In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2019: 13

KW

Appellant (Father)

-v-

CD

Respondent (Mother)

JUDGMENT
(REASONS FOR DECISION)

Appeal against Interim Order granting Care and Control and Access to Child - Section 36T of Children Act 1998 (Order where child unlawfully withheld) - Whether the Family Court has a duty to state its findings of facts and Whether it has a duty to provide written reasons for decisions on interim applications - Stay Pending Appeal - Operation of Section 11(1) of the Criminal Appeal Act 1952 - Avoidance of Delay by the Court in making a Determination on the welfare of a Child – Anonymity of appeal Judgments from Family Court proceedings

Date of Hearing:	Monday 12 August 2019
Date of Judgment:	Monday 12 August 2019
Reasons:	Tuesday 20 August 2019

Appellant:	In person
Respondent:	Mrs. Karen Williams-Smith (Trott & Duncan Limited)

JUDGMENT delivered by S. Subair Williams J

Introduction and Summary

1. The parties to this appeal are the parents of an infant child of approximately 9 months in age[1] ("the Child"). This appeal was brought by the Appellant father in challenge of an interim decision made by the Family Court of summary jurisdiction, as chaired by

[1] The Child was 7 months in age at the time of the hearing in the Family Court.

learned Acting Magistrate Jacqueline MacLellan sitting with Rev. Veronica Outerbridge and R.W. Baptiste ("the Family Court" / "the Panel"), on 4 July 2019.

2. On 4 July the Family Court granted, *inter alia*, weekly care and control to the Respondent mother from Monday to Friday with continual access to the Child from Friday at 4:30pm through to Monday at 9:00am. A return date for the final hearing of the Respondent's application before the Family Court for care and control is pending and fixed for 9 October 2019. I shall interchangeably refer to the Order made on 4 July as "the Family Court Order" / "4 July Order").

3. At the conclusion of the appeal hearing, I dismissed the appeal on all grounds and informed the parties that I would later provide these written reasons.

The Notice of Appeal

4. The grounds of the Notice of Appeal are as follows:

    1) The application having been brought by the mother, the court required the Appellant to make his representations first and was not given an opportunity to reply to the representations made by the mother so that the Appellant could not make full representations;
    2) The court failed to give any or sufficient consideration to the mother's previous consent for the child to reside with the Appellant and the effect of section 36C(4) of the Children Act 1998 with regard to such consent;.
    3) In relation to the said orders the court made no finding of fact at all or no sufficient findings of fact on which its decision was based;
    4) The court failed to adequately enunciate the points for determination, the decision on each such point and the reasons for the decisions; and
    5) Any other grounds as may be advanced by counsel and accepted by the court after receipt of the court order and record of appeal.

Ground 1

The application having been brought by the mother, the court required the Appellant to make his representations first and was not given an opportunity to reply to the representations made by the mother so that the Appellant could not make full representations

5. Ground 1 is a procedural complaint about the 4 July hearing. During the course of his oral submissions the Appellant further protested that he was deprived of the opportunity to conclude his evidence. However, no serious criticism was made that the Appellant was disabled from putting forth his case which was this: the Respondent mother ought not to be granted unsupervised access to the Child because she had a violently aggressive disposition.

6. As seen on page 8 of the record of appeal ("the Record"), the Appellant stated in evidence that he had placed 911 calls on at least 5 or 6 occasions arising out the Respondent's conduct in the presence of the Child. The Appellant further caused consequential referrals to be made to the Department of Child and Family Services ("DCFS"). The Appellant spoke in evidence about The Respondent's threatening behaviour towards him and about an occasion on which she unsuccessfully attempted to remove the Child from him by force. The Appellant stated that the Respondent also broke all of his dishes on this occasion in addition to throwing and hitting both him and the Child with a stone (see pages 9 and 10 of the Record). Additionally, the Appellant spoke in evidence about another incident whereby the Respondent abandoned the Child on a sidewalk while she attacked him.

7. At page 9 of the Record, the Appellant is noted to have said that he was agreeable to the Respondent being granted access on the condition that her visits would be supervised, having regard to her threat that she would leave Bermuda with the Child. At page 10 of the Record he repeated his agreement to the notion of supervised visits and his support of the Respondent securing anger management counselling.

8. I now turn to the Respondent's evidence in the Family Court. It does not appear from the Record that the Respondent spoke about the specific incidents of confrontation which were raised during the Appellant's evidence. However, the Respondent described an incident where the Appellant slapped and kicked her out of a car only five days after having had a caesarean section. She said that the Appellant picked her up, threw her and locked her out.

9. The only matter raised by the Respondent which was perhaps arguably relevant to the Appellant's case for supervised access was the above car incident. However, in my judgment, the Appellant's unheard evidence on the car incident did not prejudice the presentation of his overall case that the Respondent ought not to be granted unsupervised access to the Child because she had a violently aggressive disposition as illustrated by the examples the Appellant provided during his evidence.

10. The Appellant was inviting the Family Court to find on his evidence that the Respondent's demonstrated anger towards him was so extreme that she posed a general danger to the Child. The Appellant's case was amply put before the Family Court but rejected. The simple fact of the matter is that the Family Court was not persuaded on the evidence that the Child would be endangered by the Mother's care and control and/or access to the Child.

11. The Appellant sought to persuade the panel that the Respondent's access to her infant child should only occur under his supervision or under the supervision of a third party. The Appellant's supervision of the mother's access to the child seemingly served as an opportunity for the Appellant to police the Respondent's anger towards

him. At page 10 of the Record the Appellant warned that he would terminate any visit whereupon the Respondent showed him hostility. Consequently, it was open to the Panel to reasonably find that the Appellant father's insistence on supervising the Respondent mother's access undermined the sincerity of his claims that he feared for his safety from the Respondent mother. Notwithstanding, on the Appellant's case, the Respondent's violent disposition was only triggered by the Appellant's presence before her.

12. I, therefore, see no valid basis for interfering with the Panel's exercise of discretion in granting the mother unsupervised weekly care and control of the Child. The Family Court undoubtedly accepted the evidence of Ms. Charmaine Richardson of DCFS that the issue for concern was more so the boiling relationship between the parties rather than any serious apprehension as to whether either party would be competent to have unsupervised care and control or access to the Child.

13. For these reasons, I dismissed Ground 1.

Ground 2

The court failed to give any or sufficient consideration to the mother's previous consent for the child to reside with the Appellant and the effect of section 36C(4) of the Children Act 1998 with regard to such consent.

14. Section 36C(4) provides as follows:

(4) Where the parents of a child live separate and apart and the child lives with one of them with the consent of the other of them, the right of the other to exercise the entitlement to custody and the incidents of custody, but not the entitlement to access, is suspended until a separation agreement or order otherwise provides.

15. Consent under section 36C(4) plainly refers to the agreed *status quo* during the period where the parties occupy separate dwellings. The effect of this section is that the *status quo* in respect of which individual parent has custody of the child concerned (ie care and control and the right to direct the education and moral and religious training of the child) cannot lawfully be transferred to the other parent unless a separation agreement or order of the Court is made. Thus section 36C(4) did not in any way disentitle the Family Court from hearing and granting the Respondent mother's application for custody of the Child.

16. For this reason, I found that Ground 2 was without merit.

Grounds 3 and 4

In relation to the said orders the court made no finding of fact at all or no sufficient findings of fact on which its decision was based;

The court failed to adequately enunciate the points for determination, the decision on each such point and the reasons for the decisions;

17. The Respondent's application to exercise her entitlement to custody under section 36C of the Children Action 1998 ("the 1998 Act") was heard by the Family Court on 4 July 2019 on an interim basis.

18. Having heard *vive voce* evidence from both parties, the Family Court, in the exercise of its discretion the 4 July Order which stated the following terms:

    1. *There shall be a(n) S.I.R. with respect to custody/care and control and access.*

    2. *Pending S.I.R., and subject to the DCFS confirming that house is suitable, the child shall live with the mother from Monday through Friday.*

    3. *The father shall have access with child Friday at 4:30 through Monday at 9 with handover at DCFS or such other place as DCFS recommends.*

    4. *The mother and father shall share the costs of day care.*

    5. *Review on 9th October 2019 at 2:30pm Family Court 2.*

19. At page 34 of the Record, the following narrative appears:

MAGISTRATES COMMENTS

For the purposes of Section 6(a) of the Civil Appeal Act, 1971 I hereby state, that I have no particular comments that I should like to make on this appeal other than the comments contained in my Judgment.

20. Section 6(1)(a) of the Civil Appeal Act 1971 outlines the conditions of appeal in civil matters and refers specifically to the 14 day timeline for filing a notice of appeal. While this legend is routinely included in records from the Magistrates' Court, the reference to "*section 6(a) of the Civil Appeals Act 1971*" is obviously flawed and misguided. Notably, section 6 has no relevance to the appeal process for matters arising from the Family Court. Indeed, pursuant to section 18 of the Children Act 1998, the Criminal Appeal Act 1952 governs the procedural steps for appeals from the Family Court to the Supreme Court.

21. Section 18 of the Children Act 1998 provides:

Appeals
Any child or other person aggrieved by any order made under this Act may appeal from the order to the Supreme Court in the manner and subject to the conditions

provided by the Criminal Appeal Act 1952 [title 8 item 87] as though the order appealed against were an order made on a conviction by a court of summary jurisdiction.

22. Section 13 of the Criminal Appeal Act 1952 requires the magistrate presiding over the Family Court to prepare a report giving his opinion upon the proceedings and upon any points arising in the proceedings, as he or she thinks expedient to embody in the report:

Documents to be sent to Registrar
Without prejudice to any power of the Supreme Court under section 15(1) to order a magistrate to furnish a supplementary report in connection with proceedings taken before him, upon an appellant duly giving notice of appeal in the manner provided by this Act, the Senior Magistrate (if he was not the magistrate comprising or presiding over the court in question) shall forthwith inform the magistrate who comprised or presided over the court in question; and the magistrate comprising the court of summary jurisdiction or, (in the case of a Family Court), presiding over the court of summary jurisdiction before which the proceedings in connection with which the notice of appeal was given were heard, shall, unless the appeal is earlier abandoned, prepare a report giving his opinion upon the proceedings and upon any points arising in the proceedings which he thinks it expedient to embody in the report, and shall (if he is not the Senior Magistrate) cause the report to be transmitted to the Senior Magistrate as soon as practicable, and in any event within five days after the day on which notice of appeal was given.

23. Section 15(1) of the Criminal Appeal Act 1952 empowers the Supreme Court to direct the presiding magistrate to submit a supplementary report of his or her opinion on any particular point arising in the proceedings:

Supplemental powers of Supreme Court
15 (1) The Supreme Court of its own motion, or upon the application of the appellant or the respondent in an appeal, or upon the application of any person who under section 14 is made an additional party to an appeal, may, if it appears to the Court to be necessary or expedient in the interests of justice, exercise in connection with the hearing of the appeal any or all of the following powers, that is to say,—

(a) the Court may order the magistrate comprising the court of summary jurisdiction or, (in the case of a Family Court), presiding over the court of summary jurisdiction, to submit to the Court a supplementary report giving his opinion upon any point arising in the proceedings;

24. Immediately below the above caption for the magistrate's comments on page 34 of the Record, appears a blank and unsigned provision for the signature of the learned acting magistrate. Thereunder, are handwritten notes from Acting Magistrate MacLellan, dated 25 July 2019, perhaps made with sections 13 and 15(1) of the Criminal Appeal Act 1952 in mind.

25. She states the following:

The other comments that I would like to make are as follows:

1. *The mother did <u>NOT</u> consent that baby should be with father- see her letter to the Court.*

2. *The mother asked Dad to look after baby for a day while she looked for work. Dad refused to give baby back and refused to let her see child and refused to let her know who child minder is: Mother in financially vulnerable position.*

3. *DCFS did not get involved and take child into care and said they had no authority to place child with mother or father, hence mother brought application for care and control.*

4. *The original agreement was that mother would have child during week and father have child on weekends- agreed with DCFS in family presentation plan. Father disregarded this and took unilateral control- Refused access to mother. Child is young and needs a primary home and mother has been primary caregiver to date. The status quo should be returned.*

5. *Much of this was stated when giving the judgment and the oral evidence should be listened to at the appeal.*

26. (On 31 July 2019 when this matter first came before me for directions to be made, I informed Counsel[2] that I would be averse to the playing of a lengthy audio record of the 4 July 2019 proceedings unless it was absolutely necessary. I instead directed Counsel to prepare an agreed transcript of the proceedings and for any disaccord on the accuracy of the transcript to be highlighted for my ease of reference. On the return of the parties at the 12 August hearing, Mrs. Williams-Smith confirmed that she prepared a transcript but advised that the Appellant did not agree that it was accurate in content. Nonetheless, neither party sought to rely on any portion of the transcript during the hearing of the appeal before me.)

27. Notwithstanding the written points made by the acting magistrate, the Appellant pursued Grounds 3 and 4 in his oral submissions complaining that the points for determination were not enunciated and that there were no stated findings of facts supportive of the Family Court's decision, albeit an interim decision. There was no suggestion from the Respondent that the acting magistrate expressed any findings of fact or reasons beyond her subsequent handwritten notes made on 25 July 2019.

[2] The Respondent was then represented by Ms. Victoria Greening of Chancery Legal Limited before retaining Mrs. Karen Williams-Smith of Trott & Duncan Limited.

28. Prior to its repeal in whole by the Criminal Jurisdiction and Procedure Act 2015, section 21 of the Summary Jurisdiction Act 1930 made it mandatory for a Court of summary jurisdiction to give reasons for its decisions:

Record of judgment

21 When the case on both sides is closed the magistrate composing the court shall record his judgment in writing; and every such judgment shall contain the points for determination, the decision therein and the reasons for the decision, and shall be dated and signed by the magistrate at the time of pronouncing it.

29. Section 21, when it was in force, was applied by Kawaley J (as he then was) in *S v M (Re K: Access) [2007] Bda LR 27*. Kawaley J allowed the mother's appeal against the Family Court's decision to grant unsupervised access to the father on the basis that decision was radically inconsistent with the previous approach of the same Court (but a differently constituted panel) and was delivered without the benefit of reasons. At paragraphs 11-14 Kawaley J held:

11. The second substantive ground of appeal was that no reasons were given for the decision. It was not open to serious argument that no reasons for the decision were recorded and that the decision was liable to set aside on the grounds of an error of law by virtue of non-compliance with the requirement for reasons contained in section 21 of the Summary Jurisdiction Act 1930.

12. In my judgment it was unarguably clear that, in the absence of reasons explaining why it was considered to be in the best interests of the child for immediate access to be granted, this Court could not decline to allow the appeal on the grounds that no substantial miscarriage of justice had occurred. A Family Court, particularly a panel which has no (or no recent) prior dealings with a case, in my view may not ordinarily order unsupervised access, against a history of limited and/or problematic access and the absence of consent, without seeking independent professional support for such decision, such as a written or oral report from the Court Social Worker. Exceptional cases may well occur, but clear reasons for departing from a more precautionary approach would have to be spelt out in order to support such an adventurous decision.

13. It seems likely that the Family Court before whom the Appellant appeared unrepresented were, perhaps understandably, swayed by the advocacy of the Respondent's Counsel Mr. King. This doubtless led to the Court overlooking the importance of the crucial fact that (a) the last panel to deal with the case formed the view that supervised access was appropriate, and (b) the Respondent was not, between August 14, 2003 and February 2, 2006, legally entitled to exercise access, because the necessary supervisory mechanisms had not yet been put in place.

14. The Order was set aside and the matter remitted to the Family Court so that the issue of access can be considered afresh after input has been sought from the Court Social Worker, the Department of Child and Family Services and/or some other appropriate independent professional.

30. While section 21 of the repealed 1930 Act clearly applied to Family Court matters, it appears to have been taken over by section 83(5) of the Criminal Jurisdiction and

Procedure Act 2015 which expressly requires a magistrates' court's final judgment to be included in the record of proceedings. The meaning of the Magistrates' Court's final judgment is particularised to include the point(s) for determination; the decision made on such points and the reasons for the decisions.

31. Mrs. Williams-Smith argued that section 83(5) did not apply to matters in the Family Court and I admittedly found myself initially persuaded by this submission. However, on a wider examination of the 2015 Act, it became clear from section 87 that section 83(5) also applies to Family Court matters:

Saving for family courts

87 The provisions relating to the constitution, place of sitting and procedure of magistrates courts shall, in their application to family courts, have effect subject to rules prescribed by the Chief Justice in accordance with this section, or to any other enactment regulating the constitution, place of sitting or procedure of family courts.

32. Of course, section 6(8) of the Bermuda Constitution Order ("the Constitution") also stands as one of the guarantee provisions to secure an individual's right to the protection of the law through a constitutional right to a fair Court hearing in determination of any civil right or obligation established by law:

Provisions to secure protection of law

6(8) Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.

33. Having reviewed these provisions, I find that the Family Court has a statutory duty imposed by section 83(5) (as read with section 87) of the Criminal Jurisdiction and Procedure Act 2015 to provide reasons for its decisions on points for determination in its final judgments and that such reasons are a necessary component of an individual's right to fair hearing under section 6(8) of the Constitution.

34. The next question for resolve was whether or not the Family Court's record of proceedings complied with the requirements of section 83 of the 2015 Act.

35. Section 83 provides:

Record of proceedings

83 (1) The magistrates' court must maintain a record of proceedings for all cases coming before it, which is to include all matters noted in subsections (2), (3), (5) and (7).

(2) The record of proceedings must include the details of any rulings, determinations or directions made at a case management hearing held under Part XXVI of the Criminal Code Act 1907.

(3) The record of proceedings must include a written note of all material evidence before the court in narrative form, to be composed by the magistrate composing a court of summary jurisdiction.

(4) In any written note taken under subsection (3), any particular question and the answer thereto shall be taken down in full—

(a) on an application by a party to the case; or

(b) of the magistrates court's own motion.

(5) The record of proceedings must include the magistrates' court's final judgment in writing, which will include—

(a) the point or points for determination;

(b) the decision made on such points; and

(c) the reasons for the decisions.

(6) When it is delivered, the final judgment mention in subsection (5) must be dated and signed by—

(a) the magistrate composing the court of summary jurisdiction; or

(b) in the case of a Special Court, its chairman.

(7) The record of proceedings must include such other particulars as may be required by rules made under section 540 of the Criminal Code Act 1907.

(8) Subject to subsection (9), for the purposes of subsection (4) and (5), a tape recorded record of proceedings may be used in lieu of a written note.

(9) A tape recorded record shall be of such type approved by the Minister and specified in a notice published in the Gazette.

36. The term '*rulings*', '*determinations*' and '*directions*' in section 83(2) is clearly distinct from what is meant by '*the magistrates' court's final judgment*' in subsection (5). Subsection (2) requires the record of proceedings to include details of any rulings, determinations or directions made at a case management hearing. Subsection (3) requires a written note by the magistrate of all material evidence before the Court in narrative form. No issue of concern arises here as the acting magistrate's handwritten notes appear at pages 13-19 of the Record and an audio record is available as per sub-section (8).

37. As a matter of construction, I find that section 83 has the effect of recognizing a distinction between a ruling (for example a decision on an interim application) and the final judgment of the Magistrates' Court. In respect of rulings, the Family Court is required to proffer *details* of its rulings as opposed to *points for determination, decision on such points for determination* and *reasons* on a final judgment.

38. In my judgment, the details of interim 4 July ruling are sufficiently spelled out on pages 12 and 34-35 of the Record. Accordingly, I dismissed Grounds 3 and 4.

39. However, I see it fit to remark, that a Court's provision of reasons for an interim decision may become necessary and determinative of whether there has been a fair hearing within a reasonable timeframe under section 6 of the Constitution in appropriate cases where the length of time between the interim decision and the final decision is particularly significant and where the matters decided on the interim application are so closely related or impactful on the facts and issues to be determined at the final hearing.

Overall Analysis as to the Welfare of the Child

40. Careful attention must always be given to the below provisions of the Children Act 1998 when dealing with child welfare matters:

> ***Purposes of the Act***
> *5. The purposes of this Act are to protect children from harm, to promote the integrity of the family and to ensure the welfare of children.*
>
> ***Welfare principle***
> *6. In the administration and interpretation of this Act the welfare of the child shall be the paramount consideration.*

41. A Court must not make an Order in respect of a child unless it considers that such an order would better promote the welfare of the child. Section 14 states:

> ***Decision to make order***
> *14. Where the court is considering whether or not to make one or more orders under this Act, it shall not make an order unless it considers that doing so would better promote the welfare of the child than making no order at all.*

42. The Appellant did not complain on his pleaded case that the Orders made by the Family Court were in part or wholly adverse to the welfare of the Child. However, peeling through the layers of his complaint unveiled the seedlings of his concern that the Order for the mother's unsupervised access to the Child was contrary to the Child's welfare.

43. However, in my judgment it was open to the Family Court on the evidence before it to reasonably find that the relationship between the parties is a tumultuous one and that the intended target of aggression (on each party's separate versions) is always the other party as opposed to the Child.

44. For these reasons, I saw no sound reason to interfere with the Family Court's interim decision to grant shared care and control to the parties having reviewed the evidence

generally and having had particular regard to the evidence of Ms. Richardson of the DCFS.

Operation of Stay Pending Appeal

45. The application of the Criminal Appeal Act 1952 to the procedural scheme for appeals from the Family Court is triggered by section 18 of the Children Act 1998. The stay provision at section 11(1) of the 1952 Act is as follows:

> *11 (1) Where notice of appeal has been duly given by an appellant under this Act all further proceedings shall, subject to this section, be stayed; and accordingly, after notice of appeal has been given, no sentence shall be imposed or order made pending the determination, or, as the case may be, the abandonment of the appeal.*

46. The unsatisfactory operation of section 11 in criminal matters was considered by the former learned Chief Justice, Mr. Ian Kawaley in a line of previous cases (See *Menzies v R [2015] Bda LR 51* and *Brangman v Raynor (Police Sergeant) 2013 Bda LR 23*) However, in *Simons v Miller (Police Sergeant) [2017] Bda LR 68* Kawaley CJ construed section 11(1) in a constitutional context so to ensure that litigants were not being unfairly deprived of a fair trial.

47. At paragraphs 10-14 Kawaley CJ in held:

> ***Section 11(1) of the Criminal Appeal Act and its misuse***
>
> *10. The conduct of this appeal brings into focus the difficulties with section 11(1) of the Criminal Appeal Act 1952. That section provides an automatic stay of any sentencing proceedings once a Notice of Appeal has been filed. It causes a considerable mischief, delay and, more significantly still, a dilution of the constitutional rights of complainants in criminal cases to a fair hearing in a reasonable time for an appellant to be able to file a Notice of Appeal which does not even disclose an arguable ground of appeal and delay the sentencing process.*
>
> *11. In this particular case the charges are serious and there is a considerable public interest in expedition because the charges represent an attempt by the Commissioner of Prisons to ensure that illicit material is not smuggled in to the prisons or correctional facilities by prison officers. An inability to bring to justice a prison officer who has been tried and convicted for smuggling drugs into a prison for prisoners undermines the authority of the Commissioner of Prisons and undermines his efforts to hold his officers to proper standards of discipline.*
>
> *12. Section 11(1) of the Criminal Appeal Act reads as follows:*
> *"(1) Where notice of appeal has been duly given by an appellant under this Act all further proceedings shall, subject to this section, be stayed and accordingly after notice of appeal has been given, no sentence shall be opposed or order made pending the determination or as the case maybe the abandonment of the appeal."*

Construing section 11(1) so as to conform to section 6(1) of the Constitution

> *13. This provision (section 11(1) is found in a 1952 Act which predates the Bermuda Constitution Order 1968. Section 5 of the Bermuda Constitution Order provides that existing laws shall be read subject to such adaptations, modifications and qualifications as are required to bring them in to conformity with the Constitution (Footnote 1: Section 5(1) provides: "Subject to the provisions of this section, the existing laws shall have effect on and after the appointed day [2 June 1968] as if they had been made in pursuance of the Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.") It seems to me that section 11(1) of the Criminal Appeal Act 1952 cannot properly be read consistently. It seems to me that section 11(1) of the Criminal Appeal Act 1952 cannot properly be read consistently with section 6(1) of the Constitution (Footnote 2: Section 6 of the Constitution provides: " (1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law." if it is read as giving persons who are convicted an unfettered right to file a notice of appeal and postpone indefinitely the sentencing process.*
>
> *14. In my judgment, Section 11(1) must be read as being subject to a proviso to the following broad effect. The entitlement of an appellant to the benefit of the automatic stay will only crystallize when (1) there is some good reason for filing an appeal before the sentencing hearing takes place and provided that (2) any arguable appeal is prosecuted in a diligent manner.*

48. The bottom-line effect of Kawaley CJ's ruling in *Simons v Miller* was to cure the abused criminal appeal process from further reliance by Defence Counsel on the mandatory stay provision created by section 11(1) of the 1952 Act. Recognizing the supremacy of the Constitution, the Court construed this provision so as to make it conform to section 6 of the Constitution.

49. The effect of section 11(1) in Family Court cases is, in practical terms, remarkably different from its historical misuse in criminal cases where the aim was to stay pending sentence proceedings. The Respondent did not challenge the Appellant's proposition that the 4 July Order was stayed by section 11(1). Equally, I did not address my mind to the true ad full effect of section 11(1) when the matter was before me on 31 July for directions or at the 12 August appeal hearing. However, in reviewing section 11(1), I find that any such attempt to invoke this section as a means of automatically staying the 4 July Order is, as a matter of literal construction, flawed.

50. Section 11(1) bars the lower Court from making any orders or holding any *further* proceedings once the notice of appeal has been filed. Section 11(1) does not unravel or freeze any orders made by the Court prior to the filing of a notice of appeal. Thus

the 4 July 2019 Order was not capable of being stayed under section 11(1) by a notice of appeal dated and filed on 5 July 2019.

51. For these reasons, I find that the 4 July Order was unaffected by section 11(1) of the Criminal Appeal Act 1952 and continues to be live and operational.

Section 36T (Police Powers where Child is unlawfully withheld)

52. The Appellant has wrongly asserted a right to rely on section 11(1) of the 1952 Act as a basis for lawful non-compliance with the 4 July Order.

53. The Respondent has alleged through correspondence to the Court dated 14 August 2019 and further email correspondence with the enforcement officer of the Family Court that the Appellant continues to withhold the Child, having filed a Notice of Appeal against this judgment.

54. Section 9(1)(g) of the Court of Appeal Act 1964 provides that the President (or any Justice of Appeal appointed by the President for the purpose) may make Rules for a stay of execution pending the determination of an appeal and the conditions, as to security or otherwise, which may be imposed in any order for a stay.

55. Order 2/37 of the Rules of the Court of Appeal for Bermuda ("the COA Rules") provides:

> ***2/37 Stay of execution***
> *37 Upon the application of an intending appellant, the Court or a Judge may stay the execution of any judgment of the Supreme Court until the determination or other disposal of the appeal:*
> *Provided that no application under this Rule shall be entertained until it is shown to the satisfaction of the Court or a Judge that application for a stay of execution has been made to the Supreme Court and has been refused.*

56. Order 2/36 of the COA Rules reinforces that the application for a stay shall be first made in the Supreme Court:

> ***2/36 Court to which applications should be made***
> *Whenever an application may be made either to the Supreme Court or to the Court, it shall be made in the first instance to the Supreme Court but, if the Supreme Court refuses the application, the applicant shall be entitled to have the application determined by the Court.*

57. In my judgment, there is no basis for any claim to an automatic statutory stay of the 4 July 2019 Order. Any continued non-compliance in the face of this judgment should accordingly be met with, *inter alia*, the force of section 36T of the Children Act 1989 which states as follows:

Order where child unlawfully withheld

36T (1) Where a court is satisfied upon application by a person in whose favour an order has been made for custody of or access to a child that there are reasonable and probable grounds for believing that any person is unlawfully withholding the child from the applicant, the court by order may authorize the applicant or someone on behalf of the applicant to apprehend the child for the purpose of giving effect to the rights of the applicant to custody or access, as the case may be.

(2) Where a court is satisfied upon application that there are reasonable and probable grounds for believing that—

(a) any person is unlawfully withholding a child from a person entitled to custody of or access to the child;
(b) a person who is prohibited by court order or separation agreement from removing a child from Bermuda proposes to remove the child or have the child removed from Bermuda; or
(c) a person who is entitled to access to a child proposes to remove the child or to have the child removed from Bermuda and that the child is not likely to return,

the court by order may direct the Provost Marshall General or a police officer, or both, to locate, apprehend and deliver the child to the person named in the order.

(3) An order may be made under subsection (2) upon an application without notice where the court is satisfied that it is necessary that action be taken without delay.

(4) The Provost Marshall General or police officer directed to act by an order under subsection (2) shall do all things reasonably able to be done to locate, apprehend and deliver the child in accordance with the order.

(5) For the purpose of locating and apprehending a child in accordance with an order under subsection (2), the Provost Marshall General or police officer may enter and search any place where he has reasonable and probable grounds for believing that the child may be with such assistance and such force as are reasonable in the circumstances.

(6) An entry or a search referred to in subsection (5) shall be made only between sunrise and sunset unless the court, in the order, authorizes entry and search at another time.

(7) An order made under subsection (2) expires six months after the day on which it was made, unless the order specifically provides otherwise.

(8) An application under subsection (1) or (2) may be made in an application for custody or access or at any other time.

58. Mrs. Williams-Smith, at the 12 August hearing before me, applied for this Court to invoke section 36T against the Appellant by directing a police officer to locate, apprehend and deliver the Child in accordance with the Family Court Order.

59. As I have found that the Appellant's non-compliance with the 4 July Order is unlawful, it follows that the test set by section 36T for reasonable and probable grounds for believing that the Respondent is unlawfully withholding the child has been met to the satisfaction of this Court.

Best Efforts to Avoid Delay in Cases involving the welfare of Children

60. Having heard full submissions from Counsel for both sides, I dismissed the appeal on all grounds at the close of the hearing and ordered that the Child be delivered to the DCFS before close of the business day on Tuesday 13 August 2019. I affirmed the 4 July Order and held that the stay provision contained at s. 11(1) of the 1952 Act was inoperative, having disposed of the appeal. (I have since which explained herein that section 11(1) never had the effect of staying the 4 July 2019 Order.)

61. I further remarked that my orders were made at the immediate close of the hearing so to avoid any unnecessary delay which is of paramount importance in child welfare matters.

62. Pursuant to section 7 of the Children Act 1989, the Court[3] has an express statutory duty to avoid delay in making a determination as any such delay would likely prejudice the welfare of the child concerned.

63. Section 7 of the Children Act 1989 provides:

> ***Delay***
> *6. In any proceedings under Part IV (care and supervision) or Part V (protection of children), the court shall have regard to the fact that any delay in determining any question with respect to the upbringing of a child is likely to prejudice the welfare of the child.*

64. The importance of the Court operating at a reasonably efficient pace in child welfare matters was underscored by the Court of Appeal in the judgment of the learned Mr. Geoffrey Bell JA in *C v D (re A and B (Minors)) [2016] Bda LR 113* at paragraph 18 where he stated the following:

> ***Delay***
> *18. Finally, we cannot record these reasons without also commenting that it was highly regrettable that in a matter concerning the welfare of children, the wheels of justice should have moved so slowly. The Mother's applications for leave to appeal and for a stay of the 7 June order were made to the judge on 8 September, and were not ruled on by the judge until 8 November 2016, very shortly before the appeal came on for hearing. That application should have been dealt with immediately or certainly within days rather than weeks. Priority must always be given to cases concerning the*

[3] Under the interpretation provision at s. 2 "court" means the Family Court and, where the context so requires, includes the Magistrates' Court and the Supreme Court

wellbeing of children, and that is particularly the case in a matter such as this, where the proceedings were initiated on an ex parte basis, and despite the best efforts of those advising the Mother, it took weeks before the matter came back before the judge, and many more weeks before the efforts to set aside the ex parte order were rejected by the judge, a total of more than 11 weeks in all. These children's best interest(s) have not been served by the delay and events that have occurred thus far. This Court expresses the hope that the preparation of reports and the allocation of Court time will be undertaken with the early resolution of their future firmly in mind.

65. Having stated for the Court record the decision and orders of the Court, I advised Counsel that I would follow up with written reasons.

66. This matter was heard before me on Monday 12 August when I delivered my decision on the appeal and made the said orders. By letter dated (Wednesday) 14 August 2019 (first shown to me on Thursday 15 August) Counsel for the Respondent mother requested an indication from the Court on the timeframe for the delivering of these written reasons ("the formal ruling" as it was termed in the said letter) on the following stated basis:

"*In accordance with Justice Williams' ruling, the child, born on 31 October 2018, was meant to be handed over to the Department of Child & Family Services yesterday evening (13 August 2019) before close of business. However, (the Appellant) did not surrender the child and in fact sent our firm an email indicating that he had lodged an appeal to the Court of Appeal and based on those proceedings, he has refused to return the child. We herewith enclose a copy of (the Appellant's) appeal which was due to be lodged with the Supreme Court first thing this morning…*"

67. On Friday 16 August, under my direction, a Court administrator corresponded with the parties by email and invited the Appellant to reply to the 14 August letter at his earliest opportunity. The parties were also advised on the same day that I would deliver my reasons in Court on Tuesday 20 August 2019. (At the time of completing these reasons, no reply from the Appellant had been filed with the Court.)

68. In recognition of an infant child's natural desire and need to be reunited with his mother, this Court employed all best efforts to hear this matter in an expeditious timeframe (the initial directions hearing was listed on Wednesday 31 July 2019 and the substantive appeal was heard at the parties' earliest opportunity on Monday 12 August). Best efforts were also applied to the timely delivery of the Court's decision on the appeal, its consequential orders and these written reasons.

Anonymity

69. Section 6(10) of the Constitution empowers the Court to exclude the public from proceedings in circumstances where such publicity would prejudice the welfare of

persons under the age of eighteen years and / or the protection of the private lives of persons concerned in the proceedings.

70. No doubt, section 17 of the Children Act 1998 is purposed to protect minors from any such adverse publicity as the public is expressly excluded from sittings of the Court without leave of the Court. Section 17 provides:

    Exclusion of the public
    Except by leave of the court no person shall be present at any sitting of the court other than the parties to the case, their counsel and other persons directly concerned in the case.

71. Although neither party requested for this judgment to conceal their respective identities, it seems to me that the long-standing practice of anonymizing judgments involving the welfare of a minor should apply to this case having regard to section 17 of the 1998 Act and section 6(10) of the Constitution.

Conclusion

72. The appeal was dismissed on all grounds.

73. The Appellant was ordered by this Court to deliver the Child to DCFS for handover to his mother by close of business on 13 August 2019. Failure to deliver the Child as ordered constitutes a breach of the Order of this Court.

74. The Appellant is further directed to deliver the Child to the care of the DCFS by 12noon on Tuesday 20 August 2019 in resumption of the impugned 4 July 2019 Order of the Family Court which is affirmed. (This only applies if the Appellant has not yet delivered the Child in compliance with my previous Order made on 12 August 2019.)

75. This Court invokes section 36T of the Children Act 1989. I will hear the parties on Tuesday 20 August 2019 as to the particular terms of the order to be made under section 36T.
76. The decisions made by this Court will not be stayed without leave of the Court.

77. This matter is listed for the formal delivery of these reasons on Tuesday 20 August 2019 at 9:30am.

Dated this 20th day of August, 2019

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HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE