



[2021] JMSC Civ. 81

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NOS. SU2020 CV 03386

BETWEEN ISABELLE VACANTE BARNES CLAIMANT/APPLICANT
AND CHRISTOPHER BARNES DEFENDANT/RESPONDENT

IN CHAMBERS

Sherry-Ann McGregor and Deborah Dowding instructed by Nunes Scholefield Deleon & Co., Attorneys-at-Law for the Claimant/Applicant.

Gordon Steer instructed by Chambers Bunny & Steer, Attorneys-at-Law for the Defendant/Respondent.

Heard: 8th April and 7th May 2021.

Family - Children (Guardianship and Custody) Act - Maintenance Act - Jurisdiction to grant interim order for maintenance of children pending determination of substantive claim for their custody and care and control.

C. BARNABY, J

INTRODUCTION

[1] The Claimant, a Canadian is the estranged wife of the Defendant. They have lived in Jamaica during marriage and share two minor children. Consequent on the breakdown of the marriage, the Claimant wishes to relocate to Canada with the children and the family pets where she will have the support of family and an opportunity to start afresh. Efforts to arrive at an agreement in those regards proved futile.

- [2] On 10th September 2020 the Claimant filed a Fixed Date Claim Form seeking an order for the sole custody and care and control of the parties' minor children; orders permitting her to emigrate with the children to Canada; for the Defendant to cover reasonable expenses for relocation of herself, the children and the family pet; access to the children by the Defendant; and the payment monthly of a specified sum towards the maintenance of the children together with all educational, extracurricular activities, medical, dental and optical expenses. She also asks the court to grant such further or other relief that it deems just. A Notice of Application for Court Orders (hereinafter called "the Application") was also filed by the Claimant on the said date. With the exception that she seeks an interim order for the sole custody and care and control of the children and that the Defendant be permitted access to the children pending their emigration to Canada, the relief sought in the claim and on the Application are the same.
- [3] The Application came on for hearing before me on the 8th April 2021 and following the submissions of Counsel, a decision thereon was reserved to today's date.
- [4] On commencement of the hearing before me Mr. Steer submitted that the matters on the Application could not be determined solely on affidavit evidence and that he intended to cross examine the Claimant. This belated indication follows an adjournment of the hearing of the Application on account that documents which were filed and ought to have been before the court were not before it.
- [5] While the timing of Counsel's indication that he wished to cross examine the Claimant in respect of the Application was regarded as unfortunate, I shared his concern that it would be impossible to properly determine some aspects of the Application on affidavit evidence alone based on the positions taken by the parties. Additionally, I was of the view that if some of the orders sought on the Application were granted, they would significantly disrupt the lives of the children as they know it, well before the

substantive claim is determined, in which similar but more “final” relief are being sought.

- [6] While Ms. McGregor initially argued that the court could properly consider the Application, she eventually conceded that some difficulty would be experienced in respect of orders relating to the removal of the children from Jamaica. Accordingly, it was proposed and accepted by Counsel for the parties that the trial of the claim be fixed to commence in the shortest possible time and that only the issue of an order for interim maintenance for the children be dealt with at the hearing. Accordingly, a date for the trial of the substantive claim was fixed.
- [7] Ms. McGregor indicated that the dispute which remained to be resolved concerned an interim order relative to the medical, dental, optical and educational expenses of the children. This is on the basis that the Honourable Ms. Justice J. Pusey had previously ordered the Defendant to pay \$50,000.00 per week towards the maintenance of the children, and that he be permitted reasonable access to them while they continued in the care and control of the Claimant.
- [8] The Defendant has indicated his willingness to pay the medical, dental and optical expenses for the children. It is his evidence that he paid educational expenses, specifically the school fees for both children at Jamaican schools in anticipation of their attendance in the 2020/2021 school year. The Claimant says this is without her consent. As it transpires, the children, who still remain in Jamaica, have been enrolled and are in attendance at a Canadian School since September 2020. They receive online instructions in English and French under the Claimant’s supervision. The Claimant’s evidence is that their attendance at the institution is being financed by their maternal grandparents who she will be required to repay.
- [9] It is the Defendant’s contention that although he and the Claimant had had discussions about enrolling the children in a school in Canada when they attempted to settle issues relating to her relocation with them to that

jurisdiction, those discussions had broken down prior to the start of the 2020/2021 school year. Consequently, he says that they are in attendance at the Canadian School without his consent and without his financial contribution. There is a substantial difference between the cost of educating both children in Jamaica as opposed to Canada. The Defendant therefore objects to an interim order being granted requiring him to pay the costs associated with the children's education in Canada.

- [10] This court's jurisdiction to make orders for maintenance arise on three pieces of legislation, the **Matrimonial Causes Act**, the **Maintenance Act** and the **Children (Guardianship and Custody) Act**. The Claimant's Application is grounded on the last two of the referenced Acts in addition to a number of factual grounds which need not be repeated for present purposes. I will briefly address the court's jurisdiction in respect of maintenance under the two pieces of legislation on which the Claimant relies.

Maintenance Act

- [11] Mr. Steer submitted that I did not have the jurisdiction to grant an interim maintenance order under the **Maintenance Act**. I agree with this assessment.
- [12] The obligation on each parent to maintain a minor child is recognized in the **Maintenance Act**, section 8 of which prescribes that the obligation is to the extent that the parent is capable of maintaining the child. There is however a limitation on this court's jurisdiction under the legislation. Pursuant to section 3 (1), applications for maintenance orders in accordance with the Act are to be made to the Parish Court or the Family Court. Where an application is made for the division of property under the **Property (Rights of Spouses) Act** (PROSA) however, this Court is permitted to make a maintenance order in accordance with the provisions of the **Maintenance Act**. While the Claimant has issued a claim under **PROSA**, the application for maintenance of the children was made in a

separate claim. As a result, the court is not authorised to grant a maintenance order in respect of the children under the **Maintenance Act**.

Children (Guardianship and Custody) Act

[13] The Claimant's application for interim maintenance is also grounded on the **Children (Guardianship and Custody) Act**. It was submitted by Mr. Steer that there was no order made for custody under that Act and that in the absence of the Defendant's consent to pay the educational expenses claimed for the children, the court was without jurisdiction to grant an order for maintenance under this legislation. While I agree that a custody order under the Act is a prerequisite for a maintenance order thereunder, I do not agree with Counsel that there was no order for custody in this case or that I am precluded from making an interim order.

[14] Section 7 (1) of the Act provides as follows.

The Court may, upon the application of the father or mother of a child, make such order as it may think 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.

[15] The starting position is that both parents of a minor child have a right to custody as an incident of guardianship. Consequently, either parent may apply to the court, which is defined to include the Supreme Court, for an order regarding custody and right of access pursuant to section 7(1). In those regards the court is permitted to make orders it thinks fit having regard to the welfare of the children, and the conduct and wishes of the parents. I do not believe there is any doubt that a discretion is reserved to the court by section 7(1), including the discretion to grant an interim order for custody having regard to the matters it must consider, pending the determination of the substantive custody application.

[16] The jurisdiction of the court to grant an order for maintenance under the Act is set out at section 7(3) which reads thus.

Where the Court under subsection (1) makes an order giving the custody of the child to the mother, then, whether or not the mother is then residing with the father the Court may further order that the father shall pay to the mother towards the maintenance of the child such weekly or other periodical sum as the Court, having regard to the means of the father, may think reasonable.

[17] If the starting position is that each parent is entitled to custody of their children, on an application for custody under section 7(1), the entitlement of each parent can only be disturbed on an order from the court. It appears to me that if the court is to exercise the jurisdiction given to it by section 7(3), there must be a predicate order giving custody to the mother. In my view that predicate order for custody may be either “interim” or “final”, having regard to the discretion given to the court at section 7(1) to make such orders as it thinks fit having regard to the matters prescribed by the statute.

[18] Having so concluded, the question for this court is whether an interim order giving custody to the Claimant has been made by the court. It was submitted by Ms. McGregor that paragraph 2 of the order of Justice J. Pusey on the 15th October 2020 is an interim order for custody. I am inclined to agree with that submission.

[19] While the Claimant did seek an order for “custody, and care and control” pending the determination of the Fixed Date Claim Form on the Application, paragraph 2 of the order of J. Pusey, J states, so far as is relevant that “[t]he Defendant is to have reasonable access to the children, who will continue in the care and control of the Claimant...until further order.” Otherwise it provides a schedule for the Defendant’s access to the children. Nowhere in the paragraph is the word “custody” mentioned, whether in relation to the Claimant or otherwise. I do not believe that that omission is fatal to Ms. McGregor’s contention. In that respect I find the

following extract from the judgment of Sykes J (as he then was) in **F v D** [2017] JMISC CIV 9 as to the meaning of custody quite instructive.

[118] Custody, properly understood, means the right to physical care and control of the child. Care and control refers to who the child should live with. The person with care and control decides the day to day issues concerning the child...

- [20] I also note that the **Children (Guardianship and Custody) Act** does not make any distinction between custody and care and control, in fact the term “care and control” is not mentioned at section 7(1). On an application for custody the court is empowered to make orders regarding the custody of the child and the right of access of either parent. The Defendant having been granted right of access to the children as scheduled in the order of J. Pusey, J and ordered to continue in the care and control of their mother until further order, I find that an order giving custody to the mother in the interim has in fact been made. I therefore determine that I have the jurisdiction to grant an interim order for maintenance of the children under the Act.
- [21] As stated previously, in addition to the fifty thousand dollars (\$50,000.00) which J. Pusey, J ordered for maintenance, the Claimant also sought payment of all educational expenses for the children in the interim.
- [22] There is a dispute as to the meaning of correspondence between the Claimant and the Defendant in respect of the children’s attendance at the Canadian School, in particular, whether there was agreement between the parties. There is also a dispute in respect of the circumstances under which the Claimant became a homemaker during the parties’ marriage and the genesis of her financial dependence upon the Defendant so that she requires the Defendant to pay all educational expenses in the interim. Those disputed matters among others will have to be resolved on cross examination.
- [23] It suffices to say however, that both children have been attending online classes at the Canadian school under the supervision of the Claimant who

avers that she is unemployed and unable to meet the financial needs of the children. It is her evidence, which is not challenged, that educational expenses, particularly school fees are being paid by her parents, who are to be repaid.

[24] The Defendant states that he is a Manager but he does not name the entity, nor has he supplied evidence of his earnings. In addition, it is his evidence that he enrolled the children in Jamaican schools and paid fees which would have enabled them to start the 2020/2021 academic year here. The Claimant says the children's enrolment was done without her consent.

[25] The fees for school in Canada are significantly higher than the costs associated with attending schools in Jamaica. The Claimant's evidence is that it is CDN \$1,606.00 monthly which at the prevailing exchange rate is approximately JMD \$200,000.00 monthly. While no receipts have been supplied by the Defendant, it is stated that a cumulative sum of \$560,000.00 would have been paid annually as fees in the schools here. I take judicial notice that the school term here lasts for approximately nine (9) months and that when the sum the Defendant said he would pay is spread over that period, fees would amount to \$62,222.22 monthly.

[26] It is the Claimant's evidence that children attend classes online, which is the reality for most students in Jamaican schools in light of the Covid 19 pandemic. It is her evidence that she is required to purchase ink cartridges and reams of paper to print material to enable the children to do their school work at a cost of \$20,000.00. No receipts have been supplied but ink cartridges in particular can be very costly and with classes for the two children being conducted exclusively online, the amount does not appear beyond the realm of what are reasonable costs for those items or that the cost is incurred on a monthly basis.

[27] Having regard to the welfare of the children, and on the basis of the available evidence, I consider the sum of JMD \$82,222.22 per month to be a reasonable amount for the Defendant to pay to the Claimant towards

the children's educational expenses. The amount is due and payable for nine (9) months to coincide with the approximate length of the school year in this jurisdiction.

[28] While the above is capable of determining the application, I will address one other issue raised by Counsel for the Claimant in respect of this court's jurisdiction to grant an interim maintenance order. It was Ms. McGregor's further submission that quite apart from any statute, the welfare of the children must be a consideration for the court in its role as *parens patriae*, to enable it to make an order for maintenance to meet the needs of the children. It is undoubted that the court in its role as *parens patriae* must have regard to the welfare of the children but I do not believe that it extends to making an interim maintenance order in the circumstances of this case.

[29] While no authorities were cited by Counsel in support of her contention, I sought and found assistance in the judgment of Brooks, JA (as he then was) in **B and C v the Children's Advocate (Interested Party)** [2016] JMCA Civ 48 when he stated as follows.

[19] The Supreme Court does have an inherent jurisdiction to appoint and remove guardians for children. The jurisdiction of that court, in this context, has a rich history. That history includes the history of the Court of Chancery, which had exclusive jurisdiction in equity, providing relief where the common law offered no remedy. It is a history that is not without some uncertainty, but the more accepted view, in this context, is that the jurisdiction of the Court of Chancery, over children, was founded on the prerogative of the Crown as parens patriae.

[20] The term parens patriae is defined in the ninth edition of Black's Law Dictionary as meaning:

"...parent of his or her country"...The state regarded as a sovereign; the state in its capacity as provider of protection of those unable to care for themselves..." Based on that doctrine, the Sovereign was regarded as having the right to make decisions concerning people who were not able to take care of themselves.

[21] ...

[26] In re McGrath is another of the cases that demonstrated the nature of the jurisdiction emanating from the role of the court as

parens patriae. In ***In re McGrath***, Lindley LJ addressed, at page 147, the role inherited from the Court of Chancery:

“There was at one time an attempt to throw some doubt upon the jurisdiction of the Court of Chancery over the guardians of children who had no property; but all doubt on this point was set at rest by Lord Cottenham's decision in *In re Spence* (1), and it is clear that the old Court of Chancery had, and that the High Court has, jurisdiction to interfere with and to remove a guardian of a child who has no property on proof of misconduct on the part of the guardian towards the child, or upon proof that it is for the welfare of the child that the guardian should be removed. But it is obvious that **the jurisdiction of the Court is very limited in such a case. The child having no property under the control of the Court, the Court cannot provide any scheme for the child's maintenance or education. All that the Court can do is to remove the guardian and appoint another, if another can be found, to take care of the child.** This limited jurisdiction being however established, it follows that the exercise of such jurisdiction can be invoked on behalf of any child by anyone who is willing to come forward on its behalf and to act as its next friend.” [My emphasis added]

[30] As demonstrated in the foregoing extract, the powers of the court as *parens patriae* is quite limited. Where a child has no property under the control of the court, the court cannot provide for its maintenance or education in exercise of its power as *parens patriae*. As absurd as it might now appear, while the common law has long recognized that children who are too young to maintain themselves have a right to be maintained by their parents, there was difficulty in finding an effective method of enforcing that right. A child was too young to enforce the right himself and his mother, even where married, had no separate right to sue her

husband. The parental obligation to maintain therefore developed both at law and in equity as a creature of statute. Consequently, outside of the exercise of a statutory power to order maintenance, the presence of money in court for the minor or the consent of a parent, maintenance of a child or provision for his education cannot be ordered by the court. For a more detailed exposition of the development of the law and its import, reference may be had to the speech of Baroness Hale of Richmond in **R (on the application of Kehoe) v Secretary of State for Work and Pensions** [2005] 4 All ER 905, [50] - [69], and the decision of the England and Wales Family Court in **FS v RS and another** [2020] EWFC 63, [100] - [106].

ORDER

[31] In all these premises it is ordered as follows:

1. By and with consent, the Defendant is to pay the medical, dental and optical expenses for the children until further order.
2. The Defendant is to pay to the Claimant the sum of JMD \$82,222.22 per month for nine (9) months payable from the 1st September 2020 and thereafter on the 1st day of each successive month until further order, towards the children's educational expenses.
3. The sum referred to at order 2 herein is to be paid by way of four (4) equal monthly instalments commencing on the 28th May 2021 and thereafter on the 28th day of each successive month until payment is made in full.
4. No order as to costs.
5. The Applicant's Attorneys-at-Law are to prepare, file and serve this order.

**Carole Barnaby
Puisne Judge**