

Judgment 53/2005

**I v. I – Royal Court (Divorce file 6549) –
10 October, 2005**

Matrimonial cause – wife’s application for leave to remove the children from the jurisdiction – husband’s application for delay to enable younger child to become ‘qualified resident’ under the House (Control of Occupation) (Guernsey) Law, 1994 – welfare of the children is paramount – Court differed from the conclusion of the Court Welfare Officer – wife’s application granted – husband’s application for delay refused.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Before John Russell Finch, Esquire, Lieutenant Bailiff

On the 10th day of October, 2005

Between:

I

Petitioner/Wife

v.

I

Respondent/Husband

IN THE MATTER OF the Petitioner’s application of the 4th April, 2005 for an Order enabling her to return to live [outside the jurisdiction] with the Children;

WHEREAS on the 13th September 2005, the Lieutenant Bailiff, having heard Advocate P. A. Allen, Counsel for the Petitioner and Advocate S. E. Wallis, Counsel for the Respondent respectively, reserved Judgment;

THE LIEUTENANT BAILIFF this day issued written Judgment in the terms attached hereto, and GRANTED the application to remove the children [from the jurisdiction], subject to the expiration of fourteen clear days from the date of this judgment.

AND THE COURT reserved costs.

M. A. TOSTEVIN
Her Majesty's Deputy Greffier

The Lieutenant Bailiff set out the law and his conclusions in paragraphs 10 to 26 of the judgment, as follows: -

Court Welfare Officer

10. Mrs Scott heard all the evidence and was the last witness. Her report (folio 9, pages 31-69) is thoughtful and intelligent. She gave in evidence that underwrote her views, which are encapsulated at para 12.25 of her painstaking report (page 67):

“If the Court deems it is appropriate for the family to leave before [the younger child] is 10 years old, I would have some serious concerns whether this child will ever be domiciled again in Guernsey long enough to obtain his local qualifications”.

11. In evidence, Mrs Scott considered that any further delay in moving would not cause the children significant harm, but that both were very positive about going, though [the younger child] expresses sadness – see paragraph 7.9 of the Report, page 48. It is evident from what Mrs Scott has written and said that the children are a credit to their two caring parents.

Legal Principles

12. There is a helpful and comprehensive review of the cases in the case of L v M Matrimonial Causes Division, 2003 per Brelsford L.B. In this case, a mother failed in her application to move a 5 year old child back to Australia. Pages 5 – 13 of the Judgment are a full review of the relevant cases and principles to apply. Like Brelsford L.B. I emphasize the words of Charles J. in Re K (Application to remove children from jurisdiction) [1999] 2 FCR 410:

“But not a lot is gained by seeking support from past decisions, however superficially similar the facts matrix may appear to be”.

13. The leading cases in England are Payne v Payne [2001] Fam 273 and Poel v Poel [1970] 1 WLR 1469 CA. In the words of Thorpe L.J. in Re H (application to remove child from jurisdiction) [1999] 2 FCR 34:

“the approach that the Court must adopt in these cases has not involved or developed in any way since the decision of this Court in Poel v Poel”.

14. Rayden and Jackson on Divorce (18th Edition) comments that:

“The principles have been distilled in the proposition that the welfare of the child is the paramount consideration; refusing the primary carer’s reasonable proposals for relocation..... is likely to impact detrimentally on the welfare of the dependant children; therefore the application to relocate will be granted unless the Court concludes that it is incompatible with the welfare of the children”.

(para 43.56, page 43/44)

Para 43-57 of Rayden goes on to state (page 43/35):

“The Court is slow to interfere with the mode of life chosen by the parent who has the principal care of the child, since any such interference may reflect adversely upon the child’s welfare. The Court has to consider to what extent it would cause that parent unhappiness or distress, or indeed bitterness, if a reasonable desire to move out of the jurisdiction were frustrated, and how such an order and the unhappiness it would cause would react upon the child”.

15. These observations seem to me, with respect, to accord fully with the so-called “checklist” in section 1 of the UK Children Act, 1989, referred to by Brelsford L.B. at page 5, H-I, and page 6 A-B.
16. The other case which is of assistance is cited in Rayden at page 43/35, namely *Moody v Field [1981] CA, transcript number 0071*: “leave should be refused only if it is clearly shown, beyond any doubt, that the interests of the children and the interests of the custodial parent are incompatible”.
17. The cases referred to, including *L v M*, refer to stronger situations than this case, where the move is agreed, but it is a question of resolving the parental differences on timing. The same principles should be followed, based on the paramount consideration of the welfare of the children.

Observations and Findings

18. Guernsey is much favoured by those who have chosen to live there, as well as those born in the Island. The Housing Law sets out a complex collection of requirements for obtaining the right to live, without an essential licence in local market accommodation. As Mrs Scott has pointed out, Guernsey is all that the children have known. One is now residentially qualified, the other has only some 6 months to go.

The right to live freely in the Island of your birth is indeed a species of “birthright”, as stressed by Mrs Scott and indeed the husband.

19. The children will be going with their mother and are not opposed to it. The continuing uncertainty is painful for everyone, including them. The elder child will be assessed for Secondary School by an Educational Psychologist. If the younger child departs before too long, he will be able to perform fully. These points seem to me to be clear and tangible. Both children need to be integrated at school as painlessly as possible in order to enjoy the benefits of a good education. What is not clear, and will not become clear until adulthood is reached, is whether either child would wish to live in Guernsey. They may well choose to do so, but may not. The decision will be theirs when they are able to exercise it, and all sorts of factors, many unforeseeable, to come into the equation. Not everyone wants to live in the Island of Guernsey, even if entitled to do so.

20. As the husband gave his evidence and particularly when cross-examined, I became more and more clear in my mind that his opposition to the move until April 2006 was a manifestation of his considerable (and natural) reluctance to see them go at all. I consider this was a last vestige of his opposition and although he is acting in good faith, he is considerably influenced by disappointment that the children are going away. I do not criticise him for this in any way, he is a good father, just as the wife is a good mother.

21. Both Advocates, the parents and the Court Welfare Officer consider that this is a “balancing act” for the Court to undertake. I have to balance all the considerations with the paramount welfare of the children uppermost in my mind. At the end of the day, I find the submission made on behalf of the wife to the effect that she feels the education of her children is of far greater importance than getting a Housing Licence, which may never be used, is persuasive. As suggested, the children may never come back, but certainly need a good education ‘now’.

22. I have already expressed doubt (para 9 above) about the practicality or desirability of seeking to obtain the younger child’s remaining months by coming over to Guernsey for the summer holidays. It is much more reasonable (and possibly more lawful in terms of the legislation) to let him do this when he is older.

23. I have differed from the conclusion of the Court Welfare Officer. It should be noted that in *L v M* Brelsford L.B. found herself in the same position (pages 42, F-H and 43-45 of the judgment). I have reminded myself of the guidance in *W v W (a minor: custody appeal) [1988] FCR 640* per Purchas L.J. (cited in *L v M*) and also in *Re V (residence: review) [1996] 3 FCR 101* per Russell L.J. (referred to in Rayden at pages 37/77 and 37/78):

“What is vital is that the parties should understand in terms why the recommendations of the independent officer appointed by the Court to advise it are not being accepted. It is a courtesy to the Court Welfare Officer that he or she should know. However, provided the judgment read as a whole directly or by necessary inference discloses the reasons for departure, its precise format and phraseology must be a matter for the judge”.

24. It will be apparent, it is hoped, why my views on the application differ from Mrs Scott’s. In my judgment the “welfare” of the children comprises emotional, physical and psychological elements. Educational needs are of signal importance and a concrete consideration; the Court has to be concerned with them at this juncture. In relation to the younger child, I accept Advocate Allen’s submission that there are 10 more years in which attaining his residential qualification can be dealt with, but not that time available for meeting his educational needs. Accordingly, his Guernsey “birthright” is markedly less tangible than his present need for certainty in his education. Also, balancing the effect delay would have on the wife, I consider this could well have a deleterious effect trickling down to both children, however caring and supportive the wife may try to be in the interim period.

Conclusion

25. Accordingly, the application made by the wife succeeds as on the facts, I consider it is consistent with the paramount needs of the children. In order to enable the husband to consider the judgment and seek advice thereon, I propose to add the words “after the expiration of fourteen clear days from this judgment” to the sentence “an order enabling the petitioner to return to live [outside the jurisdiction] with the children”.

Costs

26. Costs are reserved. My preliminary view, subject to any submissions to the contrary, is to make no order.