Judgement Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. HCV 1883/2004

BETWEEN	**ANGELLA BIGGS**	**CLAIMANT**
AND	**EARL BIGGS**	**DEFENDANT**

Heard the 2nd and 17th September 2004.

Ms. Carol Davis , Attorney-at-law for the Claimant.

Mr. Sean Kinghorn, instructed by Kinghorn & Kinghorn for the Defendant.

Mangatal J.:

1. This Case originated when the wife Angella Biggs filed a fixed date claim form against the husband Earl Biggs for varied claims and relief. There is a claim for the parties respective interests in matrimonial property known as 23 Florida Avenue, Independence City in the Parish of St. Catherine to be determined and other relief consequential on that determination is claimed. There is also a claim asking that the Defendant be restrained from remaining or entering into the matrimonial home until the determination of the matter. The wife asks the Court to grant custody of the relevant child of the marriage Danielle Biggs, born 30th March, 1992 to her, with care and control to the wife's mother Icilda Gay, and to the wife's adult son by a previous relationship, Sheldon Coulson. The wife is additionally seeking an order that the Defendant provide reasonable maintenance to the wife in respect of Danielle.

2. The application which came before me for hearing on the 2nd of September was an

application as follows:

(a) That the husband be restrained from remaining or entering into the matrimonial home at 23 Florida Avenue until the matter has been determined.
(b) That interim custody of Danielle be granted to the wife, with care and control to the grandmother and to the wife's adult son Sheldon.
(c) That an interim order be granted that the husband pay reasonable maintenance to the wife in respect of Danielle.
(d) That a probation officer's report with respect to Danielle be ordered
(e) Further or other relief.

3. At the hearing the husband was in attendance and so was the son Sheldon. The wife and the grandmother were absent.

4. Mr. Kinghorn took preliminary objections to the matter proceeding. Firstly, he argued that the Court has no jurisdiction to deal with this matter on an application commenced by fixed date claim form pursuant to the Civil Procedure Rules 2002 "CPR". He submitted that the claim should be made under the Matrimonial Causes Act "MCA" and Matrimonial Causes Rules "MCR". He referred to Rules43 to 46 of the MCR to demonstrate that the claim for maintenance of Danielle, for example, is a claim for ancillary relief under the MCR and that has certain procedural consequences including the requirement that within certain time lines affidavit evidence be filed by the husband as to full particulars of his property and income.

5. That this was no mere technical point Mr. Kinghorn sought to demonstrate by reference to Rule 51(4) of the MCR which relates to applications for custody, care and control of, or access to a child. The Rule states:

On the hearing of an application by a Judge relating to the custody, care and control of, or access to a child:

(a) neither the applicant nor the respondent shall be entitled to be heard in support of or, as the case may be, in opposition to the application unless he or she is available at the hearing to give oral evidence or the Judge otherwise directs;
(b) the Judge may refuse to admit any affidavit by any person (other than the applicant or respondent) who is or is proposed to be responsible for the child's care and upbringing or with whom the child is living or is proposed to live unless that person is available at the hearing to give oral evidence.

6. Mr. Kinghorn submitted that the matter not being properly before the court, affects the court's jurisdiction to make the orders sought on the application. He further submitted that in the event that the Court was not with him on this point, that the Court should be guided by Rule 51(4) of the MCR and refuse to hear the matter in relation to custody care and control unless the wife and grandmother are present.

7. Ms. Davis in response referred to Rule 53 of the MCR which speaks to applications by way of originating summons. She submitted that whilst for proceedings for dissolution of marriage and for nullity of marriage one would still proceed under the MCR by way of petition, since we no longer have the creature of an originating summons, all applications hitherto brought by originating Summons must now be brought by Fixed Date Claim Form.

8. Ms. Davis also submitted that whilst these are hybrid proceedings, in that they are proceedings brought both under the MWPA and the MCA , her understanding is that prior to the CPR those claims would have to be brought by filing separate

originating summonses, one in the equity division, and the other in the family division of the Court.

Pursuant to the CPR it was now proper to make one single application by way of fixed date claim form.

9. She went on to submit that even if she had taken the wrong view of the law, since the matter was concerned with a mere procedural defect, she was willing to give an undertaking to refile an originating summons but she was asking the Court to hear the matter in any event. This matter having come up for hearing during the legal vacation, an affidavit of urgency had been filed.

10. As regards the question of the attendance of the wife, Miss Davis referred me to a number of paragraph's of the wife's affidavit, including paragraph 18 where the wife indicates that she is abroad in the United States of America and that she is in the process of " regularizing her immigration status in the United States". She further indicates that her Attorney in the United States has advised her that this process would be irreparably set back if she were to travel now. Paragraph 4 of Sheldon Coulson's Affidavit indicates that the wife will not be able to return to Jamaica before 2005. Ms. Davis has asked me to proceed with the matter notwithstanding the absence of the wife, given her predicament and the fact that the wife is in the United States in order to assist in meeting the family expenses, including those related to Danielle.

11. As regards the attendance of the grandmother, Miss Davis indicated that her instructions were that the grandmother had taken ill but that if the Court felt it necessary for her to be in attendance that could be arranged on sufficient notice.

She made the point that in any event, both the wife and the husband are content to have the grandmother play some sort of role in Danielle's upbringing. The real bone of contention is about the son Sheldon coming back to the matrimonial home to exercise the care and control prayed for and the husband being removed from the matrimonial home.

12 These are the main issues that arise for consideration:

FIRST ISSUE-Are these proceedings properly brought by way of fixed date claim form?

SECOND ISSUE-If the Fixed Date Claim Form is the appropriate procedure, do the MCR still apply?

THIRD ISSUE- If the MCR still apply, specifically Rule 51(4), should the Court proceed with the hearing with regard to interim custody, care, and control notwithstanding the fact that the wife has not made herself available for the hearing? Should the grandmother be required to attend?

FOURTH ISSUE- Are there other aspects of thr application, or other reasons that would necessitate the attendance of the wife or grandmother at the hearing?

13 . **FIRST ISSUE-Are these proceedings properly brought by way of fixed date claim form?**

The introductory part of the CPR, page v, states that all rules of court relating to proceedings in the Supreme Court, save for those relating to insolvency, and matrimonial proceedings are hereby revoked.

Section 2.2(1) of the CPR states that subject to paragraph (3), the CPR applies to all civil proceedings in the Court.

Paragraph(3) reads:

These rules do not apply to the following proceedings...(b) matrimonial proceedings.

In its original form, this subparagraph (b) had excepted "family proceedings". By way of a February 2003 amendment, the term "matrimonial proceedings" was substituted for the term "family proceedings". By way of the same amendment, a

definition of matrimonial proceedings was added to section 2.4 of the CPR as follows:

> *"matrimonial proceedings" for the purposes of these Rules means proceedings for dissolution of marriage and proceedings for nullity of marriage.*

14. Interestingly, the MCA defines matrimonial causes(note causes, not proceedings) and therein includes proceedings for dissolution of marriage and nullity of marriage as well as, amongst others, applications between the parties to a marriage, for custody, maintenance and injunctive relief.

15. A number of determinations can be arrived at by analyzing the plain user-friendly language of the CPR. These are:

(a) The MCR are still in existence and have not been revoked.
(b) The CPR apply to all proceedings except certain proceedings and listed amongst the excepted proceedings are matrimonial proceedings, i. e. proceedings for dissolution of marriage and proceedings for nullity of marriage.
(c) Proceedings for dissolution of marriage and proceedings for nullity of marriage are not, and do not include proceedings under the MWPA, or for injunctive relief, or for maintenance under the MCA or indeed any other application between married persons.
(d) The CPR apply to the proceedings before me.

16. Rule 8.1(4) of the CPR in its amended form indicates that a fixed date claim form must be used in certain circumstances , including where by any enactment proceedings are required to be commenced by petition, originating summons or motion.

17. Under Rule 53 of the MCR applications such as the instant applications were required to be brought by way of originating summons.

18. My ruling on the first issue is therefore that the proceedings have been properly brought by fixed date claim form. I am also of the view that the Claimant is

entitled to bring these several claims in one fixed date claim form and I find support for that view in Rule 8.3 of the CPR.

19. **The Second Issue-If the Fixed Date Claim Form is the appropriate procedure, do the MCR still apply?**

My ruling on the second issue is that the MCR still apply, subject to the modification that proceedings under the MCA which are matrimonial causes under that Act but which are not matrimonial proceedings as defined by the CPR, must now be brought by Fixed Date Claim Form, instead of by way of originating Summons, referred to in Rule 53 of the MCR.

20. **The Third Issue-If the MCR still apply, specifically Rule 51(4), should the Court proceed with the hearing notwithstanding the wife's failure to make herself available for the hearing?**

H v. H & C 1 All E.R. 262, was a case involving the custody , care and control of a child of the marriage. Lord Dankwerts, L.J. stated (page 263 D-F),

> *.....it seems to me that the learned judge dealt with the case in a rather unfortunate manner; he apparently read the affidavits himself and then Counsel addressed him with arguments about the order he should make. He never saw either of the parents at all; he decided the case simply on the written evidence contained in the affidavits- although, of coursed there was also the report of a welfare officer.*
>
> *To me that seems to be a very unfortunate course to have taken. It was impossible to judge the character of the mother, or the father for that matter, as the learned judge never saw either of those parties personally. In a case of this sort the character and appearance of the respective parties is very often a decisive matter."*

At page 264 C, Lord Justice Salmon said:

> *"I am bound to say that in circumstances such as these it is desirable that the judge, who after all is dealing with the future of a small child, than which nothing can be more important, should see the parties for himself,...so that he may form a view of the personality, of the character of the man and the woman as a father and mother, and assess how their personality and character are likely to affect the child. I hope that in similar cases that practice will be followed in future. It is very often adopted now and it really ought to be the universal practice unless the welfare officer's report is completely clear on this topic and there is no challenge on one side or the other."*

21. This case predates the English Matrimonial Causes Rules 1973, in which the English Rule 92(4) (a) and (b) are identical to our MCR Rule 51(4)(a) and (b).

22. In **Re F(a minor) (wardship appeal)** [1976] 1 All E.R. 417, the English Court of Appeal held that the general principle applicable to appeals was applicable to cases concerning infants. This was a case where the English Court of Appeal held that the Judge in the Court below had erred in awarding care and control of a child to a grandmother instead of a father, in circumstances where a mother had died. It was held that an appellate court was entitled to set aside the decision of the trial judge if it was satisfied that, although he had taken all relevant factors into consideration, his decision was wrong in that he had given insufficient weight, or too much weight, to certain factors. The appellate court would be reluctant to interfere where the judge had been influenced to a decisive, or even to a substantial, extent based on seeing and hearing the witnesses, but it could not be said that, in those circumstances it should never do so.

In the course of arriving at the decision, Browne LJ (at page 433e) stated:

> *"In infant cases, however, the court at first instance will almost always have seen and heard the witnesses H v. H&C and the MCR R. 92(4) (a)and (b)."*

23. At page 434 e-f Browne L.J. indicated that he was not satisfied that an analogy between the authorities about the power of an appellate court to reverse a finding of fact by a judge who has seen and heard the witnesses, and discretion cases such as infant cases was sound. Said he:

> *"I have found it difficult enough to decide from seeing and hearing witnesses whether or not they are telling the truth at that moment. I should find it even more difficult to form any reliable view of how their characters were going to develop over, say, the next five years."*

24. Browne L.J. then went on to say he was inclined to agree with the following which Donovan L.J. had to say in his dissenting judgment in **Re B (an infant)** [1962]1All E.R. 875:

> *In matters where credibility is an issue, of course that consideration [that being the seeing and hearing the witnesses} is of great weight. I do not think it is of such weight when one is assessing a person's character and ability to look after a child. The encounter is too brief for any reliable conclusion.*

Lord Justice Donovan then went on to state:

> *"Beyond saying that there would be a bias in such cases for respecting the decision of the court below, I would myself be prepared to go no further in a case which concerns the welfare of an infant. In such a case the appellate court should preserve its freedom."*

25. In my view, their Lordships were not disagreeing with the propositions put forward in **Hv.H&C** as embodied in Rule 51(4). The *comments* mean that an

appellate court will not be deterred from disturbing a decision of the judge below simply because the judge has had the opportunity to see and observe the witnesses, though due deference will be paid to that circumstance. They are not saying that it is not important for the judge in the court below to see and hear the witnesses as a part of carrying out the assessment of what is in the best interests of the child.

26. In this case the wife is asking this court to change the status quo from a situation where Danielle has been residing in the matrimonial home with the husband without the wife. The wife has not had Danielle living with her for over three years while she has been abroad. According to both the wife and son the arrangement with Danielle living with the husband has gone well up to June 2004 when it is alleged that there were incidents of inappropriate intimacy between the husband and the domestic helper and consequent mental distress for Danielle. The husband denies this and claims that there is a very bad relationship between himself and Sheldon leading to numerous mischievous allegations. Sheldon alleges that there have been incidents when the husband has hit the Danielle aggressively. The husband does not deny hitting Danielle by way of disciplining her on some occasions but gives his own explanation as to the circumstances. In this case, it is not just a situation where the wife wants to have interim custody of the child, with care and control to the grandmother and son. She wants the husband ordered out, and the grandmother and son permitted in to the matrimonial home so as to effect the care and control of Danielle. An order

ousting a husband from the matrimonial home has often been described as a draconian order.

27. It seems to me that the matters advanced in respect of what is happening to the relationship of Danielle and her father fall short of demonstrating any real immediate harm to Danielle, physical or otherwise, of such a level as to override the usual desirable situation of the Court having all the parties before it in order to carry out its assessment of what is in the child's best interests. At the time of this application Ms. Davis advises, Danielle is presently residing with an Aunt with whom the wife grew up, somewhere in Red Hills Road in the corporate area. This Court is being asked to disturb a status quo which admittedly worked well until recently. Further, whilst the problems being encountered by the mother in returning to Jamaica may be regrettable, they do not in my view provide a sufficient reason for doing away with the mother's presence. Even if the factor of the mother regularizing her status would be in the best interests of Danielle, and to my mind there are aspects to that particular presentation of the wife's problems that are not free from carrying a negative aura in the arena of the Court's discretion , there are many other aspects of the matter that would far outweigh that interest, and in respect of which the Court would be greatly assisted by the presence of the wife at the custody hearing. Further, it is not possible to properly contend that all information and input relevant to the applications can be provided by the wife's son and the grandmother, the parties to whom the Court is asked to grant actual care and control of Danielle. Nor can same be fully provided in a probation officer's report.

28. My ruling on the third issue is that both the grandmother and the wife should attend the interim custody and care and control application.

29. **The Fourth Issue-Are there other aspects of the application and other reasons which would require the attendance of the wife and grandmother at the hearing?**

There are disputes as to fact on several issues covered in the affidavits. In those circumstances cross-examination will be vital for the court to arrive at a proper resolution of the issues. In relation to the custody care and control matters there are serious factual disputes, and in relation to the injunction to remove the husband from the matrimonial home, there are serious disputes as to the relevant matters such as the conduct of the parties, and needs of the child. These issues can only properly be distilled after cross-examination. In addition, the fact that the applications for interim custody, care and control and the application for Injunctive relief for removal of the husband from the matrimonial home are interwoven, makes it all the more imperative that all the parties should be present for the hearing.

30. There is an aspect to this matter in respect of which I will canvass the views of the parties. It is the fact that by virtue of Rules 25.1(k), 29.3, and 26.1(2)(o), the Court has been empowered to make great use of technology and to allow a witness to give evidence without being present in a Courtroom, by way of a videolink or by any other means. Unless the wife indicates that she wishes to explore this avenue, the Court would not of its own motion pursue this route, given the cost factors, and attendant details and comparative complexities involved in and associated with the giving of evidence by videolink.

31. In all the circumstances therefore, I hold that the claim was properly filed by way of fixed date claim for. However, the Wife/Claimant and the grandmother and indeed all persons who have provided affidavit evidence are required to attend the hearings. There shall also be liberty to apply. A new date is fixed for the 7th October 2004 at 2:00 p.m. for 2 hours after consultation with the Registrar.