IN THE SUPREME COURT OF BELIZE, A. D. 2020

CLAIM NO. 695 OF 2020

	(LUCY REMPEL-GAERTNER	**APPLICANT**
	(	
BETWEEN	**(AND**	
	(	
	(CALEB GAERTNER	**RESPONDENT**

BEFORE MADAM ACTING CHIEF JUSTICE MICHELLE ARANA

Mr. Godfrey Smith, SC, and Mr. Hector Guerra for the Applicant

Mrs. Melissa Balderamos Mahler and Ms. Erin Arthurs for the Respondent

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R U L I N G

Facts

[1] The Applicant Mrs. Lucy Gaertner and the Respondent Mr. Caleb Gaertner are the parents of three minor children. According to the Affidavit of Mrs. Gaertner dated December 2nd, 2020, she met her husband when they attended the Pensacola Christian College in Florida between 2007 and 2013, and they were later married in Pensacola, Florida, U.S.A. The parties have three children: the first child was

born in Florida on December 8th, 2013 and the second was born on January 6th, 2016. Both of these children are dual nationals of the United States of America and Belize. The third child was born in Belize on May 3rd, 2018. In July 2017, Mr. and Mrs. Gaertner moved to Belize from Pensacola, Florida, with their first two children as Mr. Gaertner was joining the United States Army and wanted them to be in the care of family while he was away. On October 8th, 2018, Mrs. Gaertner informed Mr. Gaertner that she would not be returning to Pensacola with the children. She said that she was fearful for the safety of the children. Mr. Gaertner then made an Application on September 20th, 2020, under the Hague Convention on the Civil Aspect of International Child Abduction seeking the return of the three children to Pensacola, Florida. Magistrate Morrison-Novelo granted the Application sought to Mr. Gaertner.

[2] This present Application in the Supreme Court is an Application for a Stay of Execution of an Order of the Belize Family Court made under the International Child Abduction Act of Belize, the "*Hague Convention*". On November 13th, 2020, Magistrate Shanti Morrison-Novelo ordered that:

i) Caleb Gabriel Gaertner, Gideon Otto Franz Gaertner and Lydia Christine Gaertner be returned to the United States of America by the 30th of November, 2020;

ii) The Father Caleb Gaertner pay for the travel, accommodation and living expenses associated with returning the children; and

iii) Any of the Father's access and supervision be supervised.

The Applicant Mrs. Lucy Gaertner applied to the Magistrate for a stay of execution of judgment which was denied on the 27th of November, 2020. The Applicant has therefore applied to the Supreme Court seeking the stay of execution of the Magistrate's order.

Legal Submissions in support of the Stay of Execution

[3] Mr. Godfrey Smith, SC, on behalf of the Applicant Mrs. Gaertner submitted that there are several preliminary matters which he wishes the Court to note:

i) The Magistrate though required by Section 112(2) of the Supreme Court of Judicature Act to supply copies of the Reasons for Decision prior to the hearing of an Application for Stay never supplied copies of the reasons for her decision;

ii) Two of the three children are dual citizens of both the United States of America and Belize;

iii) The third child is a citizen of Belize only, and has never been to the United States;

iv) The Hague Convention under which the Respondent Mr. Gaertner brought his application does not contemplate the prompt return of the children if those children are being wrongly retained in the requested state (Belize). The requirement to act with promptitude is without prejudice to a party's right to challenge the correctness of a Magistrate's decision on appeal and the right to be granted a stay where the Applicant satisfies the applicable test;

v) The Applicant (mother) and the Respondent (father) agreed that the Applicant would leave the U.S.A. and go and live with the children in Belize with her parents while the Respondent attended military school, but that permission was only up to a particular date. At the expiration of that permission, the Applicant decided to remain in Belize against the wishes of the father. Mr. Smith, SC, argues that the retention of the children by the mother in Belize is not unlawful because in relation to the first two children, they were not habitually residents in the U.S.A. In relation to the third child, the mother had a defence, i.e., the risk of psychological harm if that child is returned.

[4] Learned Counsel for the Applicant submits that the Stay of Execution of the order of the Belize Family Court should be granted because if these children are returned to the U.S.A. and the Appeal is successful, there is absolutely no way of getting them back under the Hague Convention or otherwise; the appeal would therefore be rendered nugatory.

[5] It is submitted that the Appeal has a strong prospect of success because the Magistrate erred as follows:

a) Article four of the Hague Convention requires that a child must have been habitually resident in the country seeking its return for the Convention to even apply. The youngest child was born in Belize and has never been to the U.S.A. The Convention does not apply to her;

b) The second child was born and spent a little over a year in the U.S.A. but cannot, in law, be considered to have been "*habitually resident*" in the U.S.A. based on the established criteria for determining habitual residence;

c) There was evidence of sexual abuse of the first child by the father which the Magistrate did not reject but instead ordered the children be returned and that the Father's visits be supervised. It is argued that the Magistrate was mindful of the sexual abuse evidence but it was an Order which was not open to the Magistrate to make;

d) The Magistrate did not properly consider the risk of psychological harm or other damage to the first child which is an established ground under the Convention for not ordering the return of a child.

[6] It is contended on behalf of the Applicant that applying the "*Balance of Harm*" test great prejudice would befall the Applicant if the children were returned to the

U.S.A. while there would be no prejudice to the Respondent if he is to wait for the outcome of this Appeal.

[7] Mr. Smith, SC, emphasizes the following points for the Court's consideration in deciding whether to grant this stay of the Family Court's order:

a) This case involves allegations of sexual abuse of a child by his father;

b) The provisions of the Hague Convention applied regularly by the Belize Family Court in Belize has never been scrutinized on appeal by the Supreme Court; such scrutiny would be beneficial to Belize;

c) The applicable principles in granting a stay of execution must be viewed through the prism of the welfare of the children;

d) The uncontested evidence is that the Applicant's entire family network is in Belize where the children have been living these past three years. The Respondent father lives in Florida.

[8] Learned Counsel for the Applicant cites Section 112 of the Supreme Court of Judicature Act which gives the Court jurisdiction to order a stay of execution in this matter:

> *"112(1) Where any person has filed an appeal to the Court against a decision of an inferior court, the appeal shall not by itself result in the suspension under appeal, but the appellant may, within the time prescribed for filing such appeal, apply to the inferior court which made the decision under appeal, for*

stay of execution of any judgment appealed from (whether civil or criminal), pending the determination of that appeal;

(2) Before hearing the application for stay, made pursuant to subsection (1) of this section, the inferior court shall give its reasons for the decision under appeal and shall supply copies thereof to both the appellant and the respondent, such reasons to be given no later than seven days from the date of the application for stay of execution;

(3) If the application for stay is refused by the inferior court, or the inferior court fails to give its reasons for the decision under appeal within the time specified in subsection (2) of this section, the appellant may apply to the Court for appropriate relief."

[9] It is submitted that ***NB and LB of Haringey*** [2011] EWHC 3544 is relevant to this case as it deals with the removal of a child. This case is set out to determine whether a stay should be granted in a case involving a child. Mostyn J declared that the welfare prism that overarches all family proceedings is paramount in such cases. The Court went on to set out the five principles to be considered as follows:

"From these authorities, I derive the following five principles in relation to the application before me. First, the court must take into account all the circumstances of the case. Second, a stay is the exception rather than the

general rule. Third, the party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted. Fourth, in exercising its discretion the court applies what is in effect a balance of harm test in which the likely prejudice to the successful party must be carefully considered. Fifth, the court should take into account the prospects of the appeal succeeding. Only where strong grounds of appeal or a strong likelihood of success is shown, should a stay be considered."

[10] Applying these five principles to the case at bar, Mr. Smith, SC, argues that once the children are returned to the U.S., the appeal would be rendered nugatory as the children would be beyond this court's jurisdiction. The determinative question for this Court is what legal mechanism can be applied to have the children returned if the appeal succeeds as there is no mechanism under the Hague Convention for the return of children under such circumstances. The Applicant would be left to retain counsel in the U.S.A. to explore some legal avenue of moving U.S. Courts to consider the matter with no clear cause of action and at considerable expense and inconvenience to the Applicant and to the children. It is therefore far simpler to stay the order pending the appeal.

[11] On the question as to whether the appeal is likely to succeed, Mr. Smith, SC, says that the Magistrate plainly erred in ordering the return of all three children when Section 4 of the Hague Convention provides that the Convention shall only apply to

any child who was "*habitually resident*" in a Contracting State immediately before breach of a custody or access rights. The Gaertner's youngest child was born in Belize and has never been to the U.S.A. therefore the Convention does not apply to her. The second child was born in the U.S.A. and lived there for a little over a year but cannot be considered to have been "*habitually resident*" in the U.S.A.

[12] The criteria needed to establish "*habitually resident*" are questions of fact including the child's integration into the family and social environment, physical presence of the child in the territory in question including duration and living arrangement, enrollment of the child in school and related school activities, etc.

[13] The place of habitual residence must be established on the basis of all the surrounding facts specific to each individual case. These factors were carefully explained by Moylan J in B (A child) Case No. B4/2020/0698. The second child has spent all but one year of his life living in Belize and his familial relationships have been established in Belize. In relation to the first child, the Convention under Article 13 provides that the Court should not order the return of a child where there is risk of physical or psychological harm to the child. Mr. Smith, SC, submits that there was clear evidence that the Respondent (father) had sexually abused the first child. The father denied those allegations. In her oral reasons, the Magistrate did not reject that evidence but instead she ordered that the access or visitation of the children by the father be supervised. It is submitted that the Magistrate did not have

the power to make that particular order. She did not properly weigh, consider or mention the risk of psychological harm or other damage to the first child which is an established ground under the Convention for not ordering the return of a child.

[14] Learned Counsel relies on ***Commonwealth Caribbean Civil Procedure 3rd Ed*** and ***Blackstone's Civil Practice*** as authority for the principle that in considering whether a Court should grant a stay of execution, the essential factor is the risk of injustice. In the case at bar, if the stay is refused and these children are returned to the United States before the determination of an appeal, the Appellant, if successful on appeal, would not be able to enforce the results of the appeal since the children would be beyond this court's geographical jurisdiction. If the stay is granted and the Applicant is unsuccessful on the appeal, the Respondent would still be able to enforce the Family Court's decision since the children would still be in Belize. In addition, the Social Inquiry Report points to the fact that the children are safe in Belize so there is no risk of harm to the children pending appeal. There is little to no risk of injustice to the Respondent if the stay is granted.

[15] Mr. Smith SC concedes that the general rule is that granting a stay is the exception rather than the rule, especially in the usual cases involving financial matters, however, he submits that the circumstances of this case are such that it involves children and must be viewed through the welfare prism that overarches all family proceedings. He goes on to emphasize that the Social Enquiry Report shows

that the children are free and safe from any abuse and not at risk of suffering any type of harm while the appeal is determined. The case involves allegations of sexual abuse of a child by his father and that allegation was not rejected by the Magistrate. This is a quintessential case for the grant of a stay of execution of a judgment and the Court should grant the Applicant the relief sought.

Legal Submissions on behalf of the Respondent

[16] Mrs. Melissa Mahler contends on behalf of the Respondent (father) that the Respondent has an Order in his favor and he should not be deprived of the fruits of this decision. She relies on ***Sagis Investments Limited v. Radio Krem Limited*** Civil Appeal No. 13 of 2008. Learned Counsel also relies on the leading case on the test for a stay of execution ***Linotype-Hell Finance Ltd v. Baker*** [1993] 1 WLR 321 as stated by Straughton J.:

> *"It seems to me that, if a defendant can say that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success, that is a legitimate ground for granting a stay of execution."*

Mrs. Balderamos Mahler says that this test is used mainly in reference to Monetary judgments and orders.

[17] ***Blackstone's Civil Practice 2015*** at paragraph 74.46 sets out a test that applies generally to a stay of execution:

> *"The basic rule is that a litigant is entitled to enjoy the fruits of its success. This means that enforcement should be allowed to proceed unless in all the circumstances of the case and having regard to the risk of injustice to the parties a stay ought to be imposed. The Court has an unfettered discretion to impose a stay of execution if the justice of the case so demands. Relevant questions are:*
>
> *a) If a stay is refused, what are the risks of the appeal being stifled?*
>
> *b) If a stay is granted and the appeal fails, what are the risks that the Respondent will be unable to enforce the judgment?*
>
> *c) If a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the Appellant being able to recover…?"*

[18] Learned Counsel for the Respondent refers to ***Marie Makhoul v Cicely Foster*** HCVAP 2009/014 where M applied for a stay of execution of a judgment. The OECS Court of Appeal held that the essential question is whether there is a risk of injustice to one or the other or both parties if the stay is granted or refused. This calls for an examination of the nature of the case and the consequences flowing from the enforcement of the judgment.

[19] Mrs. Balderamos Mahler contends that applying that test to the facts of this case, the Applicant's appeal has no prospect of success. She says on behalf of the Respondent that the evidence of the Applicant is unfounded, uncorroborated and very unlikely to succeed.

[20] The case of the Respondent is that his first two children were both conceived and born in the United States and resided there prior to them leaving for Belize with the Applicant. Their home was in the United States until their removal and wrongful retention in Belize. The fact of their habitual residence in the United States has not been disputed by the Applicant in proceedings before the lower court. It is also the case of the Respondent that his youngest daughter was conceived in the United States but born in Belize; at no point in time did he give the Applicant permission for the child to be born in, or to remain in Belize. A parent cannot unilaterally create habitual residence by wrongfully removing or retaining a child.

[21] Mrs. Balderamos Mahler relies on the case of ***Re A (Jurisdiction: A Return of a Child)*** [2013] UKSC 60 as authority for the point that there is no rule which prevents a person from being habitually resident in a place where he had not set foot. There should be a factual inquiry into the integration of the family unit to which he or she belonged and that could well yield the conclusion that the child shared the habitual residence of that unit even if he had not yet achieved physical presence there, especially if he was being prevented by coercion or other force majeures from

doing so. It is also argued on behalf of the Respondent that the Applicant could not have legally decided on her own to retain these children in Belize without the father's consent based on his rights of custody. It is also submitted that there is no credible evidence put forward to support the allegations of sexual and psychological abuse in the court below. Other than the Applicant's say-so, there is no record that one of the children suffered abuse at the hands of the father. It is also contended that the lower court did not factor-in evidence of abuse which is also unlikely to succeed and that the Applicant's appeal has a very low likelihood of success.

[22] It is submitted on behalf of the Respondent that the Applicant has not provided evidence that her appeal is at risk of being stifled. In addition, the Applicant has failed to discharge her burden of proving that there is a risk that she would not be able to enforce a Belize judgment in the United States. There is no evidence that the Applicant would not be able to enforce an order from the Appellate Court in the United States. Mrs. Balderamos Mahler argues that the Applicant needs to put before this Court more than bald assertions that she would not be able to enforce a Belize judgment in the U.S. It is also submitted that if the stay is granted, the Respondent would suffer a grave injustice as he had not seen nor spoken with his children since July 2018. It is also beyond dispute that the Applicant has acted unlawfully by unilaterally deciding to detain the children in Belize without the Respondent's consent as the Respondent was exercising his parental rights. The

least injustice therefore lies in refusing the stay of execution as there is no merit in the appeal, the Applicant will be able to enforce her judgment in the U.S. and it is in the best interest of these children that they be returned to their father.

[23] It is submitted on behalf of the Respondent that under the Hague Convention, the children should be returned to him promptly. A stay pending an appeal is an exceptional remedy granted only after evaluating all the circumstances of the case with a focus on an avoidance of injustice being done to any particular party. For these reasons, this application should be dismissed with costs to the Respondent.

Ruling

[24] I am grateful to both Counsel for your submissions on this application for a stay of execution of the decision of the Family Court Magistrate in this matter. Having reviewed the evidence and the submissions made, it is my view that the Applicant has satisfied this Court that in all the circumstances of this case she is entitled to a stay of execution. This is so because I agree with Mr. Smith's submissions that the evidence shows that the habitual residence is Belize and not the United States since all three children have been living in this country, benefitting from strong family support and attending school immediately prior to the commencement of this case. I also agree that the welfare principle underlying these cases dictates that the children stay in a safe, secure environment here in Belize while the merits of the appeal is decided. I am satisfied that the Applicant has established

that her appeal is highly likely to succeed. It is clear that the Applicant would have great difficulty and expense in having an Order of this Court enforced in the United States if she is successful on appeal. I also wish to emphasize the fact that this Court takes very seriously the evidence of sexual and psychological abuse of one of the children by the Respondent which led the Magistrate to impose a condition of supervised visits in her order. For these reasons, the stay of execution is granted. Costs awarded to the Applicant to be paid by the Respondent to be agreed or assessed.

Dated this day of March, 2021

Michelle Arana
Chief Justice (Acting)
Supreme Court of Belize