

Neutral Citation Number: [2011] EWHC 335 (Fam)

Case No: FD10P01559

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

24/02/2011

Before:

MRS JUSTICE THEIS DBE

Between:

C

Applicant

- and -

D

Respondent

Mr Stephen Cobb QC & Ms Nicola Fox (instructed by Sears Tooth) for the Applicant
Ms Deborah Eaton QC & Ms Madeleine Reardon (instructed by Messrs Withers LLP) for the
Respondent

Hearing dates: 14th - 17th February 2011

HTML VERSION OF JUDGMENT

Crown Copyright ©

Mrs Justice Theis DBE:

1. This matter concerns two boys A (13 years) and B (8 years). Their parents are C and D, who I shall hereafter refer to in this judgment as the mother and father. The court is concerned with the mother's application for leave to remove the children from the jurisdiction to live permanently with her in south USA. The application is opposed by the father.
2. These cases are very difficult, particularly when they are finely balanced, as this case undoubtedly is. There are powerful arguments advocated by the parties on paper and in oral evidence in support of their respective positions. The court has been greatly

assisted by the parties having legal representation of the highest standard. There is no middle ground and inevitably one party is going to find the court's decision very difficult.

Background

3. There is no significant dispute about the background..
4. The parents met in the USA in 1996, their relationship developed. A was born in New York in 1998. That same year the family moved to live in London where B was born in 2003.
5. Both the parents run and operate successful businesses. The mother's business requires her to work in Europe and in America. The father is in finance and has international offices in Europe, America and Asia. He said he spends about 40% of his time attending meetings within his organisation and the balance is meeting with managers, clients, accountants and auditors. He doesn't work remotely via a computer; most of it is face to face.
6. The family lived together in London until the breakdown of the parents' relationship in 2005. On separation they agreed a shared care arrangement whereby each child spent an equal amount of time with each parent; during term time this was done by the children moving between their parents' homes each week and the school holidays were shared equally. There were times when they were flexible in the arrangements to accommodate the other parent's commitments.
7. The father formed a relationship with X in 2007. She has two children who are a similar age to A and B. She is separated from her husband and lives in north-east USA. In 2008 the father and X got engaged, no date was set for a wedding. The father would spend time with X, mainly in north-east USA which he combined with working there too.
8. In late 2008 the father applied to vary the term time arrangements to provide for the boys to spend alternating 2-week periods in term time with each parent, with the holiday periods remaining the same (divided equally). The mother's response was to propose that term time be divided as to 20 days with the mother and 10 with the father ('20/10'). The father agreed to try this from September 2009, subject to it being reviewed at some stage. In practice the father's parenting time during the school term runs from Friday after school until the Monday the following week, so the father has two weekends and the intervening week. The father said he only ever intended this to be a temporary arrangement, which he agreed to avoid a contested hearing and that he wanted it reviewed. In November 2009 Cafcass provided a short wishes and feelings report. This indicated that A wanted to continue to trial the 20/10 term time split for the time being, although he was keen to ensure there would still be flexibility. B was reported to say that he preferred to move to an equal division of time. A was then aged 11 years and B 6 years. The father agreed the 20/10 regime should continue, albeit not without some reservations.
9. In early 2009 the mother formed a relationship with Y. He has business interests in the USA, the Caribbean and South America. He is based in south USA. They see each

other when they can either in the USA, the Caribbean, England or Europe. Y is divorced from his wife. He has three children, two are around the same age as A and B and a third child who is between them. They live with their mother in central USA. During term time Y sees his children every other week for five nights, from Thursday to Tuesday. He pilots his own jet and travels to see them in central USA.

10. On the 28th June 2010 the mother informed the father about her wish to move to live with Y in south USA and take the children with her. She set out the details in an email and said that she had not spoken to the boys about this. The father responded on the 2nd July setting out that he did not consider the move to south USA would be in the best interests of the children and suggested getting specialist advice to help them work out what the best way forward was. At the end of that email he said "Can I ask that you do not discuss this at all with the boys until we have worked out and agreed what is best for them." The children were due to go to the father after school on 5th July. The mother responded to the father's email on 5th July at 14.49, she did not agree to the suggestion of specialist help but suggested dates for a meeting between the parents. She did not respond to the father's request about not speaking to the boys. The father sent an email in response 16 minutes later at 15.05, just before the boys pick up time from school, asking her to confirm that the boys were not aware of any plans and that she had not discussed her plans with them. The mother sent an email at 15.09 chasing the father to confirm what time he was free for a meeting but made no reference to whether she had discussed her plans with the boys. The father sent a further email at 15.21 asking the mother to respond regarding what had been said to the boys, he said "it is imperative I know before seeing the boys". At 15.40 the father sent an email saying as he had not heard he assumed she had spoken to the boys and asked for a response as he commented "I need to know what they know". The father set out in an email on 6th July why he thought he needed to know what had been said to the boys, the mother responded on 7th July in an email which included the following "Finally, you seemed distressed that I had spoken to the boys about this before you...As you often don't choose to answer my emails and I was not sure you would respond given my past experiences and there was a small window of time due to a short parenting week, and a long delay in your response to me, I chose to gently introduce the idea to the boys to hear their views before I submitted the relevant paperwork by July 10th. Your choice to discuss this with the boys immediately upon handover on Monday without meeting with me first to hear what I had said to them, was entirely your decision". Complaint had been made of the father that he raised this issue with the boys at the earliest opportunity after collecting them; the father denies raising it straight away but accepts he did speak to them about it.
11. I have set this email exchange out in some detail as it is a shining example of the mother and father simply not communicating effectively or acting in a way that promotes the best interests of these children. The father should have responded earlier than 2nd July; the mother should have responded to his request for information as to what the boys had been told; neither parent should have discussed this issue with the boys until they had had a chance to speak with each other. There can have been no doubt that what the mother was proposing was going to be a contentious issue. It was clearly a matter of some importance to the children as well as the parties. The mother accepted in her oral evidence it would have been better for the father to know what had been said to the children prior to picking them up so, from the children's perspective, there could have been an agreed message to the children from the parents

about this issue. This was even more important as, if I have understood the sequence correctly, this was the start of the father's parenting time which led onto (either immediately or very soon thereafter) his extended summer holiday period.

12. The mother issued her application for leave to remove the children to live with her and Y in south USA on 15th July 2010.
13. The parties met in September and October to discuss the application and explore ways to resolve the issues between them. Those discussions were not successful. A considerable amount of oral evidence was given about the context and content of these meetings. It was suggested on behalf of the mother that the father had, in effect, agreed to the move to south USA in principle providing arrangements could be made regarding his time with the children. The father's case was that he did not consent to the move but was exploring what the options were. The meetings were not successful in finding common ground; further emails were exchanged between the parties. In one dated 11th October the mother stated "I don't believe any further face to face meetings is helpful or necessary". A meeting with the respective legal teams was requested by the father's legal team on 15th October; it was set up for 20th October. On the 19th October the father's solicitors rang to cancel the meeting as the father could not attend, no further meeting was arranged. A letter was sent by the mother's solicitor on 10th December suggesting mediation, which had apparently been canvassed at the hearing before Mr Justice Mostyn on 2nd December. That letter was responded to on 22nd December but for various reasons it was not pursued. The reality is these parties have never come to terms on this issue. I accept the analysis of this aspect of the evidence set out in paragraph 53 of the closing submissions on behalf of the father.
14. Standard directions were made setting the matter down for this hearing. A directions hearing was fixed in December. The matter came before Mr Justice Mostyn on 2nd December 2010. He determined a disagreement that had arisen as to the date when A should take his SSAT tests, which were required to enable A to be considered for the American schools proposed by the mother. The details of that dispute are no longer relevant.
15. By agreement between the parties an independent social worker was instructed to prepare a report as to the children's welfare and their wishes and feelings. Her report is dated 9th February 2011. Both parties have filed extensive statements setting out their positions and the mother has filed a statement from Y.
16. The court was informed at the start of this hearing that the father's relationship with X had broken down in late January. There was a reference to this in the father's meeting with the independent social worker, according to the independent social worker he said that the relationship was "on hold".
17. Over the four day hearing I heard oral evidence from both of the parties, Y (by video link from south USA) and the independent social worker. I have had the benefit of a transcript of the oral evidence. I reserved judgment which enabled me to consider the papers again. I have given this case anxious consideration as I am very much aware of how much this case means to each of the parents.

The Law

18. The children's welfare is the court's paramount consideration. The burden is on the mother to establish that the children's removal from the jurisdiction would be better for them than making no order (CA 1989 s1 (5)).
19. Most relocation cases have been considered in the context of a situation where there is a clear primary carer. This is not the case here. Where there is a shared care arrangement a modified approach is required. This was acknowledged in *Payne* and expanded on in later authorities.
20. In *Payne v Payne* [2001] 1 FLR 1052 Butler-Sloss P referred to the possibility of there not being one obvious and established primary carer:

[85] All the above observations have been made on the premise that the question of residence is not a live issue. If, however, there is a real dispute as to which parent should be granted a residence order and the decision as to which parent is the more suitable is finely balanced, the future plans of each parent for the child are clearly relevant. If one parent intends to set up home in another country and remove the child from school, surroundings, and the other parent in his family, it may in some cases be an important factor to weigh in the balance. But in a case where the decision as to residence is clear, as the judge in this case clearly thought it was, the plans for removal from the jurisdiction would not be likely to be significant in the decision over residence.'

21. The ratio of *Payne* was expressed by Thorpe LJ as follows:

[26] In summary a review of the decisions of this court over the course of the last 30 years demonstrates that relocation cases have been consistently decided upon the application of the following two propositions:

(a) the welfare of the child is the paramount consideration; and

(b) refusing the **primary carer's** reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children.

Therefore her application to relocate will be granted unless the court concludes that it is incompatible with the welfare of the children.' [emphasis added]

22. The seminal judgment in relation to what should happen in a shared care case was given by Hedley J in *Re Y* [2004] 2 FLR 330. In that case, the facts were similar to this case in that the child was spending 4 nights with the mother and 3 nights with the father and was thriving in the parents' shared care (although this arrangement had operated for nowhere near as long as in this case.)

23. At paragraph 14 Hedley J said:

[14] Now, the court clearly contemplates two different states of affairs. The one, the more common and in some ways the more obvious, is where the child is clearly living with one parent, and it is that parent that wishes to leave the jurisdiction, for whatever reason. The other, and much less common state of affairs, is where that does not exist and either there is a real issue about where the child should live, or there is in place an arrangement which demonstrates that the child's home is equally with both parents. In

those circumstances, which are the ones that apply in this case, many of the factors to which the court drew attention in *Payne v Payne* [2001] EWCA Civ 166, [2001] Fam 473, [2001] 1 FLR 1052 whilst relevant may carry less weight than otherwise they commonly do.

24. Hedley J said that of the welfare checklist factors:

[16] ...the ones that are important in this case are the educational and emotional needs of Y, the likely effect on him of any change in his circumstances, and his age and background so far as his life is presently concerned. It seems to me that I need to remind myself that the welfare of this child is the lodestar by which the court at the end of the day is guided.

25. Hedley J went on to say that:

[24] In reaching a decision in this case I have tried to focus on Y's welfare and to postpone the interests of both the parents, however fair and reasonable, to that one consideration. It truly is a case in which the paramountcy of the child's welfare has led to one parent being dealt a crushing disappointment.

26. I was referred by Miss Eaton QC and Miss Reardon to the relevant passages in a recent article by Thorpe LJ which picks up this theme and which I agree supports the rationale of Hedley J's decision in *Re Y*.^[1]

27. I have also been referred to *MB v JB*, a Cayman Islands decision of the Honorable Justice Quin on 22.6.10, as being illustrative of the analysis set out above, and indicates why the home life with both parents is such an important factor in a shared care case.

28. Mr Cobb QC and Miss Fox have rightly reminded me what has been said about the impact of the refusal in the cases where a parent wishes to locate to be with a new partner. However, that must be considered in the context of the child's overall welfare.

29. Thorpe LJ said in *Payne* at para.31 a refusal of an application for leave in these circumstances (where the Applicant wishes to relocate to be with a new partner):

"is likely to destabilise the new family emotionally as well as to penalise it financially."

30. In *Re B; Re S (Removal from the jurisdiction)* [2003] 2 FLR 1043 the Court of Appeal returned to para.40(c) of *Payne*. Thorpe LJ (at para.11) said that:

"I would in the light of recent experience of applications and appeals in relocation cases, offer the following extension to subparagraph (c) of para [40]. Where the mother cares for the child or proposes to care for the child within a new family the impact of refusal on the new family and the stepfather or prospective stepfather must also be carefully evaluated."

He added:

"That consideration applies with greater force in the case where the child's stepfather is a foreign national. There, as well as work, all his history, his

family ties and his loyalties pull in the same direction. If the Court frustrates that natural emigration it jeopardises the prospects of the new family's survival or blights its potential for fulfilment and happiness. That is manifestly contrary to the welfare of any child of that family" (at para.12)

31. Thorpe LJ commented in *Re B; Re S* about changes in the contact arrangements with the 'left behind' parent:

"Often there will be a price to be paid in welfare terms by the diminution of the children's contact with their father and his extended family. But the court's powers to ensure the children's continuing contact with both parents after separation or divorce is necessarily circumscribed. The court has the power to support the father who seeks to maintain or extend his relationship with his children through contact. However, if in the aftermath of separation the father takes employment abroad or marries a woman whose employment takes her abroad or who marries a woman whose every connection is with another jurisdiction, the father will accompany her there and the consequential loss or diminution in his contact with the children of the prior relationship cannot be surveyed or controlled by the court. These are the tides of chance and life and in the exercise of its paternalistic jurisdiction it is important that the court should recognise the force of these movements and not frustrate them unless they are shown to be contrary to the welfare of the child." (para.12)

32. My attention was also drawn to what has been said about the effect upon the applicant mother of a refusal. This was discussed in some respects in *Payne v Payne* wherein Thorpe LJ said:

"as a matter of experience the child cannot draw emotional and psychological security and stability from the dependency unless the primary carer herself is emotionally and psychologically stable and secure. The parent cannot give what she herself lacks." [para.31]

"...in most relocation cases, the most crucial assessment and finding for the judge is likely to be the effect of the refusal of the application on the mother's future psychological and emotional stability." [para.32]

He re-stated this point at para.40(c) of the judgment and added (at para.41) that "great weight must be given to this factor". If this mother is unhappy here, it will materially affect her ability to care for the children.

33. A more recent review of the jurisprudence and international perspective in this area was provided by Mostyn J. in *Re AR (A Child: Relocation)* [2010] EWHC 1346 (Fam) [2010] 2 FLR 1577. He acknowledges the binary nature of these cases at para 4:

"If the decision is that the child goes, then the left-behind parent inevitably suffers a disruption to his relationship with the child, at the very least in terms of quantum and periodicity of contact. If the decision is that the child stays then the primary carer, if not invariably, then frequently will suffer distress and disappointment in having what will normally be well-reasoned and bona fide plans for the future frustrated. So the decision, whichever way, is bound to cause considerable trauma."

34. Mr Cobb QC and Miss Fox drew my attention to what Mostyn J said in *Re AR* at para 12 that "the factor of the impact on the thwarted primary carer deserves its own berth and as such deserves its due weight". They submit to do otherwise would be to trump welfare considerations in the broader view. I agree although note that case concerned an application by a primary carer.

The Parents

35. Both parents spoke very movingly about each of the children. There is no doubt they both have an extremely close relationship with each of the children and are immensely proud of them.
36. In her oral evidence the mother said there were three factors behind her application. As she put it in her oral evidence "I think that the catalyst is my relationship with Y, for sure, but it is in tandem with the fact that, you know, I really want to grow and need to grow the business in America as well. And combined with that I feel that the lifestyle and the education and the environment will be really great for the boys. So it is a sort of a three-pronged holistic aspect. It is not just only one thing."
37. Dealing first with her relationship with Y she said that he was the "love of her life" and she wanted to spend the rest of her life with him. She had been seeing him since early 2009 and this was the first relationship she had had since the breakdown of her relationship with the father in 2005. It was the first time she had introduced another man to the children. She was asked in oral evidence whether they were planning to get married, she replied "In a perfect world, yes, but, you know, I think that it's step by step and you need to be really practical about this. You know, there is an integration period between -- if we were to be granted leave we have to integrate his family, my family, our lifestyles. I'd like to be with him for the rest of my life. Now, whether that means that we're married or not I don't know, but that's my feeling about it." She said it was going to be difficult for them to move to the next stage of their relationship if they were still living "inter-continentially" she said "...I think we have done very well over the last couple of years going back and forth. It hasn't been easy but we've been committed to it, and committed to each other, and committed to the relationship, and committed to the children, and we've done it the best way we can. But, you know, we need to be realistic. The relationship won't continue over at least an integrated relationship, there would be no purpose. Why would we continue to fly back and forth? It doesn't make sense any more. I don't want to go on about this, but I feel it has gone on for a long time."
38. At the moment she said she spends much of her non-parenting time with Y in south USA during term time and at various locations during the school holidays. As she commented in her oral evidence the person who looks after both her and the father at the airport remarked that as the father flies in she flies out. When Miss Eaton QC suggested to her the various scenarios of dividing the children's time here between the father and the mother so that she could maximise her time with Y in south USA she said "This is not about how many evenings I spend with Y, and therefore this is not relevant to me because it is not about how many nights I spend with him. It's about integrating families in a way that is based on love, in a family situation, it is not how much I can see my boyfriend in the evening." It was put to her that if the boys remained in England and the division of the school term time was adjusted to 50/50

(two weeks on two weeks off) she would have more time available to see Y, she said she did not consider such a change was in the interests of the children.

39. Y's written and oral evidence confirmed the details of the development of his relationship with the mother. In his oral evidence he was able to give more details about the amount of time he had seen A and B, in England, Europe, the Caribbean and the USA and the amount of time they had spent at his home in south USA. He confirmed during term time he always travelled to central USA to see his children, holiday time was spent in various locations. He agreed he needed to travel for his work, and estimated about 6 – 7 days per month. He agreed, subject to his time constraints, he could travel to England with relative ease as he had his own plane. Resources are not an issue.
40. If there were no other considerations I accept the next stage in their relationship would be for one of them to move to base themselves with the other. However, it is of note that due to the domestic and commercial logistics of their lives, in particular the amount of travelling they do, wherever they are based, individually or together, there will be considerable periods of time when they will not be together due to other commitments. So whilst I take into account what the mother says about it not being about the time they spend together it is about integrating the families, the fact is that each month there are likely to be significant periods when they are apart and their children are only likely to be together during holiday periods, as they are now. During school term time Y is likely to be away for over half of each month. In addition, on the mother's case, the children will be with their father for 10 days of the month, which may or may not overlap with the time Y is away. Mixed into that would be the mother's absences due to her commercial and business commitments. This aspect of the mother's case needs to be considered in this important context.
41. The independent social worker said in her evidence that one of the points made by the mother that resonated with her was the fact that at the moment the temptation for the boys would be to think that as soon as they hand the pair over to the other parent they are off on a plane, and so she was seeing one advantage of them relocating to south USA would be that actually they would see one parent with a far more settled life, not always handing the children over and then leaving the country. However, again this must be looked at in the context of the evidence in this case. This is a very international family who undertake a lot of travel. As B observed to the independent social worker, in one of his more dramatic moments, he said he had spent half his life on a plane, this was not said as any complaint but as a fact of life. Travelling is very much a feature of all their lives, both for the children, their parents and Y.
42. Turning to the mother's business interests it was conceded by her solicitor in a letter dated 20th August 2010 that the proposed move was not based on business but the best interests of the boys and in the letter dated 23rd November 2010 that their client's application to relocate was not primarily based on business interests. She accepted in evidence that she had significant financial resources available now but said she needed to retain and build on them for her financial security. Her case that she needed to be based in the US to pursue her future business interests and opportunities was somewhat vague. She was not suggesting that if she was based in London she would be prevented from pursuing these opportunities, she said she needed to be based in America but gave little detail other than expanding her business in America which did

not seem to be dependent on her living there. Some of the projects she is involved in now are based in London and some are based abroad. She produced three letters, two of which suggested being based in the US would make it easier to pursue her business interests. Having considered the evidence on this aspect it has to be looked at in the context that if the mother's application is refused she is still likely to, and will be able to, spend significant periods of time abroad, whether for work or pleasure, or a combination of the two. She will be in a position to exploit the US market, whether she lives there full time or not.

43. There were a number of references in the mother's statements to the father not paying child support. However, she accepted in oral evidence that the parties had agreed financial arrangements regarding the support of the children when they separated and at no stage since had she asked that that arrangement should be changed. I do not regard these assertions as having any relevance to the issue I have to determine.
44. The final part of the mother's reasoning was the lifestyle, education and environment in south USA would be "great for the boys". There is no doubt Y's home is very pleasant, there are good schools and the weather may well be considerably sunnier than it is in London. However, the evidence also demonstrates that the children have very good homes in London and holiday homes in the Caribbean, they are very well established in the English education system where they have been all their educational lives and have flourished under that regime. There is no identified opportunity that is offered in south USA that is not available in London. London is a known quantity in all aspects of the children's lives. Part of the mother's case emphasises the importance for the children of seeing their parent's being happy and settled and the mother's happiness would be significantly enhanced if she was able to settle in her relationship with Y in south USA. That needs to be balanced with other relevant considerations, in particular the impact of the move on the children's relationship with their father.
45. The mother made clear in her evidence that if she was able to go to south USA with the children there would be continuity of her key staff who are well known to the children, in particular, the children's assistant, the mother's PA and the housekeeper. This would obviously give continuity for the children.
46. The mother's position regarding the time the father should have with the children after the move to south USA is that the regime here should be replicated, namely a 20/10 split in the school term times and an equal share of the school holidays. Her evidence is that she still regarded that regime as being best for the boys. She said in her oral evidence "...I have always wanted D to be included in the boys' lives, not just holiday time but also the term time, and I would hope that in south USA we could still maintain a 20 day, 10 day contact schedule, and I believed that it could be true because I think he is brilliant and creative and totally capable....I truly believe that he could make this happen if he wanted to." The mother maintained her position that she felt the current regime worked best for the children and that the father should be involved during term time as well as the school holidays.
47. The father's opposition to the mother's application centres on the impact the move will have on his relationship with the children. He described in some detail the implications of running his business. It is heavily reliant on his personal involvement. Much of his work involves face to face meetings, either with clients (private or

institutional) or account managers. It is mainly based in London, mainland Europe, north America and Asia. With the children being based in London he is more easily able to combine running his business and spending time with the children during the school term time.

48. Like the mother he has staff who are familiar and known to the children and who he is able to effectively delegate to when necessary. Much has been made in the oral evidence of the fact that the father does not sign the homework book for the children or do much homework with them. When they are with the father much of it is done with the nanny employed by the father who the children have known for a number of years. Although this is less so with A who, he says, does a lot of his homework unsupervised. It may well be that the nanny helps with or supervises much of the homework when the children are with the father but that did not diminish the importance of the children being able to spend significant periods of time with the father during the school term time with him in his home. He gave evidence of the routine during the time the children were with him which is something the children have known virtually all their school lives. When they are with him he spends most evenings with the children when he gets back from work in the early evening, talks about the day with them, discusses what they have done, plays with them, baths B and reads to them. There have been times when he has work commitments in the evening, when he has not been able to attend school events but that has not diminished the significance for the children of them being able to spend time in their father's home during term time. It is of note that the independent social worker commented on the "seamless" way the children regarded the arrangements and, unusually in her experience, there was no hint of things or equipment being left in one home or the other. The children regarded each home and each parent as equal.
49. In his oral evidence the father explained that it was not going to be logistically possible for him to have 10 days every 30 days during the school term time in south USA. It is agreed he has no business interests there and it was not pressed that he could effectively operate his business 'remotely' during that time. His case is that he can't run his business that way, it is very dependent on face to face contact and he can't be out of the running for such long periods at a time. It is possible in London as that is one of the centres of his business. Europe, where he also has offices, is not that far away. What was suggested to him by Mr Cobb QC was that now his relationship with X was over, and he accepted that about one third of the four months he spent in north-east USA each year was attributable to his relationship with X, he could simply move that time (estimated to be 35 days) to be in south USA with the children. The suggestion being that the 35 days would equate to the weekday time within the 10/20 regime during the school term time (there are about 7 or 8 of these over a year) and the weekends could be spent at his property in the Caribbean. That way he would not exceed the maximum number of days in the US for tax reasons. In my judgment this suggestion fails to recognise (a) the proximity of the father's work in north-east USA. He said he went into his office each day when he was in north-east USA with X. That would not apply in south USA. The extra time attributable to X was not identified as being specific time periods or suggested as being compatible with the school term dates; (b) the mother in her own oral evidence accepted that travelling to the Caribbean each weekend, either end of the father's 10 day parenting time, was not in the children's interests. She even retreated from it being a good idea for one of those weekends. I accept the father's evidence that if the move to south USA did take place

his parenting time during the school term would probably be once a month for the weekend or possibly twice every five weeks.

50. I am satisfied on the evidence I have heard that the father would not be able to replicate the current term time parenting time he has with the children, either in quantity or quality, in south USA. The position in terms of quantity is outlined in the previous paragraph. The commitments to his business and the logistics of the location of south USA, however "brilliant and creative and totally capable" the mother may regard him to be, means that he will not be able to spend the 10 day time periods in south USA during the school term. The position in relation to the quality of the time is also, in my judgment highly relevant. It is of significance that the current term time parenting is in his main home with known structures in place that have enabled the children, in the words of the independent social worker, to move in a seamless way between each home. The children have not only been able to experience time with their father but it has been in a place that is his home. That would not be the case in south USA. It would either be in a hotel or other accommodation that would be of a different quality, it would not be his home and he would either have to create a temporary structure out there or transport the relevant people who work with him in London to south USA for the time he is there. This was perhaps most vividly brought into focus when the father was asked about various scenarios by Mr Cobb QC. It was put to him that he could continue to operate his business in north-east USA if he was in south USA, as he could fly up for the day for appointments. It was suggested that if he did not have the structures in place in south USA the children could return to be with their mother and/or be looked after by those employed by her to do this in the mother's household. Under the current regime that would be absorbed by those in the father's home in London.
51. There are changes on the horizon in the father's circumstances. The breakdown in his relationship with X will mean that the children will see much less of her children who they are clearly close to. The nanny who works for the father who is well known to the children has moved back to Australia and is going to get married. At the moment she still returns to London to be with the children during the school term time when they are with their father. It is unclear how long she will continue to be able to do that. The father plans for another member of his household, who has been working for him for three years and has been away with them on a number of occasions, to step into the nanny's role
52. There can be little doubt that both parents will be distraught if the outcome is against them.
53. The mother made it clear in her evidence and to the independent social worker that she would be devastated if her application failed because of the impact on her relationship and wellbeing. She said in her oral evidence she would appeal. However, this has to be viewed in the context of the reality in terms of the integration that there could be on the ground between the two families in the widest sense. The mother was clear that she saw this as the next stage in her relationship with Y and there are obviously benefits to A and B in seeing their mother more settled. However, in fact A and B and Y's children would be unlikely to see any more of each other than they do now. A and B would see more of Y but probably less of their father.

54. The father made it clear in his evidence and to the independent social worker his devastation if the application was granted. He said in oral evidence he would be "absolutely distressed; absolutely crushed; destroyed. Everything I have tried to build for them, their home life, their family life, friends and infrastructure, everything I have tried to create for them around us would be gone, and it would just be completely different..." I accept his evidence that he would not be able to replicate the current regime in south USA, the children will spend less time with their father, certainly during the school term time and such time as he does spend with them will be in very different circumstances than he does now. That has to be taken into account.
55. In considering the position of each of these parents following the court's decision I am clear from the evidence I have read and heard that despite the decision being a crushing disappointment for one of them they will continue to do what is best for the children. The mother to her credit said that she would continue to do her best for the boys as she has always done, she would support the boys in the English education system and in their routine whatever it is the court decides. She has continued to do that during the currency of her application. The same applies to the father. He will continue to do his best in any circumstances for the boys.

The Children

56. Despite the extent of the dispute between the parties regarding this application, and the uncertainty it has no doubt caused for the children, the evidence is very clear that the children are in a situation that works. They are flourishing and thriving in all aspects of their lives, including developmentally, socially and educationally. All their needs and interests are being met by their parents to such an extent that there is no discernable difference between the two households. This is borne out by the schools and the independent social worker. As the independent social worker described the current arrangement "It just seems very seamless" and she agreed that the children had no sense of one parent or one household being more important than the other.
57. For the majority of their lives the children have been cared for within a shared care arrangement. It has been in existence for nearly 6 years. From the boys' perspective during that time they have had two homes and two primary carers. Whilst since September 2009 the term time division has not been precisely equal (it has been nearer two thirds one third) that has not undermined the fact that there has been shared care of these boys by the parents. That is how it was described by the independent social worker and I agree.
58. Both parents ensure the children's needs are met. They are interested in all aspects of their lives and development. They are both "hands on" when they can be. The mother has attended more school events than the father and had signed their homework diary. Criticism was sought to be made of the father that this demonstrated a lack of interest on his part or an inability to suitably prioritise his children's needs in a way that undermined the genuineness of his opposition to the mother's proposed move and his real commitment to the children. I did not regard this to be the case, when considered in the context of all the evidence regarding the father's very strong relationship and time with the children. He gave compelling evidence of his day to day involvement with the children when they were with him during the school term time as set out

above. I do not doubt the mother is a better attender at school events than the father. If the children remain living here it is an aspect the father may be wise to pay more attention to but that did not, in my judgment, undermine his significant contribution to the children's welfare during the school term time when they are with him.

59. The mother's case is that the current London arrangement regarding division of the time the boys spend with their parents works best for the boys (the mother described the boys as "thriving" on it; that it is "important for the boys that they have his [the father's] input into their life, their school life and their social life") and it can be replicated in south USA. As the independent social worker said in her evidence the mother was "very clear that in her mind the current arrangements best suit the needs of A and B". However, when pressed about how that could work given the father's position she repeated that "he is brilliant and creative" and she truly believed he could make this happen if he wanted to. On the evidence I agree with the observations in the closing submissions on behalf of the father this is a rather starry eyed and blinkered view.

60. On the evidence the reality is there are real difficulties in this being done for the following reasons:

(1) The father has a business life which requires him to travel extensively to meet clients and managers, much of which needs to be face to face. Apart from London his business is mainly centred in Europe, north America and Asia where the clients and managers need to see him. According to the father he uses the telephone to some extent, but not the computer and does not conduct his work remotely. It is accepted that the father has no business connections with south USA. Whilst the mother's closing submissions have drawn attention to the father's business connections with north-east USA, it is not going to be possible or realistic for him to effectively block out 10 day periods (probably more if the travel time and time difference is factored in) two or three times a school term and be present in south USA, in the same way that he currently does in London.

(2) The mother suggested that any difficulties the father has with the number of days he is able to spend in the USA for tax reasons could be resolved by him taking the children to the Caribbean on both of the weekends in the 10 day block he would have with the children. The father has always said this is not practical and the mother in her oral evidence accepted that this was not good for the children "I would hope that they would not [fly out each weekend] because I do not think it is great for the kids to be flying out each weekend....I do not think it is optimal for the kids."

(3) The children's home life with the father is a significant part of the shared care arrangement. The quantity and quality of the father's time with the children is important. In London they spend time with the father in his home where he has structures in place to care for the children. That simply cannot be replicated in south USA or anything like it. In all likelihood the father would be in accommodation or a hotel where he does not spend any time other than when he had the children. His home life would not be there, neither would his work or social network. The time the children spent with their father would be very different than it has been to date, they would not be sharing his home life in the way that they do now. As the independent social worker said you would not be comparing like with like it [time in south USA]

would be of a "very different quality and nature because of course the father would only be going to south USA for the purpose of seeing A and B. In London as well as obviously the important time with the boys he has his own friends here, his own network, his business." She observed "the whole concept would be different."

(4) The parent's relationship with each other concerning the children is at a fragile stage. They both accepted in evidence their communication needs to improve. Both gave the attitude or actions of the other as the reason why this is so. They have both said things in the context of this difficult litigation that have not helped. The mother in her statements and in her discussions with the independent social worker has been very critical of the father (for example where she has suggested he does not prioritise the children). The father's behaviour to the mother on 7th January 2011 was totally unacceptable. There is, in my judgment, a real risk that with increased physical distance and the consequent logistical difficulties in making the arrangements for the division of time the children spend with each parent if they move to live in south USA the fragility of the parents' communication would result in them spending less time with their father.

61. The reality, in my judgment, is that if they move to south USA it is very likely the father would spend significantly less time with the children, possibly only one or two weekends a month. That would significantly reduce the time he spends with the children, it would severely limit the opportunity he has to be involved with the day to day life of the children, in particular their school life in the widest sense. Such a reduction in quantity and quality of his time with the children would be a significant change from the current shared care arrangement and would not, in my judgment, be in the children's best interests. Although the independent social worker did comment on the current strength of the children's relationship with their parents despite the periods they spent apart from them (half the school holidays or during the 20/10 split in term time) the time spent with their father, if the children did go to south USA, would be of a different quality than it is currently. It would be likely in time to distance the children from their father, have an adverse impact on the strength of their relationship with their father and, as a result, cause them distress which would not be in their interests.
62. The mother did suggest in her oral evidence that if the father was unable to replicate the 20/10 split there could be increased time in the holiday periods to compensate. The difficulty with that is that whilst it may be possible to replace the time on a numerical basis it would, from the children's perspective, be very different from the time they have with their father now, not only in frequency but also the fact that it would be out of school term time. That would further distance the father from the involvement he has had in their lives (particularly their day to day lives) under the current shared care arrangement.
63. The children's wishes and feelings are clearly important. A has just celebrated his 13th birthday and B is nearly 8 years old. In considering the children's wishes the court needs to consider their age and understanding. Their views need to be considered separately, taking into account the following matters:
 - (1) An important consideration is that the boys are keenly aware of their parents' differing views. I have no doubt both parents have spoken to the children about this

issue and have made their views (both explicitly and implicitly) clear. As the independent social worker observed "both boys are very aware obviously of this application, especially A. He has understanding and anxiety about what happens, the impact on his parents." A poignantly said words to the effect to the independent social worker "When I am with Mum I think it is a great idea and when I am with Dad not so". Both parents have involved the children in a way that has not been helpful. For example, the mother should not have sent the children to their father on the 5th July without him knowing what had been said to them, the father should not have discussed the issues so openly with the children seeking their views. As a result any evidence of the children's views as reported by the parents has little, if any, weight as the children, particularly A, would have been very alert to what that particular parent would have wanted them to say. The action taken by the parents has made the task of evaluating the children's wishes and feelings all the more difficult for the court.

(2) The views of the children expressed at any one time need to be considered in context, for example the independent social worker commented that when she saw A he had just taken the SSAT exam and was focussed on the US school system, B had been doing assessment days for London schools and was focussed on those.

(3) Both children have no real understanding of the likely impact on their time with the father that a move to south USA would entail. A thought in his emails he sent to the independent social worker he would go to south USA and see his father "a bit more than he does now" and B thought his father would come maybe every weekend, maybe 3 weekends a month. The independent social worker accepted that she had not addressed the issue of the children's views if relocation meant they would see less of their father, as she said "With the benefit of hindsight I wish I had explored that more explicitly with them." The mother acknowledged in her evidence "nobody could imagine that D would only see the kids a weekend a month...the children could not imagine it and I certainly could no..I do not think they would understand..it is not what they would want." I reject the suggestion in the closing submissions on behalf of the mother that due to the comments that have been made to the children by the father (that if they went to south USA he would spend less time with them) they are therefore fully aware of the implications regarding the reduction in time they would spend with him if they moved. This is perhaps best illustrated by A's email to the independent social worker when he says he would like to spend more time with his father than he does now.

(4) A was obviously hesitant about expressing his views in the light of his previous experience with Cafcass and the reaction of his father.

(5) As the views expressed by A have been expressed by email the independent social worker accepted that it was difficult for her to assess (even though she thought they were expressed in A's language) what message was being conveyed, for example by him stating "no one has influenced me" as to whether it was literally correct or not. Also, the significance of him stating that he wants to move to school in south USA and see more of his father than he does now. That is asking the impossible but there was not an opportunity to explore that.

(6) I have considered carefully the evidence and what has been submitted about the father's temper and over emotional language with the boys and its impact. Having had

the opportunity to observe the father giving oral evidence over two days he did, on occasion, appear unable to provide suitable boundaries to protect the children from his own sometimes over emotional responses to situations. According to A when the father is sad he [the father] "shuts himself off", the father sulks and A tries not to make him angry when he is like that. A's headmaster, thought that A was a little frightened of his father at times as the father could express his views forcibly. The father agreed that it was possible that A could be a little frightened of him when he expressed himself forcibly. Having considered all the evidence I do not regard this feature of the evidence as providing a foundation for the court to give more or less weight to the children's wishes. This was not a feature that the independent social worker was asked about and she did not regard it as being of significance to comment on in her report.

(7) The children have not spent significant periods of time with Y or with his children. It is of note that they were not mentioned by the children to the independent social worker as significant people in their lives.

(8) The court is left with the position that was summarised by the independent social worker in her oral evidence that "they [the children] are slightly pulling in overall different directions, that A is more leaning towards wanting to go, and B less so."

(9) Turning to the father's position (if the court does refuse the mother's application) that the division of time between the parents during the school term time should change from the 20/10 arrangement to an equal division; this was not specifically discussed with the children by the independent social worker.

Welfare Checklist

64. Turning now to consider the relevant parts of the welfare checklist:

(a) ascertainable wishes and feelings of the children in the light of their age and understanding:

A is 13 years old. He has been acutely aware of the dispute between the parents and what each parent wants. Since July 2010 he has had to navigate a difficult path, endeavouring to keep both parents happy. He was unable to express clear views to the independent social worker when he met her but was able to send her emails setting out his views. I regard it as notable that when looked at together the emails ask for something that he can't have namely, go to school in America and see his father more. They reveal, in my judgment, a young man who is still desperately trying to keep both parents happy. Neither of them were able to see that it was not in his interests for him to be put in such an impossible position. I do take into account the fact that he sent these emails very soon after he had taken his entrance exams for the American schools.

B is 8 years old. Because of his age and level of understanding his views are very much dealing with the here and now. He has remained relatively consistent in wanting to stay in this jurisdiction, it is all he has known.

(b) Physical, emotional and educational needs:

The evidence is very clear that the current regime works and the boys are thriving under the existing arrangement which meets both their physical and

emotional needs. For the reasons outlined above, I do not regard the evidence that the father (or the mother for that matter) has limited time away when the children are with them as being significant. The significance is not about quantity, but quality and quantity. The father has relied on the nanny employed by him but it has been in the context of the children being in the father's home and no criticism has been made of what the nanny has done. I agree the father has no real plan for replacing the nanny, although he did suggest that another member of his household who is known to the children and has been away with them on a number of occasions would take over her role. It was not suggested to the father that he would take steps to replace the nanny in a way that was other than in the children's interests.

The educational needs of the children are being met if they remain in this jurisdiction. Both parents speak highly of the schools. The father accepts A's current wishes that he doesn't want to board. The plan if he remains here is for him to attend a London day school. Since the hearing concluded the court has been informed that A has been offered a place at one of the London day schools chosen by the parents. If he moved to south USA he would attend one of two possible schools. Since the hearing concluded the court has been informed that both children are likely to be offered a place at one of the schools in south USA. In relation to B he will either attend a London prep school if he remains here and one of the schools in south USA if he moves. It is right that both children are moving schools this summer so it would provide a natural break. However, even though the children are described as being very adaptable and sociable the move of home and school may be more difficult than just a move of school with all other structures and arrangements being in place.

(c) The likely effect of any change in circumstances

If they remain here there will be a number of changes for both children:

(i) A change of school, albeit in an educational system they are familiar with which has a proven track record of meeting their needs.

(ii) A change with the departure of the father's nanny, although it was not suggested to the father that he would replace the nanny in other than an appropriate way.

(iii) A change in going to the father's English holiday home during the autumn season, although the father is investigating renting a replacement property.

If they go to south USA there will be a number of changes for both children:

(i) A change of country, to one that they are familiar with but have not lived in.

(ii) A change of home, to a home they are familiar with but have not spent significant periods of time in.

(iii) Living full time with Y which they have not done before although their mother and familiar personnel (the children's and the mother's assistants and the housekeeper) will be with them.

(iv) A change of school.

(v) A change in the quantum and circumstances in which they would see their father.

When considered as a whole the more significant changes will take place if they move to south USA and with those changes there are increased risks of some aspects not working. Whilst both boys have been described as adaptable and sociable taken together the move to south USA will amount to a

significant change in their lives. Although the parents will do their best to protect the children from any adverse consequences caused by those changes the risks remain higher, due to the larger number of changes in the move to south USA in particular the change in the time and circumstances when they will see their father.

(d) Age, sex, background and any characteristics the court considers relevant Both children will be changing schools this summer. Both children have an international heritage and have been described as international children who are very used to travelling.

(e) Any harm which he has suffered or is at risk of suffering.

I have already observed above the concerns I expressed about the communication difficulties between the parties and the effect of the uncertainty on the children as a result of the application. As I raised with each of the parents in their oral evidence it is vital that they both sensitively manage the communication to the children of the courts' decision and any further action either party may take. There should not be a repeat of what happened in July. Further both parties agreed that they needed to take active steps (possibly with the involvement and assistance of a third party) to improve their communication with each other to relieve the burden and uncertainty on the children.

(f) How capable each of his parents and any other person in relation to whom the court considers the question to be relevant is of meeting his needs.

Both parents have at times been unable to shield the children from the disputes that have arisen between them. The father has the more volatile temperament of the two but they are both strong characters. However, despite their differences they have both been able to make a significant contribution to the welfare of the children since they separated to the extent that the evidence clearly establishes that what the children have now is attributable to the significant role that has been played by both parents in the shared care regime they have devised here. It is in the children's interests that as far as possible both parents retain a significant role in the children's lives.

The court had the opportunity of observing Y. He was impressive, laid back and understood the issues involved in the case. However, from the children's point of view he is not a significant person in their lives, even though they have spent some time with him in various locations.

From the point of view of the children's welfare both parents being actively involved in the shared care of them is what best meets their needs.

(g) The range of powers available to the court:

Whilst the court could, in the event of the father not being able to replicate the 20/10 term time regime, compensate the father's loss of time with increased time during the holiday periods this would need to be balanced with the court's overall view as to whether this is in the best interests of the child in weighing up the relevant considerations for and against the move to south USA.

Decision

65. Having carefully considered all the evidence and the welfare checklist I have come to the clear conclusion that the welfare of each of these children is met by the mother's application being refused. I recognise that this will be devastating for the mother but I have come to this conclusion primarily based on the evidence that the children are

thriving under the regime the parents have devised in this jurisdiction and the adverse impact on their time and relationship with their father if they did move to south USA. For the reasons set out above I do not believe it can be effectively replicated if the children move to south USA and that any different regime will not meet the children's needs. With the welfare of these children as the lodestar by which I am guided I am satisfied that the move to south USA would not meet the welfare needs of these children, however disappointing that decision will be for the mother.

66. In the event that the application is refused the father seeks an adjustment of the division of time between the parents in term time from the 20/10 regime to an equal division (two weeks alternating). The father says (a) he entered into the current regime as a temporary measure that would be reviewed (b) the setting up of schedules of time with each parent is more complicated under the 20/10 regime than under an equal division of time (c) the children will benefit from spending equal time with each parent (d) it is what the children want although the father accepts (as does the independent social worker) they were not specifically asked about this. The mother objects, she says the current regime works and is in the best interests of the children.
67. I have considered the welfare checklist in reaching my decision. In my judgment the children's interests are best met by the current regime remaining in place for the following reasons: (a) It has been shown to work, the children have been described as thriving under it; (b) In the circumstances of this case the court is unlikely to get any further relevant information from seeking more information as to the children's wishes and feelings. As set out above these children have already been over exposed to the dispute between these parents and further delay to seek their views will risk them becoming further involved with no obvious benefit. Both children are very close and loyal to each of their parents. (c) An equal division of time would have the advantage of simplicity in terms of the division of time and thereby reduce the conflict, but that is only one of the considerations. (d) The children will be acutely aware of the impact on the mother of her application being refused. To increase the amount of time the children spend with their father at the same time may send a confused message to the children and cause further uncertainty and conflict which would not be in their interests. The father's application is therefore refused.
68. As I have already set out above I am greatly concerned that these children should not have mixed messages about the outcome of this case. One of the striking and very positive features of this case is the wealth of evidence that rightly pays tribute to each of the parents' ability to contribute to the care of the children.
69. It is therefore incumbent on these parents to work together to ensure that the children are given the same message by each parent. There are no winners and losers in this situation, all the court has endeavoured to do is reach conclusions on the evidence that are in the best interests of the children. Both these parents have to take responsibility to protect the children from their ongoing communication difficulties and take steps to improve their method of communicating with each other, which can only benefit the children.

www.thecustodyminefield.com