



[2016] JMSC Civ. 58

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FAMILY DIVISION

CLAIM NO. 2011M00308

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|----------------|----------------------------------|------------------------------------|
| BETWEEN | GARFIELD LISHBURN HYMAN | PETITIONER / RESPONDENT |
| AND | JACQUELINE CARLETTE HYMAN | RESPONDENT / APPLICANT |

TRIAL IN CHAMBERS

Mrs. Kay-Ann Parke instructed by Chambers, Bunny and Steer for the Applicant/mother

Miss Tonnelle Beecher for the Respondent/father

Heard: December 17, 2015 and April 6, 2016

Maintenance - Application to vary consent order for maintenance of child by mother - Mother and child migrated since the consent order - Maintenance Act sections 8, 9 and 14 - Application by father to vary visitation and access - Children (Guardianship and Custody) Act.

BERTRAM-LINTON, J (AG.)

[1] In June 2011 when the parties were in the process of finalizing their divorce, a consent order was ratified by the court. It provided for joint custody of the child of the marriage Carlisya born on the 5th February, 2008 with care and control to the mother.

It further made provision for:

2. *“Access to the Petitioner /Respondent, father on alternate Sundays commencing on the 3rd July, 2011 and thereafter on alternate Sundays between the hours of 10am to 4pm and at any other times as can be agreed on by the parties. That the mother is to accompany the child for the first four months after the commencing of the order and thereafter the father shall have unaccompanied access on alternate Sundays from 10am to 4pm. The father is to collect and return the child on every occasion.*

3. *That the Petitioner/Respondent do pay by way of maintenance of the Relevant child, Carlisya the sum of Twenty thousand dollars (\$20,000.00) per month and in addition one half the school fees and all the child’s medical, dental and optical expenses as covered by the father’s health insurance under which the child is covered commencing on the 25th day of June 2011 and thereafter on the 25th day of each succeeding month until the child attains the age of eighteen (18) years.*

4. *Liberty to apply.*

The parties are back before the court, each with applications to vary that order. The respondent/mother seeks to vary the order for maintenance while the petitioner/father is unhappy with his access to the child given the developments since the making of the order.

Maintenance order variation

[2] The application for maintenance by the mother seeks:

“the sum of US\$900 per month and in addition to half of the educational expenses, all the child’s medical, dental and optical expenses as covered by the father’s health insurance under which the child is covered commencing on the...”

In the final submissions to the court the mother agreed that the application for maintenance would be amended to seek the sum of US\$500.00 per month.

Access/Visitation order variation

[3] The Application by the father to vary the existing order for access seeks:

“Access to the Respondent father, on the following basis:

a) *Each one half summer holiday commencing with the first summer holiday subsequent to the Order herein being made. In the event that the relevant child is unable to make it for a particular Summer holiday that the*

Respondent shall have access to the relevant child during the Christmas holiday of the same year:

b) Each party to share the cost of the relevant child travelling expense to visit Jamaica on each occasion.

ISSUES

- [4] 1. Whether the Mother should be awarded an increase in maintenance, and if so:-
2. Whether that award should be made in United States dollars bearing in mind the present circumstances of the child's residence and living arrangements.
3. Whether the father should be granted the variation to the order for access sought and who should pay the cost.

MAINTAINANCE

- [5] The mother and child relocated to the United States of America in January 2014. Before she left, she advised the paternal grandfather, **not the father of the child** of her departure. In fact it is uncontested that up to two and a half years before they emigrated the father had not exercised his visitation rights as contained in the consent order. The mother is of the belief that the father was aware of her decision to relocate since she has a good relationship with his family, speaks to his father and three sisters often and the father's sister has visited and stayed at her home in the USA.
- [6] The child also speaks to the three paternal aunts and grandfather. Upon migrating, the Mother got married, is currently unemployed and dependent on her husband for maintenance of herself and the child. The child is enrolled in private school and she is a straight A student. She has done well in a Regional Spelling competition and appears to have a bright academic future. The monthly expenses for the child amount to some US\$1,816.00 per month and the father continues to pay J\$20,000.00 per month albeit haltingly.

[7] The father, who is employed as an auditor with the Government of Jamaica, says he only became aware of the move when he visited the child's school and learnt she was not in attendance anymore at the institution. He says the decision to move to the USA was never discussed with him and was done without his knowledge and consent. He explains that while the child was in Jamaica, he had a combination of financial and health issues which prevented him living up to his financial obligations and visits with the child.

[8] When he filed his response to the application for variation he was able to pay whatever arrears was due on the order, but is unable to pay an increase as is being requested by the mother and certainly not in US dollars. He exhibits his pay stubs which show a gross income of approximately \$200,000.00 up to September of 2015, the largest proportion (almost one quarter) of which he says is impacted by payment to a bank for loans to cover indebtedness for his medical needs and his repayment obligation for work done on his home. He explained that he is still repaying large amounts for work done on his home since 2008 as well as defraying medical expenses for himself.

He argues that he has coverage for the child under his health insurance policy and no steps were taken to utilize this in order to cut down on the need to incur the amounts in this area.

THE LAW

[9] The Maintenance Act of 2005 sets out the legal obligations of parents to relevant children.

Section9-(1) says (as is relevant)

"A maintenance order for the support of a child-

a) shall apportion the obligation according to the capacities of the parents to provide support; and

b) ...

(2) *In considering the circumstances of a dependent who is a child, the court shall have regard to the following matters in addition to the circumstances specified in section 14(4)*

- (a) that each parent has an obligation to provide support for the child;*
- (b) the child's aptitude for, and reasonable prospects of, obtaining an education; and*
- (c) the child's need for a stable environment.*

(3) *The court shall have regard to the matters set out in subsection(4) in considering whether any or what order should be made under this section for requiring any party to make any payments towards-*

- (a) the payment of expenses in respect of the prenatal care and birth; or*
- (b) the maintenance or education, of a child who has been accepted as a child of the family.*

(4) *The matters referred to in subsection (3) are-*

- (a) the extent (if any) to which that party, had, on or after such an acceptance of the child, assumed responsibility for the child's maintenance; and*
- (b) the liability of any person other than the persons who cohabited, to maintain the child.*

Section 14(4) *In determining the amount and duration of support, the court shall consider all the circumstances of the parties including the matters specified in sections 5(2) ,9(2) or 10 (2), as the case may require, and-*

- a) the respondent's and the dependant's asset and means*
- b) the assets and means that the dependant and respondent are likely to have in the future*
- c) the dependent's capacity to contribute to the dependent's own support,*
- d) the capacity of the respondent to provide support*
- e) the mental and physical age of the dependent and the respondent and the capacity of each of them for appropriate gainful employment;*
- f) the measures available for the dependent to become able to provide for the dependent's own support and the length of time and cost involved to enable the dependent to take those measures.*

DISCUSSION /ANALYSIS

[10] Issue 1 (Increase in Maintenance payment)

The matter of maintenance then is largely governed by the circumstances of each case and a determination by the court as the best that can be derived based on the needs of the child and the capabilities of the parents. The welfare of the child is, as always, of paramount importance in the considerations to be examined.

[11] The starting point for the court is the present order and its relevance to the current circumstances of the child. No one would deny that expenses in 2011 5years ago when a child is 3years old and what is required at 8years old could not be the same but must be have increased. In fact the father in his cross examination evidence says “since she is a growing child I know she will incur new expenses.” Despite this admission however the father is resolute that he could not offer any more money towards the child’s maintenance.

[12] It must be noted that since the child left in January 2014, he has not had to pay school fees and any other expenses and in fact was not up to date in the payment of the basic amount ordered of \$20,000.00 until this application was filed, at which time he made two lump sum payments of \$40,000 each in order to regularize the payments up to that time. It is not clear from the evidence however whether he was told what the present school fee obligation was or whether he was even consulted as to the incurring of the obligation as the mother seems to have been making unilateral decisions in areas where the father’s financial resources would be implicated and impacted.

[13] He has been gainfully and permanently employed throughout this period and in fact has seen his gross pay move from some \$104,000 to over \$199,000.00 an over 50%increase in his earnings. During this time as well it was observed that his loan payments increase substantially, and he attributes this to his payment for medical treatment and towards expenses he incurred from work on his home since 2008. No evidence was supplied to substantiate these claims and as such,

the court is not able to test the veracity of them. What is certain is that his financial situation has improved since the previous order and his loan repayments has doubled suggesting that he has taken on new indebtedness since the previous order.

[14] At the time of the consent order it would mean that he should have been paying at least \$20,000 per month and half school fee which the evidence shows was \$19,500 every 3months. On a monthly basis the school fee payment for him would work out to be \$6,500. The medical expenses were being covered by the father albeit admittedly based on the basis of coverage under the contributory health scheme from his employer. This coverage is not 100% coverage but would require a minimum contribution of 20% co pay when the card is used. I would **conservatively** estimate that the father's obligation would have been no less than some \$35,000 per month at the time the order was made in 2011. This would have increased based on the additional educational requirements of the child and any additional health needs. The evidence is that the child now requires glasses and this will be considered separately as this is often a one off expense typically every two years.

[15] I would hasten to point out that there is no precise mathematical formula, evident in the legislation or indeed mandated by any law in the calculation of maintenance but in the determination of what is reasonable and just in the circumstances it is sometimes necessary to look at expenditure and income and to see to their adequacy and relevance in the circumstances in which they are to be applied. A practical approach is necessary if we are to anticipate and meet the needs of the child and this must be looked at in conjunction with the ability of the parents to meet the various obligations.

[16] In this regard I find that the father has anticipated an increase in maintenance payment and must respond to the fact of that increase based on the age and circumstances of the child, A 25% increase in the obligation to the child based on the figures presented and the earning capability of the father would amount to an

increase from some \$35,000 to some \$43,750.00. Evidence was also given, and which I accept, that the fathers' income is supplemented by a stipend which he earns as a lay preacher in his church. Whether or not it is a set amount or dependent on his travels around the island to preach, it represents a source of income which was not previously considered and this is so because it must of necessity be factored in terms of his ability to pay more than what was previously ordered.

[17] I find that a 25% increase is a reasonable amount in all the circumstances, based on the change in age and circumstances of the child and that this figure should be paid by the father to cover his maintenance of the child and his obligation for educational, medical and dental needs of the child. I consider as well that the father should pay half the cost of the optical needs for the child which may include but is not limited to vision testing and prescription glasses every two years or as required.

[18] I must hasten to add that I have sought to use one blanket figure for maintenance to include medical and dental since it would seem practical in the current circumstances, where it is anticipated that the child will reside outside of the jurisdiction and the father does not now have the option to utilize his health card in the day to day covering of the child's expenses in that area and the mother as well will need to respond to the needs of the child with the father at a distance. It is also patently obvious that these parents do not speak to each other and are unlikely to do so in the future in light of the fact that they did not speak when they were living in the same country and are less likely to do so while in different geographic locations.

[19] One blanket figure will alleviate the need for the parties to have extensive discussion and division of half costs in their dealing with the expenses for the child, and in particular where the court cannot force people to communicate with each other. It will also give the Mother the leeway to address any upcoming issues and expenses in the absence of the father being at close quarters and

inaccessible for eventualities and in a situation where she now has the sole physical responsibility for the child.

- [20] The figure has also been considered in light of the growing needs of the child and alleviates the need for the Mother to return to court every time there is a small change in the needs of the child. It has also been looked at in the context of the declared current expenses which are uncontested and which reflect less figures presented by the mother.

Issue 2 (payments in US dollars)

- [21] It is acknowledged by all parties that the ideal situation would have been for the parents to have had discussions about the move to the USA, it is certainly unfortunate that this did not happen and that the mother who had primary care and control of the child took the decision unilaterally to first make the move and then to incur expenses in a foreign currency. No doubt she felt that this was a good move based on her circumstances and it would seem that the child is flourishes in the environment in which they now live.
- [22] It is also well known that the US dollar exchange rate in relation to the Jamaican Dollar is currently US\$1 to J\$121 as at the current date and is subject to daily fluctuations, usually upwards. This makes it imperative that anyone who earns in Jamaican dollars and has obligations in US dollars plan very carefully.
- [23] I find that it is not reasonable for the father to be asked to take care of his obligations in US dollars. With the move to the USA by the mother and child the father has lost the ability to take advantage of the benefit provided by his health insurance for the child and it is unreasonable for the mother to expect that he would be in a position to meet the child's expenses in US dollars with the fluctuations. It would be unduly prejudicial to the father who is a civil servant, and but for minor increments on a yearly basis, operates on a fixed income.

Issue 3(variation to access)

[24] Section 7(1) of the Children (Guardianship and custody) Act provides as follows

“The court may upon the application of the father or mother of a child, make such order as it thinks fit regarding the custody of such child and the right of access thereto of either parent, having regard to the welfare of the child, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter ,vary, or discharge such order on the application of either parent, or after the death of either parent, of any guardian under this Act; and in every case may make such order respecting costs as it may think just.”

[25] It is conceded that the mother made a unilateral decision to remove the child from the jurisdiction, and this removed the option of the father to exercise his access rights as had been agreed in the previous order. It must be noted however that in the two and a half years prior to them leaving for the USA, the father had not seen or communicated with his daughter in any way while she lived in Jamaica and now admits in cross examination that they are tantamount to being ‘strangers’.

[26] With the child now living in the USA, it has become more difficult, since she is now eight years old and not in a position to travel alone to and from Jamaica. However she is well aware of the fact that he is her father and the mother has said in evidence that the child made a birthday card for him at one point with the hope that it would bring them close. Before the court, the father even while maintaining that he wanted to get to a position where the child would eventually be able to visit with him unaccompanied, and to spend either summer or Christmas holiday, concedes that she does not know him, does not know his wife and he seemed reluctant to even facilitate a visit in his home with his wife accompanied by the mother of the child, and his former wife, while they are here in Jamaica for the hearing of this matter.

[27] The father has asked the court to sanction, allowing an eight year old girl to come to Jamaica for the summer holiday to live with ‘strangers’ in a residence she has never been to. There is no explanation as to how on a practical level this will be

done. I have to admit that this is a tough call when one bears in mind that it is always in the interest of these courts to facilitate parents being involved in their children's lives and developing healthy and happy relationships with both parents who may not be together. There has got to be a starting point for correcting the mistakes of the past and the court proposes as follows, in light of both parties bearing some responsibility for the breakdown in the previous arrangements for access.

- [28]** It is my view that the mother and father can establish telephone and internet communication between the father and child. Thereafter they are to share the expenses equally associated with the first visits during the next 2 summer/Christmas holidays. Provided this can be agreed, the father is to have accompanied non residential access with the child for the period of these visits; this does not have to be with the mother present since she has stated that she has a good relationship with the paternal grandfather and three of the paternal aunts. It is suggested that the parents develop and monitor internet and telephone communication of the child with her father while they are in the USA and Jamaica respectively. The father is to initiate this contact and ideally should follow up with the child at least three times per month.
- [29]** The father is allowed to have residential or non residential access to the child for up to two weeks of the summer holiday for the year 2018 or the Christmas holiday for that same year and onwards until the child attains the age of 18 years. At that time the child will be ten years old and should have been sufficiently acquainted with her father if the telephone and internet contact has been fostered and maintained. The father has said he is interested in getting to know his daughter and that the distance, his financial situation and his health has prevented it. The mother has said that that she has always been interested in the father developing a relationship with his child.
- [30]** Both parents have to take a step towards this goal. It is very possible in this day and age to develop friendships and all different kinds of relationships because of

all the improvements in communication technology. Skype, face book. Whats App texting and calling are all now features of our modern society and have facilitated persons from disparate geographical locations being in close ,even face to face contact with each other with no great expense or effort. It is no great leap then to imagine that the father and child can start with the help of the mother to develop a relationship by this medium, culminating in trips to spend holidays with her father and which it is hoped will lead to a viable relationship between them far into her adult years.

[31] The fact of the father's application for access is taken by the court as a positive sign that he wants to move in this direction but it cannot be solely at the expense of the mother and the child cannot be thrust into a situation with persons she does not know. She is not yet at the age where she is fully able to take care of her personal needs on her own and understandably she would have to have familiar faces around as she gets to know her father. The picture of her as a bright 8year old child can only be enhanced if she is allowed to develop to her potential with the right guidance and encouragement and not from being placed in circumstances of insecurity.

[32] The orders for maintenance and visitation/access are therefore varied as follows.

1. In respect of the child Carlisya Brianna Stone Hyman born on the 5th day of February 2008, the father is ordered to pay to the mother the sum of \$43,750.00 per month, to cover maintenance and all medical and dental expenses, , commencing on the 25th day of April 2016 and thereafter on the 25th day of each month until the child attains the age of eighteen years. In addition he shall pay to the mother one half of all the child's optical expenses incurred until the child attains the age of eighteen years old.

2. The mother and father are to establish telephone and internet communication between the father and child effective immediately, by the mother giving access to the father of the telephone number and email

address at which the child may be reached. The father is to initiate telephone contact with the child and should follow up with the child at least three times per month or as is convenient for the parties. Provided this can be agreed, the father is to have accompanied, non residential access to the child for a period of two weeks during this summer or Christmas holidays, 2016. The parents are to share the expenses equally associated with this first visit. Further the father is to be permitted residential access to the child for up to two weeks of the summer holiday from the summer of the year 2018 or the Christmas holiday for that same year and onwards until the child attains the age of 18years. Both parents are to be responsible alternatively for the expenses associated with the visits to Jamaica, beginning with the father in 2017.

3. Liberty to apply