



In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2025: No. 28

IN THE MATTER OF AN APPEAL UNDER THE CIVIL APPEALS ACT 1971
AND
IN THE MATTER OF AN APPLICATION UNDER THE MATRIMONIAL
PROCEEDINGS (MAGISTRATES' COURT) ACT 1974
AND
IN THE MATTER OF THE CHILDREN ACT 1998

BETWEEN:

AB (FATHER)

APPELLANT

-AND-

CD (MOTHER)

RESPONDENT

*In the matter of an appeal in relation to orders made in respect of the shared custody and
control of the Child and the Child's schooling*

Date of Hearing: 2 September 2025

Date of Judgment: 2 September 2025

Appearances: Victoria Greening of Resolution Chambers Ltd for AB (Father)
Bruce Swan of Bruce Swan & Associates for CD (Mother)

JUDGMENT of Martin J

Introduction

1. This is an appeal made by the Worshipful Auralee Cassidy on 24 June 2025 in the Family Court division of the Magistrates' Court in relation to the arrangements for the schooling of a 12-year-old child for the present school year which begins this week. By the terms of paragraph 6 of the interim Order, the learned Magistrate directed that shared care and control of the child shall be driven and based on the needs and desires of the child.
2. By the terms of paragraph 7 of the interim Order, the learned Magistrate ordered that the child shall remain enrolled at Middle School¹ for the school year 2025-6 to complete her middle school years and that she is not to miss school except for medical reasons.
3. There are two principal grounds of appeal against these decisions. The first is that the learned Magistrate failed to give reasons for her decisions in relation to these two paragraphs of her interim Order. The second is that the learned Magistrate did not have jurisdiction under the Matrimonial Proceedings (Magistrates' Court) Act 1974 to make the Order in paragraph 7.

Summary and Disposition

4. The Court has decided that there is no substance in the grounds of appeal pursued by the Father, either on narrow legal grounds or on their independent merits.
5. As to the legal grounds advanced, (i) the learned Magistrate did give sufficient reasons for her decision within the body of her Order when read as a whole and (ii) the learned Magistrate did have jurisdiction to make the Orders she made (albeit not under the Matrimonial Proceedings (Magistrates' Court) Act 1974 but under the Children Act 1998) and (iii) there is nothing in the body of the decision which is unsupported by evidence which were sufficient to justify her decision or that she misapplied any relevant principle of law such as would justify the Supreme Court interfering with her decision.
6. Alternatively, if the Court were to be held wrong as to the Magistrate's jurisdiction to make the orders she did, the Court would make the same Order in relation to paragraph 6 in the exercise of its own jurisdiction, but expressed perhaps in slightly different terms, namely that decisions as to the shared care and control of the Child shall be made with a view to the best interests of the child (i.e. her needs) and that her wishes shall be given appropriate weight to the decisions that are made on her behalf (i.e. her preferences).

¹ Certain details have been anonymised to protect the identity of the Child.

7. Similarly, the Magistrate clearly had jurisdiction to make the Order she did in relation to the Child's schooling under section 36F (1) (c) of the Children Act 1998. There is no basis on which the Father can plausibly argue that the learned Magistrate did not have power to make the Order or that she did so without any sufficient evidence. The appellant's counsel was right to abandon this point at an early stage of the hearing.
8. As to the alleged failure to give reasons, the Court considers that the Order, taken as a whole, expressed the reason for making the Order adequately. This is because the main parts of the Order were agreed and the reason for making the disputed part of the Order which related to the Child's schooling was contained in the recital that "*upon reading the affidavits...and taking into consideration the filed SIR which voices the Child's perspective in the proceedings*".
9. But in case the Court is held to have read too much into the recital, this Court has also considered the merits of the Father's appeal by way of *de novo* hearing, and would dismiss his appeal against paragraph 7 of the learned Magistrate's Order on the grounds that (i) the Child is settled in her school (ii) there is no evidence that she is unhappy or underperforming academically in her present environment or that she is at any risk in her present situation that would justify the change of schooling at this time (iii) the Child has expressed a wish to remain at the school until the end of the present school year 2025-6 and (iv) the change at this time might be unduly disruptive in the event that the Court later decides to approve the Mother's intended emigration with the Child, which would result in two school moves in two years, which (in the Court's judgment) would not be in the best interests of the Child, in the absence of any evidence that the Child's educational development will be impeded or adversely impacted by remaining where she is for the next school year.

Background

10. In these proceedings the initial application relating to the question of summer vacation plans and the parties' initial evidence was directed to those questions. Happily, those matters were resolved and are not the subject of this appeal.
11. However, in his second affidavit dated 6 June 2025, the Father expressed a desire to seek an Order for sole custody of the child and also to seek permission to send the child to a new school in September 2025. The Father said that he had arranged for a place for the Child at a new school in September which he felt would be better suited to the Child's needs. He confirmed that he would be responsible for the Child's fees and expenses at the new school. He said that the Child had told him that she was excited about this development and was looking forward to going to the new school.
12. In the final paragraph of his second affidavit the Father summarised the relief he was seeking as follows: (i) the Mother and Father are to have joint custody, except concerning decisions about the child's education which the Father wanted to have

exclusive decision-making power (ii) sole care and control of the child should be awarded to the Father with defined access to the Mother and (iii) that the Child should be permitted to change to the new school in September².

13. At the hearing however, the agreed position (expressed by the Father's counsel) was that on an interim basis the Mother should have sole care and control of the Child, but that the Mother and Father should share joint custody of the Child.
14. The Father said he did not agree with the Social Inquiry Report (SIR) which had recommended that the child should remain at Middle School for the completion of the 2025-26 school year. The Father indicated that he was looking for shared care and control ultimately that he would pursue that on the daughter's timeline³.
15. In the SIR the Court Social Worker recorded the Child's desire to remain at Middle School to complete her final year⁴. The Mother said she wishes to defer any change as she intends to relocate to another jurisdiction and take the Child to live with her overseas where she will attend a new school, but the Mother has not yet made a formal application to remove the Child from the jurisdiction.
16. It was against that background that the learned Magistrate made her Orders (on an interim basis). The first of these were to confirm the access Order of 5 March 2025 as amended by the Order of 30 April 2025 and 14 May 2025. The learned Magistrate also made Orders in relation to the summer vacation travel arrangements.
17. The learned Magistrate ordered (in effect by consent) that the custody of the Child would be shared between the Mother and Father including shared decision-making on medical, dental and schooling matters on an interim basis.
18. The learned Magistrate ordered that there should be shared care and control of the Child between the Mother and Father (i.e. departing from the earlier orders) on an interim basis, and said that "*shared care and control shall be Child driven and based on the needs and desires of the Child*".
19. The learned Magistrate ordered that "*the Child shall remain at [Middle School] for the 2025-6 school year to complete [her] middle school education and shall not miss school save for medical reasons.*"
20. The learned Magistrate stayed the Father's application for sole custody pending the Mother's decision on whether she intended to relocate to live overseas and whether

² Paragraph 21 at page 28 of the Appeal Bundle.

³ Pages 9-10 of the Appeal Bundle.

⁴ Page 81 of the Appeal Bundle.

she applies to the court in the future for permission to relocate the child with her to live outside the jurisdiction permanently.

The grounds of appeal

21. There are two grounds of appeal against the Orders made by the learned magistrate. The absence of reasons in relation to paragraph 6 and the lack of jurisdiction in relation to paragraph 7.

Paragraph 6

22. The first ground of appeal in relation to paragraph 6 of the interim Order is that shared care and control shall be driven by the Child's needs and desires. This appears to be a statement of how the parties are to approach decision making in relation to ordinary care and control decisions, as opposed to more important decisions as to education and medical treatment (and other important matters such as religion, sport or travel overseas) which are referenced in the joint custody Order in paragraph 5.
23. It is difficult to see how this statement of 'approach' in the Order is really susceptible to an appeal: the Order for shared care and control (in the first three words of the paragraph) is not the subject of an appeal: it is the expression that the shared care and control shall be *driven by the Child's needs and desires* that is objected to. The Father argues that this means that the Child's desires will be the driving consideration, not her welfare for which the parents are responsible for determining, and which the law requires the Court to make the paramount consideration⁵. It is argued that the learned Magistrate did not give reasons for adding the words "*driven by the Child's needs and desires*" to paragraph 6.
24. It is axiomatic that a judge must give sufficient reasons for his or her decision for the parties to understand the legal and factual basis for the decision, so that the parties can (inter alia) challenge the decision if they are dissatisfied with it.
25. However, in the Court's view, the learned Magistrate was simply expressing in economic language that the Child's needs shall be the first and most important consideration (i.e. her welfare is the paramount consideration) but that she is of an age and maturity that her wishes shall also be taken into account.
26. It is difficult to see how this expression is objectionable, or why it is necessary to express expanded reasons for this, but the genesis of this part of the Order can be gleaned from the terms of the recital to the Order which reflect that the learned Magistrate had taken into account the SIR which "*voices the Child's perspective in these proceedings*". That appears to be a sufficient expression of the reasons behind the learned magistrate's Order, albeit conveyed in a summary and somewhat elliptical phrase.

⁵ The welfare principle is stated in section 6 of the Children Act 1998.

27. Section 36I of the Children Act 1998 expressly requires the court to take into account the views and preferences of the child to the extent that the child is able to express them. This appears to be what the learned Magistrate was trying to convey in her decision, namely that in exercising shared care and control of the child under the terms of the Order, her parents are to take into account the Child's expression of the Child's views and preferences.
28. However, if the Court were to be held to be wrong in that interpretation of the meaning of the learned magistrate's Order, the Court would express the admonition to the parties to exercise the powers of care and control jointly with a view to giving paramount consideration to the Child's needs and welfare, but that because she is of an age and emotional maturity that she is able to express her own views, the parents should also take appropriate account of her wishes in making day to day decisions that affect her.
29. There is, in the Court's view, really nothing of substance in this ground of appeal and it is dismissed.

Paragraph 7

30. As to the second ground, it is asserted that the learned Magistrate did not have jurisdiction to make the Order requiring the Child to remain enrolled at Middle School for the present school year because the application was made under the wrong Act. It is said that the Order was made under the Matrimonial Proceedings (Magistrates' Court) Act 1974 ("the 1974 Act") which makes provision for financial order in relation to children not to custody matters or matters of care and control.
31. It is true that the original provisions of the 1974 Act were not concerned with matters relating to custody but is concerned with financial provision. However, section 36H of the Children Act 1998 provides that an application in relation to the custody of a child or in relation to the care and control of a child may be made in the same application and in the same manner as an application under the 1974 Act. Therefore, the learned Magistrate was not exercising her powers under the 1974 Act, but under the Children Act 1998 by way of an application made in the same manner under the 1974 Act, and plainly had jurisdiction to entertain the application. The appellant's counsel rightly abandoned this point.

The Children Act 1998

32. Section 36C (1) of the Children Act 1998 provides that except as otherwise ordered by the court, the parents of the child have parental responsibility for the child and are joint guardians of the child and are equally entitled to joint custody of the child. A parent who has the right to custody of the child also has the right to care and control of the child and the right to direct the education of the child. Where the parents live separately (as in this case) the joint custody right of the parent who is not living with

the child is suspended until a separation agreement makes provision for custody arrangements or the court makes an order.

33. The Magistrate's Court has undoubted and indisputable jurisdiction to make custody orders in relation to children under sections 36D and 36F of the Children Act 1998 which provide that on the application of either the mother or the father of a Child, the court may make orders as to custody, and the rights of access to the child, and may make any other additional order that the court considers necessary or proper.
34. As explained above, the parents of the Child are in law the Child's joint guardians. Thus, the learned Magistrate's Order awarding joint custody to the Mother and Father and making orders for access were orders made in the exercise of the Magistrates' Court's powers under the Children Act 1998 in relation to applications made by the Child's legal guardians under the provisions of that Act. In particular, the Order directing that the Child shall remain enrolled at Middle School for the current school year is within the court's power to make an additional order that the court considers necessary or appropriate⁶.
35. As to the failure to give reasons for making the Order, the Court considers that read as a whole, the recitals to the Order give an adequate explanation for the learned Magistrate's decision. She refers to having read the affidavits and having given effect to the welfare principle in section 6 of the Children Act 1998, and that she has *"tak[en] into consideration the filed SIR which voices the Child's perspective in these proceedings."* In the context of the evidence, it is clear the learned Magistrate is taking into account the Child's wish not to move schools, which she was entitled and required to take into account under section 36I of the Children Act 1998.
36. The appellant's evidence was that the Child had told him that she was looking forward to moving to a new school, but the context in which this statement was made is not given, and it is not said that this move was put to her as a change that would be made in September 2025. The SIR report recorded the Child's wish to remain at her present school. It was said that the learned Magistrate should have conducted a trial of this issue to determine the weight to be attributed to each account of the Child's expression of her wishes.
37. No application was made for such a cross-examination, and it is doubtful whether the learned Magistrate would have found it useful to do so in the absence of direct evidence from the Child. The Family Court would naturally be disinclined to require the matter to be tried unless it was a central issue. Family Court proceedings are intended to be conducted in a less formal legal atmosphere and the strict rules of evidence and procedure are rarely considered appropriate in circumstances such as this.

⁶ Section 36F (1) (c).

38. However, if the Court were to be held to be wrong in this interpretation, then the Court would itself have made the same Order in the exercise of its powers under the Civil Appeals Act 1971. The Court would make an Order under section 36F of the Children Act 1998 for joint custody of the Child and award shared care and control of the Child to the Mother and Father, subject to the present access arrangements set out in the Orders of 5 March, 30 April and 14 May 2025, and would direct that the Child shall remain enrolled at Middle School for the current school year.

39. The Court's reasons for reaching this conclusion are:

- (i) The parties were agreed that there should be an Order for Joint Custody of the Child and that there should be an Order for shared care and control subject to the terms of the Orders of 5 March, 30 April and 14 May 2025. The terms of the Order reflect those agreed terms.
- (ii) The SIR recommended that it would be in the best interests of the Child to remain at Middle School for the school year 2025-6 and this also reflected the Child's wishes.

The careful, dispassionate and independent review of the Child's attendance at school given by the Social Worker and the Child's results strongly suggest that the account of the Child's wishes given in the SIR is, in the Court's judgment, more likely to be an accurate reflection of her wishes. Children will often give answers to their parents because they wish to avoid disappointing them or upsetting them, and this needs to be taken into account in assessing the weight to be given to the Father's account of what the Child told him. The Court therefore prefers the evidence contained in the SIR to that of the Father on this issue.

- (iii) The Mother's intended application for permission to remove the Child from the jurisdiction permanently at the end of the school year in 2026 is yet to be filed. If it is granted, a change of schools twice in two successive years does not appear to be in the best interests of the Child⁷.

This is because (a) the evidence shows that the Child is well settled in her present school (b) there is no evidence that she is unhappy or underperforming academically in her present environment or that she

⁷ The Court notes that the Mother has not yet made the application despite the direction given to do so. This is a significant application and just because it has not yet been made does not mean that it will not be made before the end of the current school year.

is at any risk in her present situation that would justify a change of schooling at this time (c) the Child has expressed a wish to remain at the school until the end of the present school year 2025-6 and (d) there is no other evidence to suggest that the Child's educational development will be impeded or adversely impacted by remaining where she is for the next school year.

Conclusion

40. These points appear consistent with the learned Magistrate's own reasoning, albeit she did not express them as fully.
41. Accordingly, for the reasons given above, the Court dismisses the appeal with costs. The appellant is to draw an Order reflecting the decision.
42. The Court notes that the issues relating to ongoing access and overnight access and shared custody and control are to be reviewed following an updated SIR and assessment of how the summer vacation access went in 2 weeks' time before the learned Magistrate. Any concerns about the extent to which the parents are to take into account the Child's wishes or preferences in the parents' exercise of shared care and control can be revisited at that hearing.

Dated this 2nd September 2025



THE HON. MR ANDREW MARTIN
PUISNE JUDGE