[2019] **JMSC Civ. 193**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014HCV03913

BETWEEN	**TAMICA CAMPBELL-EHIOROBO**	**CLAIMANT**
AND	**NATHANIEL OSAWARU EHIOROBO**	**DEFENDANT**

IN CHAMBERS

Ms Marjorie Shaw instructed by Brown & Shaw for the Claimant

Mrs Cooper-Batchelor instructed by Chambers, Bunny & Steer for the Defendant

February 19, March 22 and October 2, 2019

Family Law - Custody and Maintenance of children – Access, whether supervised or unsupervised - Children (Guardianship and Custody) Act – Maintenance Act

LINDO J

[1] On August 13, 2014, the Claimant, Mrs. Tamica Campbell-Ehiorobo filed a Fixed Date Claim Form, which she amended and re-filed on August 19, 2014. By this claim, she was seeking joint custody of the children of the marriage between herself and the Defendant, Mr Nathaniel Ehiorobo. The marriage took place on December 22, 2001. There are three children born to the parties, N, born on December 27, 2005; K, born on June 4, 2007 and M, born on July 15, 2011.

[2] On January 15, 2016, the Claimant filed a Notice of Application for Court Orders seeking sole custody of the relevant children and that the Defendant be granted residential access to them on half all major school holidays. She was then also seeking that the Defendant pays her a monthly sum of US $470.00 towards the

maintenance of each of the said relevant children and, "further and in the alternative, [they] equally discharge the educational... optical... and medical expenses not covered by health insurance..."

[3] On July 21, 2016, the Defendant filed a Notice of Application for Court Orders seeking an order that the Claimant be given supervised access to the children and on July 31, 2018, he filed another Notice of Application for Court Orders seeking an order that the Claimant pays to him the sum of $100,000.00 per month, per child, for their maintenance and one half of the educational, medical, dental and optical expenses of the children.

[4] The evidence in support of the Claimant's claim and in response to the Defendant's counter application, is contained in affidavits filed on August 13, 2014, October 8, 2015, January 15, 2016, March 1, 2016, April 18, 2016, May 8, 2017 and June 21, 2017. Evidence in support of the Defendant's case is contained in affidavits filed on August 26, 2015, July 21, 2016, May 3, 2017, June 7, 2017, June 27, 2017 and July 31, 2018.

[5] The matter has had a number of hearings, and orders have been made including orders for the children to be assessed and counselled by a Psychologist and also for the parents to be seen and assessed by a Psychologist. On December 19, 2017, a further Interim Order was made regarding access by the Claimant to the children as follows:

> *"...Access is granted to the Claimant/Mother on December 24, 2017, December 26, 2017 and December 30, 2017...Interim access is also granted to the Claimant/Mother once per month on the last Saturday of each month...The three children...are to visit with the Claimant/Mother between the hours of 10:00 a.m. and 6:00 p.m. on the last Saturday in each month in 2018 commencing Saturday January 27, 2018. This Interim Order to remain in place until the determination of this matter."*

[6] When the matter came on for trial on February 19, 2019, the affidavits of the parties were admitted as their evidence in chief and they were cross examined. The reports of Dr Kai Morgan dated April 3, 2018, August 18, 2018 and October 4, 2018, and the reports of the Child Development Agency dated July 22, 2016

and October 6, 2016 respectively, were agreed by the parties and admitted in evidence. It was made clear to the court that while the matter was proceeding in this jurisdiction, there were issues relating to the welfare of the children being heard in a court in the United States of America (USA) and based on events which took place in the USA, as well as the children's expressed desire to live with their father, and that the Claimant was prepared to give care and control of the children to the Defendant.

The Claimant's Case

[7] In her affidavit sworn to on August 13, 2014, the Claimant states among other things, that she is a civil servant, that the Defendant did not live with her or the children in the USA, but it was agreed that he would return to Jamaica and travel to be with them on a regular basis and that M would remain in Jamaica with him until he was two years old, when she would be settled and have adequate arrangements for his care. She states that the Defendant along with M, came to visit her and the other children in March 2013 and an argument ensued between them and the Defendant breached their agreement by leaving M with her in the USA.

[8] She states further that with the intervention of her employers, she was moved to a four-bedroom house, a 'live in' helper was employed and she has worked for her for a year and offers stability to the children. She says that the Defendant was given access so that the children could spend most of their summer vacation with him and he refused to return them to her by July 29, 2014, as was agreed.

[9] Her evidence contained in the other affidavits filed in 2016 and 2017 is in response to request for information concerning her employment and salary, speaks to her monthly expenses related to the children when they resided with her in Miami and includes evidence that she was asked to desist from communicating with her children.

[10] She states that she has been living in Jamaica since she returned in August 2017, and that her circumstances have not changed, save and except for her address, as given in her last affidavit. She states that she now seeks access, including residential access, where the children can visit and spend time with her and that she is no longer seeking custody of the children because her relationship with them has broken down and they rarely communicate.

[11] In cross examination, she said that she has not contributed to the maintenance of the children since they have lived with the Defendant because it is difficult to communicate with him, but that she is willing to do so. She also stated that she procured medical insurance for the children and is in possession of the cards. She added that the Defendant had stated that he did not want any support from her and that if she is to contribute to the maintenance of the children, she could afford to contribute $10,000.00 per month, for each child.

[12] She stated that she gave permission for her brother, Lance Campbell, to discipline the children, which, in Jamaican culture means, “you slap” and that she was unaware that he used a belt to beat them. She indicated that in 2014 he slapped the children, the Department of Social Services was brought in to investigate the matter and it was found that Mr Campbell was not a threat to the children.

[13] She admitted to being aware of an order made by the Court on August 14, 2014, which prohibited Mr Campbell from living with the children, but said he continued to live with them, the children never complained about him and they had a good relationship, ‘at one point’. She added that her brother was removed from the home as a temporary restraining order, taken out by the Defendant, was granted, there was a Court hearing, and, in subsequent investigations carried out by the Miami Dade Police, the allegations were found to be untrue.

The Defendant's Case

[14] The Defendant states that the agreement he had with the Claimant was that while she was in the USA, she would take care of N and K, he would take care of M until he was 3 years old, and that he and M would visit once per month. He states that he left M with the Claimant on his visit in 2013 because he had been concerned that she was not bonding with him and she did not object.

[15] He states that he did not object to Mr. Campbell temporarily residing in the same house with the children as he was unaware of his history and that he discovered the abuse of the children, saw the evidence on N, made a report to the Miami Dade Police and the Social Services were called, but the findings of the investigation were inconclusive.

[16] In his affidavit sworn to on July 20, 2016, he states that he had spoken to the Claimant about her brother beating the children and that he received a court order, which prevented Mr Campbell from residing with the children. He indicates that the Claimant did not obey the court order and after a particular incident, he applied for, and was granted an *ex parte* injunction, in court in the USA, for the removal of Mr Campbell, who had to be forcibly removed by the police on June 13, 2016. He states further that after an *inter partes* hearing on June 28, 2016, the injunction, which expires in 2019, was granted.

[17] He also states that he has had care and control of the children since February 2016 and has not been assisted with their maintenance. He adds that the monthly expenses for the children amount to $324,625.00 and they are accustomed to travelling at least once per year. He says he earns approximately $160,000.00 per month and receives financial assistance from his family in the form of trust funds, which were set up by his late mother, for the children.

[18] In cross examination, he said that Mr Campbell was found guilty of child abuse and cannot be around the children until 2022 but that they were no longer in danger as Mr Campbell was no longer living with them. He said that he never

deprived the Claimant of access to the children and then said he did not provide her with the address where the children reside because of a lack of care for them, when they are with her.

[19] He agreed that he chided the Claimant for stalking K at 'Kingdom Hall', and threatened to get a restraining order if she followed K. He said that he answers the Claimant's questions concerning the children in order to facilitate her being made current of their activities.

[20] He indicated that he was made aware of Interpol's interest in him but he has not made contact with them and they have not contacted him. He said that he owns a business which sells medical equipment and things related to dialysis and chemotherapy, and that he is aware that he is not qualified to practice in Jamaica "based on not being registered."

[21] He indicated that the children are citizens of the USA. He said the Claimant was incompetent in decision making and the children should be kept away from her. He however added that he would allow her to see the children if they are supervised and denied that he did everything to influence the children negatively against their mother.

The Submissions

[22] At the close of the trial, Counsel were ordered to file closing submissions which they did on or about March 22, 2019. I have considered carefully the submissions made, which I found to be of great assistance and I have examined the evidence carefully.

[23] I will not rehearse the submissions made and intend no disrespect to Counsel by not making specific reference to them in the course of this judgment.

The Issues

[24] During the course of the proceedings, it became evident that the welfare of the children demanded that custody, care and control of the children be granted to the Defendant who has had them since February 2016.

[25] All that the court has to determine therefore is:

i. whether the Claimant should be given supervised or unsupervised access, and

ii. what order in respect of maintenance of the children ought to be made.

The Law and Analysis

[26] Section 7 (1) of the **Children (Guardianship and Custody) Act (CGA)** provides as follows:

> *"7.-(1) 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."*

[27] Pursuant to Section 18 of the said Act, in deciding the question of custody the Court, *"shall regard the welfare of the child as the first and paramount consideration."*

[28] In the Court of Appeal in **Dennis Forsythe v Idealin Jones,** SCCA 49 of [1999], unreported, delivered April 6, 2001, Harrison J.A., (as he then was), said at paragraph 8:

> *"A Court which is considering the custody of the child, mindful that its welfare is of paramount importance must consider the child's happiness, its moral and religious upbringing, the social and educational influences, its psychological and physical well-being and its physical and material surroundings, all of which go towards its true welfare. These*

> *considerations, although the primary ones, must also be considered along with the conduct of the parents, as influencing factors in the life of the child and its welfare".*

[29] I consider that "welfare" must be taken in its widest sense. (See **Re McGrath**, [1893] 1 Ch. 143) and have therefore given consideration to, among other factors, their psychological and physical well-being as well as the conduct of the parents in order to come to a determination as to whether access to the Claimant should be supervised or can be unsupervised. I note that the child N has alleged poor conduct against the Claimant which is reflected in the Social Enquiry Report dated July 22, 2016, and that the Defendant has also made allegations of poor conduct against the Claimant.

[30] It is clear that the tension between the parties has affected their ability to jointly make the best decisions for the children and as such, it is clear that it would not be in the children's best interests for the parties to be granted joint custody. The court is therefore prepared to accede to what now appears to be the wishes of the parties, as well as the children, that the Defendant should have sole custody, care and control.

Access

[31] The Claimant is no longer seeking custody of the children and now wishes to be granted access. It is therefore now a question of whether she should be granted unsupervised access, including residential access, or whether access should be supervised.

[32] In the English case of **M v M** [1973] 2 All ER. 82 at page 88, Latey J. states his view on access, thus:

> *"...where the parents have separated and one has the care of the child, access by the other often results in some upset in the child. Those upsets are usually minor and superficial. They are heavily outweighed by the long term advantages to the child of keeping in touch with the parent so concerned so that they do not become strangers..."*

[33] I find that it is usually in the best interests of children for parents to be able to preserve and maintain their links with them. There may however be circumstances where it is found that a parent's access to the child should be supervised to ensure that the children are not exposed to any improper influences or abuse.

[34] There have been instances where the court has granted supervised access to a parent for particular reasons. In the case of **AH v JH** [2014] JMSC Civ 68, joint custody was not granted because there was a live issue of sexual molestation. The court however, granted supervised access to the Defendant. Similarly, in the case of **Fenton v Fenton,** FD 1797/2003, unreported, delivered January 23, 2006, the Court granted supervised access where allegations were made of the child being exposed to drugs while in his father's care.

[35] The cases referred to highlight instances where danger to the child or children, was present. In the instant case, there are allegations that the Claimant has not acted in the best interest of the children as she had been negligent and has condoned their abuse by her brother, during the four-year period they spent in the USA. The Defendant has presented evidence that the Claimant's brother, Lance Campbell, was ordered by the court in the USA not be in the children's presence until 2022 and copies of court documents from the USA, exhibited by the Defendant, show that orders were made against Mr Lance Campbell, including an order for his attendance at mandatory anger management classes.

[36] It is reasonable to find that at this time there is no likelihood of abuse by Mr Campbell if the Claimant is allowed residential access to the children, as there is no evidence to show that he is still residing at the home with the Claimant. There is also no evidence of the children being in danger when they are with the Claimant, although the Defendant has expressed the view that she is 'negligent' and as such was asking that the court consider granting supervised access to the Claimant.

[37] I have considered the reports of Dr Kai D. Morgan who carried out psychological evaluation of the children as well as assessment of the parties, as well as the Social Enquiry Reports from the Child Development Agency which were admitted in evidence. In her report, Dr Morgan identified the tests she administered, noting that she carried out clinical interviews with the parties and the children, as well as assessment of the socio-emotional functioning of the children and other relevant tests on the parents.

[38] I note that the report dated October 4, 2018 focusses entirely on the Defendant and that in the earlier report dated April 3, 2018, not much was reported in relation to the Claimant, although Dr Morgan stated that she was seen on two occasions for a total of approximately two hours. I am however mindful the terms of reference as stated by the Psychologist.

[39] I accept the finding of Dr Morgan whose report I have accorded substantial weight. I note that Dr Morgan expressed the view that the children showed no evidence of emotional maladjustment but she recommended that Mrs Campbell-Ehiorobo and each of the children take filial therapy sessions "(that is, sessions with one child at a time)" at least once per month with a view to healing the relationship between herself and the children. There is no evidence to show that this was undertaken.

[40] The evidence which I accept as true is that the children do not trust their mother and do not feel protected or loved by her. I have noted other concerns expressed by the children as well as the views, in particular, as expressed by the two older children in relation to likely outcome of the court proceedings.

[41] When all the circumstances of the case are weighed, I find no basis for making an order for unsupervised access at this time. The Claimant too had expressed the view that she could be allowed supervised access, with Dr Morgan. I find that the circumstances of this case dictate that the Claimant have supervised access of the children as that would be the best course of action.

[42] It is therefore my view that the Claimant be allowed supervised access, which should take the form of the filial therapy sessions for the period as has been recommended by the Clinical Psychologist, Dr Kai Morgan. This I find will allow the Claimant to keep in touch with the children, to bond and be able to properly communicate with them, "so that they do not become strangers...". Unless these sessions of therapy are undertaken, the court will not make an order for the Claimant to be granted unsupervised access.

Maintenance of the children

[43] Pursuant to the **Maintenance Act,** 2005 (MA) the Court is vested with the power to entertain applications and to make orders for maintenance. The court is mandated to apportion the obligation in relation to the maintenance of children between the parties, and according to their capacities to provide support.

[44] Under Section 7(3) of the **CGA,** where the court makes an order giving custody of a child to the mother, the court may order the father to pay a sum of money to her towards the maintenance of the child. In the instant case, the court is prepared to make an order giving sole custody, care and control of the children to the father. I therefore find that it is only just and fair that the court should further order that the mother pays to the father a sum of money by way of contribution towards their maintenance.

[45] In keeping with the provisions of the MA, it is necessary to determine the financial capacities of the parties and whether the sum claimed by the father can be regarded as reasonable in the circumstances, or whether the figure suggested by the mother as being the sum she can pay, should be preferred. In so doing, this court will consider all the circumstances of the parties and examine, *inter alia*, the monthly expenses for the children, the means of the parties and other circumstances which the justice of the case requires to be taken into account in compliance with the MA.

[46] In support of his application for maintenance of the children, the Defendant states that his total monthly expenses in relation to them amount to $324,625.00. He is asking the court to make an order for the Claimant to pay $100,000.00 per month, per child, and one half of their educational, medical, dental and optical expenses.

[47] In her affidavit sworn to on January 11, 2016, the Claimant states that her monthly income "is approximately ...JA$75,000.00 but I am allowed a monthly living allowance of approximately ...US$2,442.00 after deductions". She gave her monthly expenses related to the children then, as US$2,825.00. "Pay Advice" bearing dates 25th November, 2015, 17th December, 2015 and 21st January, 2016 which are exhibited to her affidavit filed on March 1, 2016, show her gross pay to be $91,785.58, per month. However, in a copy letter dated January 11, 2016 exhibited to her affidavit filed on January 15, 2016, there is information that her "emoluments per annum are as follows: Salary J$1,101,427.00 overseas allowances US$33,355.96".

[48] She is not now working overseas, based on her evidence, and she has not provided any evidence as to what her current income is, but, in relation to the income of the Defendant, she states that when they were together, the Defendant earned "upwards of $500,000.00 per month".

[49] The Defendant states that he earns a monthly sum of $160,000.00 and gets assistance from his family in the form of trust fund. He has not stated the monetary value of this, but it is clear that he has been able to manage to maintain the children as he has singlehandedly provided for them without the Claimant's input. His evidence is that "I have had care and control of the children since February 2016. Since that time the defendant (sic) has not assisted in the maintenance of the children"

[50] There is evidence that the two older children have been doing well at school. Both N and K now attend a traditional high school, in Jamaica, while M attends a

preparatory school. The children are also involved in extra-curricular activities which come at a cost.

[51] It appears to the court that the figure stated by the Defendant as the monthly expenses of the children approximates to the amount as stated by the Claimant. I bear in mind also that there is evidence that the Claimant provides health insurance for the children. With N and K now attending high school, the preparatory school fees are only now payable for M. I note that the Defendant has not stated what the educational expenses for the children are, even as it relates to school fees, but that he speaks, in particular, to extra-curricular activities and “lunch money” as well as travelling expenses, unrelated to school.

[52] In assessing the amount to be awarded, I have taken into account the means of the Claimant and her ability to pay, as well as the means of the Defendant and his ability to pay. As noted earlier, the Defendant has been singlehandedly bearing the expenses for the children and it is my considered view that his capacity to provide maintenance for the children is far greater than that of the Claimant. There is also no evidence of any potential earning capacity in relation to either of the parties and I am mindful that there will be miscellaneous expenses which will have to be borne by the Defendant, being the party with care and control of the children.

[53] In view of all the circumstances, I have concluded on the evidence that a sum of approximately $350,000.00 per month appears to be an amount which can provide adequate maintenance for the children. I find however that it would be unreasonable, based on her capacity, for the Claimant to be asked to pay the sum requested by the Defendant as that would amount to the Claimant paying almost all the expenses in relation to the children. I find however that the Claimant has the capacity to pay $60,000.00 per month based on her monthly salary along with other considerations relating to her receipt of “monthly living allowance”.

Disposition

[54] Applying the principles from the authorities along with the statutory provisions, including such matters as the requirement that the responsibility for maintenance (of a child) be borne equally to the extent possible, having regard to the means of the parties and other relevant factors and having regard to considerations of what is fair and just in all the circumstances, the court makes the following orders:

1. Sole custody, care and control of the children, N, K and M is granted to the Defendant with supervised access to the Claimant. This supervised access shall take the form of filial therapy sessions to be conducted by Dr Kai Morgan commencing on October 25, 2019 (after school) and thereafter on or before the 20th day of each succeeding month or at any other times as may be agreed by the parties until each child completes three sessions with the Claimant. The children shall be transported to and from Dr Morgan's office by the Defendant. The Claimant shall bear the costs of the sessions;

2. That the Claimant pays to the Defendant by way of maintenance for the relevant children the sum of $60,000.00 per month commencing on the 27th day of October, 2019, and thereafter on or before the 27th day of each succeeding month until each child attains the age of 18 years, as well as one half of their educational, medical, dental and optical expenses, reasonably incurred;

3. Each party will bear his/her costs of the claim and applications; and

4. There shall be liberty to apply;

5. The Defendant's attorneys-at-law shall prepare, file and serve this Order.