the Petitioner is putting forward the welfare of the children as her prime consideration, in effect she is saying that she is not under the dominance of her father, she does not share his foreboding concerning conditions in Jamaica, but nevertheless it

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would be better for the children if they lived abroad.

Will the welfare of the children be better served by granting the Petitioner liberty to take them to the United States of America for permanent residence? I have already said that the factual situation inclines to the contrary.

The evidence of the Petitioner that she has a job awaiting her as a Secretary/Accountant in a law firm is wholly unsatisfactory. It is inconceivable that Secretary/Accountants could be in such short supply in Seattle that a prospective employer would find it necessary to recruit outside the United States of America and in addition to select a person who is not shown to have had any experience as a Secretary/Accountant in a Law firm. The letter Exhibit "B" which contains the job offer in my view is not a sufficient and reliable basis on which to make projections as to the financial ability of the Petitioner to maintain herself much less to maintain the children of the marriage. The Petitioner says her mother has a home and will provide board and lodging free of cost and will otherwise give financial assistance to her and the children. I have no independent evidence of the means of the Petitioner's mother, I have no reliable evidence as to the extent of her interest in the house where she reputedly lives.

One certainty there is and that is that the Petitioner's mother is aged about 70 years she is, if not in the winter, then at least in the autumn of her life, her working life must be over, or substantially so; unless therefore she had accumulated and laid by in her earlier years, she would more likely need financial help, if not immediately then soon. It is unsafe to consider her as being in a position to extend a helping hand. The pious hope and fragile expectation of financial assistance from her mother entertained by the Petitioner does not enhance or render secure and sound the Petitioner's future financial

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prospects. Without a steady and secure income available to the Petitioner in the United States of America sufficient to satisfy the reasonable and growing needs of the children, the latter's welfare, at least economic and social, is bound to be seriously affected. It cannot be right that the welfare of the children should be allowed to be so seriously affected and prejudiced merely for the vindication of the Petitioner's right to choose where she and the children will live or as the price of securing a widened horizon for the children.

The consent order of custody granted to the Petitioner in summary provides inter alia that the Respondent should enjoy access and rights in relation to the children as hereunder:-

(i) Three Sundays in each month from 9:00 a.m. to 7 p.m. and one afternoon each week from 4:00 p.m. to 7:00 p.m. the Respondent was to have the children with him in his home;

(ii) Two continuous calender weeks of the summer school holidays and one week-end from 9:00 a.m. on Saturdays until 7:00 p.m. on the Monday following in the Easter and Christmas school holidays respectively the Respondent was to have the children live with him;

(iii) Up to four calender weeks in each calender year he was entitled to take the children on holidays abroad.

(iv) On any occasion when the Petitioner was absent from her home for a period exceeding 7 consecutive days the

Respondent ..../10

the admission of the Petitioner has a well-appointed house where the children visit and spend time with him.

The Petitioner accepts the fact that having regard to foreign exchange constraints the Respondent would not be able to maintain her or the children in the United States of America.

In her dilemma the Petitioner stoically looks up mainly to her mother aged 70 years as the hill from whence her help and salvation are to come. I am moved by the Petitioner's simple expression of faith in the goodwill and sincerity of her prospective employer to employ her at a salary of $1,000 per month and also of her faith in the financial assistance from her mother. Faith however, is one thing, to sever children from the security of the known which has worked well and plunge them into the unknown is another matter.

The Respondent's view is that to safeguard the welfare of the children the Petitioner should proceed alone to the United States of America establish herself as regards a home and secured finances, he in the meantime, would care for the children in Jamaica and in addition provide the Petitioner with three trips per year to come to Jamaica and visit them during their holidays or whenever it is convenient for her to do so. In my view the Respondent's approach to the issue is not only practical and reasonable but in addition manifests his overriding concern for the welfare of his children. I considered that in all the circumstance the welfare and interest of the children would be best promoted by their remaining in Jamaica.

I accordingly refused leave to the Petitioner and ordered that she be not at liberty to take the children to the United States of America for permanent residence there.

Respondent was entitled to have the children residing with him. The parties mutually agreed that one party would not take the children out of the jurisdiction of the court for any period exceeding four calender weeks in any one year without the consent of the other party.

(v) Choice of school for the children and change of school should be in consultation with the Respondent.

The salient provisions of this consent order show clearly that the Respondent was anxious to ensure that he remained an ever present and active force in moulding the character of the children in assisting in their development including the development of the right outlook on life and in providing for their material needs consistent with his and the Petitioner's view as to their station in life. The Petitioner admits that the Respondent is "a devoted father". In her petition for Divorce she admitted that "the Respondent is presently making payments to the Petitioner sufficient to maintain the children in a manner in keeping with their station in life and has informed Petitioner of his intention so to continue".

In her affidavit in support of her Summons for Custody she admitted that the Respondent paid her $76.00 weekly in addition he paid $250.00 monthly for the maintenance of the children, he also paid the rent, electricity and telephone bills of the house where she and the children live. These admissions of the Petitioner constitute testimony enough that the Respondent is not only ready and willing but also eminently able to provide for the material needs of his children in Jamaica, he also on

the admission ...../11