BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
FAMILY DIVISION

No. 589 of 2011

BETWEEN:

ANNETTE SMITHEN-WARD **APPLICANT/WIFE**

AND

DANNY WARD **RESPONDENT/HUSBAND**

Before the Honourable Madam Justice Margaret A. Reifer, Judge of the High Court

Dates 2014: August 26th
September 15th, 22nd
October 20th
November 12th
2015: June 4th
June 26

Appearances:

Ms. Jaydene O. Thomas Attorney-at-Law for the Applicant/Wife
Mrs. Dawn Shields-Searle in association with Ms. Nicole Roachford Attorneys-at-Law for the Respondent/Husband

DECISION

Background to this Application

[1] Annette Smithen-Ward and Danny Ward were married on August 28th 2005. They were both age 25 at the time.

[2] The marriage produced two children Micah Vernon Peter Ward and Eden Anne Roché Ward born December 13th 2008 and February 15th 2010 respectively. They are at the present time 6 and 5 years respectively.

[3] The parties separated in August 2010.

[4] A Section 27 Order was granted on March 12th 2012 pursuant to an Application for Dissolution of Marriage filed January 17th 2012 and on April 5th 2012 a Section 42 Order was granted. In addition thereto, this Order contained the terms of a Consent Order between the parties as follows:

> "IT IS HEREBY ORDERED BY CONSENT:
>
> 1. Custody of the minor children of the marriage MICAH VERNON PETER WARD, who was born on the 13th day of December 2008 and EDEN ANNE ROCHÉ WARD, who was born on the 15th day of February, 2010 be held jointly by the Applicant/Wife and Respondent/Husband.
> 2. The Applicant/Wife be granted care and control of the said minor children, MICAH VERNON PETER WARD and EDEN ANNE ROCHÉ WARD.
> 3. The Respondent/Husband collects the children from The Learning Ladder Nursery on Tuesday afternoons and return them to the said Nursery on Wednesday mornings at 7.30 a.m. and then collect the

children on Thursday afternoons from the Nursery and return them to the said Nursery on Friday mornings at 7.30 a.m.

4. The Respondent/Husband to have the children on alternate weekends commencing Friday 11th May 2012 from Applicant/Wife at 7.00 p.m until Monday morning and carry them to the said Day Nursery.
5. Parties to share birthdays and important holidays with the children.
6. That the Husband would pay the wife the sum of $300 per month towards the children's maintenance together with one half of the children's nursery fees, and all other expenses reasonably incurred in respect of the said children."

[5] By URGENT Application dated May 8th 2014 the Applicant/Wife sought a variation of the order of April 2012 to obtain the Court's permission to remove the children from the jurisdiction and have them reside permanently with her in Canada. Ancillary Orders were sought addressing the Respondent/Husband's access during school and other holidays and an increase in the previously agreed maintenance from $300 per month to $1500 per month and one half of all medical, dental, ophthalmic and educational expenses in respect of the children within seven days of the presentation of bills and receipts.

[6] On the Order of the Chief Justice, this Application was set down for trial before Justice Weekes on July 16th 2014.

[7] On July 23rd 2014 this Application was withdrawn before Justice Weekes.

[8] This matter first came before me on August 26th 2014 by way of URGENT application filed July 28th 2014.

The Application

[9] The Application of July 28th 2014 was in similar terms to the first application, namely, that the Applicant/Wife sought leave to remove the minor children from the jurisdiction to reside with her in Canada and the further consequential Orders referred to above. The following documents appear on the file in support of this new application:

1. Affidavit of Annette Smithen in Support of Application filed July 28th 2014;
2. Affidavit of Corey Devonish filed July 28th 2014;
3. Affidavi of Danny Aubrey Oswald Ward in Reply filed August 13th 2014;
4. Statement of Financial Circumstances of Corey Devonish filed September 9th 2014;
5. Statement of Financial Circumstances of Annette Smithen filed September 9th 2014;
6. Statement of Financial Circumstances of Danny Ward filed September 4th 2014;
7. Supplemental Affidavit of Annette Smithen filed September 10th 2014;
8. Supplemental Affidavit of Corey Devonish filed September 10th 2014.

The Affidavit Evidence

[10] The Applicant's Affidavit of July 28th 2014 establishes a factual basis for this Application: the Applicant is now married to Corey Devonish a Canadian Citizen (according to the Marriage Certificate exhibited as ATCS2 the parties were married on the

July 12th 2014, subsequent to her first application to the Court); the Applicant has been terminated by her employers having accepted a Voluntary Termination Package dated December 13th 2013 with an exit date of March 31st 2014; at the time of filing there was an allegation that the Respondent was two months in arrears of maintenance and owed $309.92 in expenses; the Applicant expressed in her first Affidavit that she is under financial duress as a result of this non-payment largely alleviated by the financial support of her new husband; she indicates that she has applied for and been accepted to do a Professional Certificate in Human Resource Management at York University in Toronto commencing September 2014 all in an effort to pursue her career goals, improve herself and increase her chances of acquiring adequate employment in Toronto. The Applicant is the holder of a B.Sc. in Psychology from the University of the West Indies, Cave Hill Campus.

[11] The Applicant expresses her desire to have the children accompany her and sets out at paragraph 11 and onwards the intended living arrangements at a matrimonial home (recently purchased by her new husband) in Toronto, with more than enough space and

facilities to accommodate a family of four. Her new husband is in steady employment (since 2007) with Air Canada with an income that can meet their needs until she can obtain immigrant status and obtain some form of employment. Her new husband met the children in January 2012 and has developed a positive relationship with them and is willing to provide for them as his own.

[12] It is her intention, with the sponsorship of her new husband, to apply for Permanent Residency Status and subsequently Canadian Citizenship for the children and herself and without the written consent of the Respondent thereto will require an order of the Court. They have consulted with an immigration specialist whose letter dated February 2013 (ATCS7 accepted by this Court as erroneously dated) outlines this process in a "TO WHOM IT MAY CONCERN" missive. The Affidavit also speaks to arrangements being made for the children's schooling.

[13] Her proposal therein is that the children will spend school breaks in Barbados with the Respondent with the exception of the Christmas break which the Applicant proposes be spent alternately with each parent.

[14] At paragraph 22 the Applicant enumerates the benefits to be gained by having the children reside and schooled in Canada as follows:

> "(a) Free Primary & Secondary Education with significantly reduced cost for University Level Education;
>
> (b) Extensive Educational Opportunities (for example, the French Immersion Programme) would be available to the children at significantly earlier ages;
>
> (c) Superior Free Medical, Dental & Vision Care would be available to the children;
>
> (d) With the eventual acquisition of Dual Citizenship, the children would be able to benefit from any opportunities available in either their place of birth (Barbados and by extension Canada);
>
> (e) A more stable & consistent environment would be provided for the children, with substantial time provided by a parent to assist them with home/school work, along with guidance in acquiring and practicing good sustainable habits;
>
> (f) More significant and quality time would be spent with either parent instead of brief one/two day encounters;
>
> (g) The children have a lesser chance of suffering neglect during the school term due to their father's unpredictable, demanding schedule as a Life Insurance Agent; and

(h) The children would also have a lesser chance of suffering under their father's anxiety when he is under the significant pressure of being a full-time single parent and have a full-time job. The Respondent has been overwhelmed in the past and is known to dismiss and avoid stressful circumstances as opposed to dealing with particular matters. I do not believe that it is in the children's best interest to leave them in such an environment."

[15] This Affidavit is accompanied by the Affidavit of her new husband Corey Devonish of equal date, speaking to his commitment to the sponsorship of his wife and her two children, his financial commitment to his wife and the two children and his ability to provide a comfortable environment for them (physically and financially).

[16] Respondent Danny Ward filed his Affidavit in Reply August 13th 2014. It expresses, in principle, his opposition to the proposed move, citing the equally beneficial effects of an upbringing and schooling in Barbados, and the beneficial effects of a close relationship with their father and his extended family, all of whom reside in Barbados. He expresses the view that his financial means will not permit him and his family to visit the children in Canada

or for them to be sent to Barbados with any regularity. He expresses the view also that the Applicant has failed to make proper schooling arrangements (the Applicant's Affidavit fails to show that they have been accepted into a school and that since the children have no status in Canada he verily believes that they will be unable to attend school there in September 2014.

[17] The focus of his objection in this document is threefold: that the residency status of the Applicant and the children in Canada is uncertain at this time; that in his view the children will do well at any school they attend, including public school in Barbados which is free; and that if the children are placed in public school in Barbados, as they would be in Canada, they (the Applicant and himself) would be able to jointly maintain them. He expressed dissatisfaction with the level of information on how the children's educational needs would be met in Canada against the backdrop of free education in Barbados (the failure of the Applicant to make proper, timely and adequate arrangements for the children both as to schooling and immigration arrangements). He outlined therein the benefits to be had from the children remaining in Barbados, featuring prominently therein the advantage of having their father

and extended family, as opposed to Canada where they would only have their mother. He spoke to his very strong family support system, the fact that he had completed his studies and asserted that he has never neglected his children because of his work schedule or for any other reason. He adverted to the Respondent's previous attempts to keep him from his children. No particulars were provided in this regard.

[18] It is his view that the Applicant will have to adjust to life as a new wife in a new country and to a new lifestyle as a student and is more likely to battle stress, anxiety and significant pressure than he would as a single parent.

[19] He expressed his willingness and readiness to assume responsibility for the care and control of the children in Barbados.

[20] The Applicant and her husband Corey Devonish both filed Supplemental Affidavits dated September 10th 2014 principally addressing the concerns raised by the Respondent in his Affidavit, that is, the legal status of the children in Canada and the immigration process and schooling arrangements for the children at the Portage Trail Community School.

The Statements of Financial Circumstances

[21] The parties (inclusive of the husband of the Applicant Corey Devonish) were ordered by this Court to file their respective Statement of Financial Circumstances for evaluation for two main purposes: firstly, to assess each parties' ability to meet the financial needs of the minor children and secondly, to assess the Applicant/Wife's application for an increase of the maintenance paid by the Respondent/Husband.

[22] The Statement of Financial Circumstances of the Applicant's husband shows him to be in receipt of an annual income of Barbados $117, 152.51 and annual expenses of $95,767.24, the excess of $21, 385.27 being available to address the increase in expenses consequent on the introduction of three additional persons to the household. He can increase his income if he works overtime and in his oral evidence to the Court revealed that he has already increased his overtime with the intention of generating additional income to fund the emigration process.

[23] The Applicant's Statement of Financial Circumstances was of limited value as the annual income there declared is a total of the Applicant's Unemployment Benefit and Severance Payment, the

latter a one-time payment already exhausted, and the former expiring no doubt by the end of 2014 or alternatively as soon as the Applicant leaves the jurisdiction. It appears that she will be unable to work until her immigration status is sorted out.

[24] It is of some value however in assessing her level of expenditure as it relates to the children in Barbados, but of course, of no value in assessing the quantum of their maintenance were they to emigrate to Canada. It is noted that she spends $250 per month on Food and Household Supplies for a family of three; $6000 on Child Care and Education and other miscellaneous amounts attributable to the children not exceeding a further $1500.

[25] The Respondent/Husband earns $25,000 from his job, with declared expenses of $32,309.00. Approximately $6000 of this amount is directly attributable to the children's maintenance. He operates on a deficit of $7309.00.

The Oral Testimony

[26] The Applicant and her new husband both gave sworn evidence and were cross-examined extensively by counsel for the Respondent /Husband.

[27] The Applicant's husband was the first to give his evidence and was merely tendered for cross-examination. In reviewing the content of his cross-examination, I will speak only to those matters that this Court considered material: the fact that they (Applicant and her new husband) sat down with the children after the marriage in July 2014 and explained the role that he would now play in their lives and his belief that he is already seen as a father figure by the children (he had been seeing the children every 2/3 months since about January 2012 when he entered into a relationship with their mother); he was extensively cross-examined on the date/time that the decision was made by the Applicant and himself that she and the children would emigrate to Canada (his position was that it was made shortly after their engagement in December 2013/January 2014 while counsel put to him that the decision was made as early as February 2013); the details and dates of her application to York University; the process of sponsorship/immigration; the schooling arrangements for the children and whether Canadian law permits their admittance to a school without a residence permit or permanent residence; his income vs his expenses and his other financial resources, for example, personal savings, credit cards and

level of debt and budgeted expenses including immigration costs should the children be allowed to relocate with their mother; the living arrangements in Canada; among other matters.

[28] The Applicant was also cross-examined extensively on the immigration process and their preparation for it; her finances vs her expenses; arrangements for the schooling of the children and their general living and care arrangements; the details of her acceptance by York University and how this study would be financed; her exclusion of the Respondent from the planning process for their relocation; the cost of the children's monthly maintenance in Canada.

[29] The Respondent gave sworn evidence in which he amplified his affidavit evidence and was cross-examined on what amounts, if any, were owing on the agreed maintenance and additional expense arrangements.

Issues Arising Therefrom

[30] This Court is being asked to determine whether it is in the best interests of these two minor children to be permitted to relocate with their mother to Canada where she proposes to take up residence with her new husband. In so doing, this Court is being

asked to address *inter alia*, the adequacy/inadequacy of the immigration and schooling arrangements made by the Applicant; the adequacy/inadequacy of the proposals for day to day care and control of the children as well as the abilities of the parties to meet the needs of the children.

The Law

[31] The statutory principle applicable to these circumstances (generally issues of custody) is so well known as to have become trite law, that is, **the welfare of the child being the first and paramount consideration**.

[32] **Section 43(1) (a) of the Family Law Act, Cap. 214** states as follows:

> "43.(1) In proceedings in respect of the guardianship or custody of or access to, children of a marriage or union,
>
> (a) The Court shall regard the welfare of the children as the first and paramount consideration."

[33] Subsection (c) is also relevant, it states:

> "(c) the court may, subject to paragraphs (a) ..., make such order in respect of these matters as it thinks fit, including an order until further order

See also **section 8 of the Minors Act, Cap. 215.**

[34] This is a seemingly simple concept that is profoundly difficult in its application.

[35] It involves consideration of the 'rights' of the child (of which the best interests (welfare) of the child feature prominently) and the 'rights' of the parents (accepting, of course, that the welfare of the child trumps any 'right' of the parent). In fact the language of the courts has been re-engineered to avoid any reference to "rights" of the parent and expressed in terms of the "rights" of children to have access to their parents.

[36] This statutory concept reflects a well-known principle long enunciated by the English courts in equity (historically at common law the issue was one of superior (legal) rights and the father was in law vested with those superior legal rights and entitled to the legal custody of all legitimate children) in which the Courts of Chancery exercised a paternal jurisdiction as "*parens patriae*" of an infant. As "*parens patriae*", equity forsook issues of "rights" in favor of considerations of the welfare of the child. This principle of equity was later incorporated in their (UK) statutes altering the old common law approach, and this concept adopted and followed in most Commonwealth jurisdictions, including the Caribbean.

[37] In this regard it is noted that this Court recognises the persuasive authority of both the English and Australian cases as this principle

is common to both, but its practical interpretation and application is a matter solely for the trial judge.

[38] This principle is elucidated in the oft-quoted dictum of Lord Mac-Dermott in the '*locus classicus'* on this point of **J v C [1969] 1 All ER 778**, where he states as follows:

> "… it seems to me that they must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interest of the child's welfare… That is of first consideration because it is of first importance and the paramount consideration because it rules upon and determines the course to be followed."

[39] In **Re McGrath (1893) I Ch. 143 Lindley LJ** made this observation, still relevant today:

> "… The dominant matter for the consideration of the court is the welfare of the child. But the welfare of the child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded."

[40] How does a Court determine what is in the best interest of the particular child or children? And what considerations does it take into account in making this determination?

[41] Case law reveals that in making this determination, the court pays regard to the physical, mental, material, moral, social, educational,

medical and religious well being of the child. There are several miscellaneous considerations often taken into account where relevant, as follows: the wishes of a child old enough to be considered: see **Haloute v Adamira Unreported decision of the Barbados High Court, March 1992 (No. 233 of 1989)**; the wishes of the parent (**see A v A (1964) 8WIR 247**); the conduct of the parents generally and specifically their conduct towards each other and the child; maintenance of the family unit; material standards and advantages which the child reasonably expects (future prospects of child); preserving the status quo in the child's life; the happiness of the child; the position or attitude of new partners towards the minor child.

[42] These considerations are by no means exhaustive as each case has a particular set of facts and circumstances to be evaluated by the Court.

[43] Anthony Dickey in the text Family Law 5th ed lists six considerations that frequently arise in proceedings for a parenting (custody) order in Australia. He listed them as follows:

1. The desirability of preserving the *status quo*;
2. Whether to allow the separation of siblings;
3. The relevance of the fact that a person seeking residence of a child is the child's mother;

4. Relevance of the fact that a person seeking residence of a child is a parent of the child, whether father or mother;
5. The relevance of the conduct of the parties;
6. The views of the child.

[44] In **Ramendhar v Armogan** an (Unreported) decision of August 22, 2013, **Chandler J** cited the case of **Holmes v Holmes (1988) FLC 91-918**, where the Full Court of the Family Court of Australia noted the following considerations in making a determination of this nature:

> "(i) Is the Application to remove the child made bona fide?
> (ii) If it is bona fide, can the Court be reasonably satisfied that the custodian will comply with orders for access and other orders made to ensure the continuance of the relationship between the children and the non-custodian? If the Court is not satisfied about this, this would be a weighty, although not decisive, matter against the success of the application.
> (iii) The general effect upon the welfare of the children in granting or refusing the application. Such a consideration would include reference to the effect on the children of deprivation of, or diminution of access and general association with the non-custodian and his family, and any disadvantages to the welfare of the children in the proposed new environment in isolation or in comparison with the previous environment."

[45] The importance of determining each case on its own facts and avoiding an approach that draws assumptions from given facts (such as, that young children always go with their mother) cannot be stressed enough. In the case of **In the Marriage of Smythe**

(1983) 48 ALR 677 (cited by counsel for the Respondent) the Full Court of Australia (Evatt CJ, Asche and Gee JJ) had this to say on that point:

> "… the Court has pointed out on numerous occasions that there are no presumptions or onuses; there are factors which in a particular case may have more or less significance according to the circumstances."

[46] In **P v P [2001] EWCA Civ 166**, cited by counsel for the Applicant, Thorpe LJ makes the following insightful observation relevant to the approach of a court in relocation cases:

> "… the opportunity for this court to give guidance capable of general application is plainly circumscribed by the obvious consideration that any exercise of discretion is fact dependent and no two cases are identical. But in relocation cases there are a number of factors that are sufficiently commonplace to enhance the utility of guidelines. For instance,
>
> (a) The applicant is invariably the mother and the primary carer;
> (b) Generally the motivation for the move arises out of her remarriage or her urge to return home; and
> (c) The father's opposition is commonly founded on a resultant reduction in contact and influence."

[47] He went on to make reference to the unreported case of **Moodey v Field (1981)** and stated further:

> "The question therefore in each case is, is the proposed move a reasonable one from the point of view of the adults involved? If the answer is yes, then leave should only be refused if it is clearly shown beyond any doubt that the interests of the children and the interests of the custodial parent are incompatible."

[48] In **Poel v Poel [1970] 1WLR 1469**, a case cited and applied by my brother **Chandler J.** in **Ramendhar v Armogan (supra), Sachs J** made the following relevant statement:

> "When a marriage breaks up, a situation normally arises when the child of that marriage, instead of being in the joint custody of both parents, must of necessity become one who is in the custody of a single parent. Once that position has arisen and the custody is working well, this court should not lightly interfere with such reasonable way of life as is selected by that parent to whom custody has been rightly given. Any such interference may, as my lord has pointed out, produce considerable strains, which would not only be unfair to the parent whose way of life is interfered with but also to any new marriage of that parent. The way in which the parent who properly has custody of a child may choose in a reasonable manner to order his or her way of life is one of those things which the parent who has not given custody may well have to bear, even though one has every sympathy with the latter on some of the results."

[49] This statement speaks volubly to the consideration of maintenance of the *status quo*.

[50] **In Tyler v Tyler [1989] 2 FLR 158**, Kerr L J had this to say on how a court should approach relocation cases:

> " I also accept that this line of authority shows that where the custodial parent herself, it was the mother in all those cases, has a genuine and reasonable desire to emigrate then the court should hesitate long before refusing permission to take the children."

[51] Counsel for the Respondent referred the Court to the dicta of Thorpe L.J in the case of **Payne v Payne [2001] EWCA Civ 166** where he suggested the following guidelines in relocation cases:

(1) The question to be posed is, "Is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life?" Then ask, is the mother's

application realistic, by which I mean founded on practical proposals both well researched and investigated? If this application fails either of these tests refusal will inevitably follow.

(2) If however the application passes these tests then there must be careful appraisal of the father's opposition: is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future relationship with the child were the application granted? To what extent would that be offset by extension of the child's relationships with the maternal family and homeland;

(3) What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal?

(4) The outcome of the second and third appraisals must be brought into an overriding review of the child's welfare as the paramount consideration."

[52] Counsel also cited the case of **Re R (Leave to Remove) [2010] EWCA Civ 1137**, where a Court in granting an order that an Australian mother in England be allowed to take her child back to Australia found that the mother's desire to relocate was real and genuine and not formed from any desire to reduce the access of the child to the father. In that case the mother had lost her job and was having difficulty finding work in the UK.

Discussion and Disposal

[53] The concern of a parent as to the effects of their child or children being removed to a new geographical location, in this case to a different country, is a real and deeply troubling one which cannot be dismissed lightly, or at all. It is natural for the parent who

remains behind (or without the day to day care and control) to be concerned that he or she will be removed from their children's lives, even more so when there is a new spouse involved who is prepared to assume parental responsibilities.

[54] It is noted that at no time has the parenting abilities of either party been seriously put in issue, save and except for the (half-hearted) reference to the Respondent's stress and anxiety when he was still at university, reference to the Applicant's possible stress and anxiety as a new wife in a foreign culture, and the rather minor determination of what money if any, was owed by the Respondent with respect to maintenance and expenses and subsequently resolved. The Applicant's competence to care for her children, her evident love and devotion to them was not questioned.

[55] The Respondent's love and devotion to his children was similarly never questioned, and that too was evident to this Court. The Applicant acknowledges him (while not perfect) to be a good parent.

[56] Both parents undoubtedly want the best for these two minor children.

[57] This Court is of the view that the purpose of the Applicant's relocation to Canada is not primarily to further her education; she met and married a Canadian national of Barbadian descent whom she started dating in January 2012, (after knowing him for some 16 years) and it is quite apparent and **reasonable** that having decided to marry her present husband she wants to reside with him in Canada and she has been positioning herself and her children to take up permanent residence in Canada with him (this court is of the view that the Applicant's study plans are more than likely intended to better position her to obtain employment in Canada). It is evident that her new husband purchased a home in 2012 ostensibly to accommodate the Applicant and her children when they come to visit but more significantly, to accommodate a family of four. The Applicant opted for a voluntary package with her employer, in December 2013 and it is no great leap to conclude that she did so with the prospect of marriage and relocation in mind.

Critical Factors Considered in the Circumstances of this Case

[58] It is noted here, that in many ways the two parties herein are evenly balanced when the Court reviews the many relevant factors.

It was the opinion of this Court that both parents were positioned to satisfy the basic needs of these two minor children and are both good parents. However, there are a number of matters that distinguish the parties:

1. It is quite clear that despite what appears to be an equal sharing of the parents' time with these young children since the Consent Order of 2012, the Applicant is unquestionably now and apparently always has been the primary caregiver and nurturer. And while I make no presumptions about the age and gender of these children, I do nonetheless make note of their young age.
2. I am satisfied that the Applicant's reason for emigrating is not motivated by a selfish desire to exclude their father from the lives of her children, in spite of the fact that this Court is of the view that her plans/decision to relocate to Canada probably pre-dated December 2013. The Respondent has provided no evidence of the Applicant's alleged "previous attempts to keep him from his children" and in fact the Applicant's consent to the order of April 2012 does in fact support her assertion that one of the reasons she agreed to such an Order was because she wanted to prove to the Respondent that she did not want to keep his children from him. Her commitment to this ideal is evident (even in the face of her belief that the present arrangements are unstable) in the fact that in three years there are no complaints drawn to the attention of this Court that the Applicant did other than faithfully honour the terms of the Consent Order (it is noted that the Respondent has asserted that the present arrangement works well).
3. The Applicant and her husband have shown the financial means necessary to be the primary care givers and she has demonstrated that she and her new husband have carefully

examined what is required of them in this regard. The parties have joint and individual savings both in Toronto and Barbados; the husband has a strong line of credit (three credit cards) and no debt beyond his mortgage. The children and the Applicant/Wife were placed on her husband's insurance coverage as soon as the parties married and therefore wife and children have access to medical and dental care both through private insurance coverage and free health care once a residency requirement has been met. His wife and her children are also entitled to his travel benefits as an employee of Air Canada.

4. The Respondent/Husband whose Statement of Financial Circumstances shows a deficit of income over expenses appears to live between three homes (his mother's home, his father's home and his grandparents' home in three different parishes) where he shares a bedroom with the minor children. He failed to outline any plan in his Affidavit or oral evidence for their full time care, other than to state that he is willing to look after the children without any assistance from the Applicant. The Respondent has stressed the effect of the removal of the children from a close association with him and his extended family without any exploration of the effect of their removal from their mother.
5. Practical proposals well researched and investigated. The practical proposals of the Applicant are not flawless and to my mind display no weakness which cannot be cured, but they do show in my estimation that the parties carefully and extensively researched this process, even going as far as retaining in February 2014 (this Court accepts that the letter from Destiny Immigration incorrectly recorded the date) an immigration consultant, Destiny Immigration. I am satisfied therefrom and from the results of the parties investigations generally, that the Applicant's husband Corey Devonish qualifies as a sponsor for his wife and her two children.

6. I am further satisfied that her new husband is committed to that sponsorship and to financially supporting her and assisting her with the schooling of her children in Canada. The Applicant has not finalized her plans in this regard but there has been a careful exploration of the options. In other words, preliminary investigations have been made which can be concretized when and if, the time arises. Arrangements can be finalized for the enrollment of the children in the Portage Trail Community School which is within five minutes walking distance from the intended matrimonial home, and their later transfer, if possible, to the George Syme Community School where there is a reputable French Immersion Programme. (It is noted that there has been no objection to the schools themselves merely that no concrete arrangements have been made for acceptance to these institutions.) This Court accepts that in order for the Applicant to enroll the children in school in Toronto there needs to be documentation supporting an assertion of an application for permanent residency.
7. This Court is satisfied that during the Residency Application process, while the Applicant will be disadvantaged should she leave Canada that this will not apply to the children who will be free to travel. There will consequently be no impact on the Respondent's access. The Applicant proposes that her Husband and/or her mother would accompany the children to and from Barbados and her husband has agreed to pay the cost of her mother's travel and discuss with the Respondent the splitting of the children's travel costs.
8. The Respondent's opposition to the relocation is more grounded in his concern that his close relationship with the children as well as their relationship with his extended family may be compromised by distance than on a consideration of what is in the best interests of the children. The Applicant usefully articulates her opinion as to why relocation would be in the best interests of the children citing the usual boilerplate advantages of living in a first

world country, and the opinion that young children belong with their mother and also articulating the reaction of her young daughter to separation from her. This Court observed that other than expressing his wish to be responsible for the children in Barbados, his oral evidence and affidavit evidence lacks practical proposals for their care and control and does not at all address the effect of their separation from their mother.

9. The Respondent's concern that the Applicant will not involve him in arrangements for the children and that he will be removed from their lives must be addressed by this Court. This Court is not of the view that the Applicant will purposely or maliciously do so, but it does note that the Applicant's responses as to why she failed to provide the Respondent with the information provided in her affidavit and oral evidence about the children's schooling and the immigration process was tinged with insincerity. However, in considering this it is clear that the law does not countenance, as one Court puts it, "an award to the innocent party" (see **Hayman v Hayman C 90,140** and, in this regard I am guided by **Hutley JA in Barnett v Barnett 919730 ALR19** where he states:

> "…The issue is not what is justice to the parents but what is for the welfare of the child, and the welfare of the child can best be weighed by disregarding entirely any concept of claim on the part of the parents. It is their conduct, in so far as it bears on welfare, which is important."

And by **Demack J** in **Jurss v Jurss (1976) 1 Fam LR 11,205** where he states:

> "The welfare of the child in any particular case must be determined on the facts of the particular case. Certainly rules of experience and prudence may indicate the limits of the inquiry in any particular case, and certainly experience may indicate certain factors which are more significant than other factors. **But to look for disqualifying factors against the mother is to put the cart before the horse. The inquiry is essentially a positive one designed to promote the interests of the child, not to demote the claims of either parent**." (my emphasis)

10. Compliance with Access Orders. This Court has no reason to question the intended compliance of the Applicant with Access Orders. Her compliance with the Consent Order of 2012 speaks to this. It may take some time for Applicant and Respondent to repair their relationship, if at all, but these problems can be avoided if both commit to expending a greater effort in achieving an acceptable level of non-confrontational communication. It is not in the Applicant's interest to increase her legal challenges and costs by refusing to comply with this Court's Orders and this Court has a great deal of confidence that she shall continue to do so. This Court encourages her to always keep in the forefront of her mind the need to ensure continuance of the relationship between the minor children and their father, the Respondent and to facilitate their fostering a close relationship with both families.

[59] The Application for an increase in maintenance. This Court is of the view that the Applicant has not established an evidential basis for an increase in the monetary 'needs' of the children should they relocate to Toronto, and is in fact asking this Court to make assumptions and/or to speculate. There is a proposed increase from $300 to $1500 without any attempt to identify and assess the increased 'needs' and without reference to the 'means' of the Respondent to satisfy what one assumes must be increased needs.

[60] In cross-examination the Applicant and her husband opine that there will be increased financial outlay by about $Cdn $1000.00 per month. No breakdown or rationalisation of this figure was advanced and this Court was left to speculate.

[61] There was no cross-examination of the Respondent on his Statement of Financial Circumstances and this Court can only conclude therefrom that his submitted figures have been accepted as true and correct. As stated above the Respondent, on the strength of this unchallenged Statement of Financial Circumstances, operates on a deficit of over $7000 with no discernible additional means of income. There are no 'means' to justify an increase in maintenance.

[62] The Respondent however has shown an ability to pay an amount greater than $300 per month, as he currently pays one-half of the children's nursery fees together with one-half of the other expenses.

[63] I accept his declaration in the said Statement that he expends approximately $6000 per annum on the children.

[64] It would however, in my opinion be inequitable to expect him to pay one-half of all medical, dental, ophthalmic and educational expenses reasonably incurred until such time as the Applicant can provide him with the likely or estimated cost of these expenses in Canada as opposed to their cost in Barbados (which would have

been the basis on which the parties negotiated the 2012 Consent Order).

[65] These considerations have largely informed this Court's 'final' Orders in this matter which are as follows:

(a) The Applicant shall be at liberty to remove the two minor children Micah Vernon Peter Ward and Eden Anne Roché Ward from this jurisdiction to reside with her in Toronto;

(b) The minor children shall for the first 12 months be returned to their father for the full summer and Christmas holidays and Easter holidays. Liberty to apply at the end of the first year to review access arrangements;

(c) The said father Danny Ward shall have reasonable access to the children during any visit that he may make to Toronto Canada upon giving to the Applicant not less than fourteen (14) days notice of his intention to so visit;

(d) The Applicant shall pay the children's travel expenses relating to such access periods and the cost of a return ticket for the mother of the Applicant to accompany the children from Barbados for the first year of access. The children shall enjoy the benefit of the Applicant's travel benefits and where they are not allowable she shall pay the difference in the costs for the first year of this access arrangement;

(e) The Consent Order of 2012 shall be varied to the extent that sections 3, 4, 5 and 6 of that Order are discharged and the Respondent ordered by this Court to pay the Applicant/Wife the sum of Bds $600.00 per month towards the children's maintenance commencing from the first month of their relocation to Toronto until further Order. Payment by the Respondent of any additional amounts towards the children's maintenance shall be suspended for one(1) year;

(f) The parties shall have liberty to apply after 1 year with respect to the issue of shared travel costs and other expenses;

(g) Each party shall bear his and her own costs;

(h) There shall be a stay of this judgment for 28 days.

[66] I wish to recognize and commend the parties for the quality of their submissions.

MARGARET A. REIFER
Judge of the High Court