

England. On the 28th day of March, 2003, Robert Fish commenced proceedings against Fenella Victoria Kennedy for joint custody and access to their child in Jamaica and out of this jurisdiction.

By a consent order dated 14th July, 2003, joint custody was granted to both parties with day to day control of the child being the mother's. Inter alia, special times were accorded to the claimant as to telephone and residential access to the child. Claimant undertook not to take the child out of the United Kingdom while the child is with him there.

The claimant was to pay a monthly sum of (£500) Five hundred pounds sterling for the child's maintenance in addition to all educational, medical and optical expenses.

It appears that problems arose between the claimant and the defendant with regards to the terms of the abovementioned consent order.

By amended Notice of Application for Court orders dated the 15th day of October, 2005, there was an application by Robert Fish for certain orders:-

1. That the claimant and defendant have joint custody of (the child) Charles William Kennedy with day to day care and control of the said child to the defendant subject to the following orders as to access.
 - (a.) The claimant to have telephone access to the said child three (3) times per week on Mondays and Thursdays at 5 p.m. or at any other convenient time nearest to 5 p.m. (Jamaican time) or any other convenient time nearer to 5 p.m. of the said days; further and on Sundays at 10 a.m. or at any other convenient time nearer to 10 a.m. on the said day.
 - (b.) The claimant to have residential access to the said child approximately every three months in Jamaica for a period of up to ten (10) days during school time and in Jamaica for a period of up to 31 days during vacation time with the defendant and claimant taking and collecting the child during access period.
2. The Claimant will be allowed to take the child once per year in the United Kingdom or elsewhere for a period of up to 31 days and to be allowed to have the said child every other Christmas for a period of up to 21 days, commencing Christmas 2007.
 - (a) The claimant to collect the said child and return the said child in Jamaica.

The grounds on which the claimant seeks the said orders are as follows:-

- (i) That continued telephone access will sustain the father-son relationship during the periods of prolonged absence.

- (ii) That increased residential access in Jamaica, will allow claimant more quality time to spend with the child.
- (iii) That if allowed to take the child outside of Jamaica, to the United Kingdom, claimant will be able to spend more time with the child, as he will be able to take more time off from work for vacation leave.
- (iv) That if the claimant is allowed to take the said child to the United Kingdom or elsewhere the flexibility of travel plans would facilitate the making of familial bonds because the claimant's twin brother also resides in the United Kingdom and the remainder of the claimant's family reside in South Africa.

Consequent on the aforementioned Notice for court orders, the defendant, on the 19th October, 2006 filed a Notice of Application for Court Orders, seeking

1. That the Consent Order dated 14th July, 2003 be varied as follows:-

- (a). That the defendant shall have sole custody, care, control of the child, Charles William Kennedy-Holland. The grounds on which defendant (now applicant) Fenella Victoria Kennedy-Holland is seeking the orders as follows:-
- (b) There has been a material change of circumstances occurring since the date of the Consent Order in that relations between the claimant and the defendant

have completely broken down and there is little or no communications between the parties on matters concerning the Welfare of the child;

- (c) The breakdown in communications undermines the joint custody agreement which requires meaningful and mature dialogue between the parents and the present situation is not the best interest of the child.
- (d) The defendant is the primary caregiver of the child along with her husband who now interacts on a daily basis with the child and see to his needs and development;
- (e) It is therefore in the best interest of child that sole custody, care and control (of the child) be given to the defendant.

Both parties have relied in supporting of their respective applications by affidavits and appended exhibits.

Between the time of the Consent Order of the 14th July, 2003 and the filing of the defendant's application for Court orders, the name of the subject child was changed by Deed Poll to Charles William Kennedy-Holland, the mother's to Fenella Victoria Kennedy-Holland, she having married David Holland on May 13, 2006.

Both applications were heard together by consent.

This Court is conferred with the power to adjudicate in applications for custody and access of children by Section 7 of the

Children (Guardianship and Custody) Act (The Act). The Court may make, vary or alter custody orders on the application of either parent.

Section 7 (1) of the Children (Guardianship and Custody) Act states as follow:-

“The Court may, upon the application of the father or mother of a child, make such order as it might think fit regarding the custody of such child and the right of access thereto of either parent, having regard 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...;

Section 7(5) of the Act states;

“Any order so made, may, on the application of either the father, or mother of the child, be varied or discharged by a subsequent order.”

The Act also lays down; in very precise language that the guiding principle in determining all applications for custody and access of a child is that the welfare of the child is the first and paramount consideration. Section 18 of the Act provides the sine qua non in cases of applications for custody or access and states;-

Where in any proceeding before a Court the custody or upbringing of a child, or the application of the

income thereof, is in question, the Court in deciding that question, shall regard the welfare of the child as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother superior to that of the father.”

What is the welfare of the child?

Harrison JA (as he then was) in a decision of the Jamaican Court of Appeal, *Forsythe v. Jones SCCA 49 of 1999* unreported judgment delivered on April 6, 2001, enunciate it thus page 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 or religious upbringing, the social and educational influences, its psychological and physical well-being and its physical and material surroundings, all of which go towards the true welfare. These considerations, although the primary ones, must also be considered with the conduct of the parents, as influencing factors in the life of the child and its welfare.”

Lord McDermott stated similar sentiments succinctly *in J v. C (1969) 1AER 788*

“It seems to me that the child’s welfare as to be treated as the top item on a list of items relevant to the matter in question....”

Lord Justice Lindley, in re *McGrath (infants)* (1983) 1 Ch. 143

opined:

“The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only nor by physical comfort only, The word ‘welfare’ must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well being. Nor can the ties of affection be disregarded.”

In the instant case, the father of the child ‘Charles’ resides in the United Kingdom and is unmarried. He is South African by birth and his sole family in the U.K. is a twin brother. The father’s application for joint custody is repeated in the Amended Application for Court Orders dated the 15th August, 2005. In a previous approach to the honourable Court, the father of the child, Robert Fish had sought, and on the 14th July, 2003 had obtained, by consent, an order that

1. “That the claimant and defendant have joint custody of “Charles Williams Kennedy”, with day to day care and control of the said child to the defendant subject to the following orders as to access;

- (a) The Claimant to have telephone access to the said child three times per week on Mondays and Thursdays at 5:00 p.m. Jamaica time and on Sundays at 10 a.m. Jamaica time.

(b) The Claimant to have residential access to the said child every other month from Friday to Monday during school time and Friday to Monday during vacation time with the defendant taking the child to the claimant and collecting the child at the end of each access period.

(c) Residential access to commence on the 16th to the 23rd July, 2003.

2. The Claimant undertakes not to take the child out of Jamaica, save as indicated in clause 3 hereof.

3. The Claimant to have access to the said child once per year in the United Kingdom for a period of up to 21 days access to commence in the month of August 2003. The claimant to pay the airfares for the defendant and the child to travel to the United Kingdom, to commence in August 2003.

4. During this period while in the United Kingdom and while the claimant is at work, the defendant will supervise the child in the days and

(a) The claimant to have residential access to the child on some nights in the week;

(b) The claimant to have residential access to the child on the weekends;

(c) The claimant to pay to the defendant an allowance of £200.00 pound sterling per week for the duration of the access period while child is in the United Kingdom.

5. The claimant undertakes not to take the said child out of the United Kingdom during the period of time that the child is in that

jurisdiction.

6. The claimant to pay the monthly sum of 500 pounds sterling per month towards the child's maintenance in addition to all educational, medical, dental and optical expense reasonably incurred.

7. Each party to bear its own costs.

8. Liberty to apply.

It is this order that the defendant seeks to have varied so that she may have sole custody of the child.

In her further affidavit dated October 19, 2006, Fenella Victoria Kennedy-Holland deponed that when she consented to joint custody in 2003, she contemplated that joint custody would mean that she and the claimant would engage in cooperation, consultation and dialogue concerning the child's educational progress and development, that they would both engage in active consultation and shared responsibility for the decisions made concerning the child's health and general well-being and his emotional and physical upbringing and welfare.

Further she deponed, that the physical distance between claimant and herself precludes joint decision making.

This arrangement does not in reality work as communication has completely broken down between herself, and the claimant with respect to matters concerning the child. Where there is communication it has been hostile and not conducive to meaningful dialogue as contemplated by a joint custody order.

The e-mail messages appended to the affidavits of the mother display an increasing degree of hostility between the parties.

The disagreements relate to matters such as the child's school fees, the disparity in costs of tennis lessons, the allegation that the claimant makes that defendant had forbidden the teachers at the child's school to share information with him concerning the child, to name a few.

There was also disagreement with regards to the sale of a vehicle apparently left behind in London by the defendant for claimant to sell and forward proceeds to defendant.

The defendant avers that in recent times, there has been dwindling communication with the claimant. She now insists that any communication between them be in writing. The mistrust apparently is so great that, as defendant avers "I always try to have someone with me

or ensure that there are people around when I drop off or collect my son from the claimant.

It was submitted that the joint custody order was consented to as merely a demonstration in 2003 of the parents' willingness to cooperate.

The uncontroverted evidence, bolstered by the e-mail messages, show a spiraling decline in the civility between the parties – disputes as to the quantum of a bill and which bill relevant to the child is to be paid. A very telling example of how changed since 2003, the tone of the communication between parties became, is to be found in an e-mail, dated 29th August, 2006 (defendant to claimant). This is but an excerpt.

“You throw the Court action around like we are to be scared of it. I am not. We are more than ready for you. I will be fascinated to see what the Court will make of you. A middle-age, unmarried man who cannot hold down a relationship so in his bitterness harasses us.”

Whatever was the relationship between the parties when the consent order was made in June, 2003, it is obvious that there has been a breakdown in the quality of that relationship.

As a rule, joint custody orders do not serve the best interests of a child, and the full promotion of his welfare “unless his parents have demonstrated that degree of maturity and such an ability to communicate and cooperate with each other as to give a Court some confidence that the order of joint custody will be workable.....”

See in the marriage of ***Foster, G.G. and Foster K.M. Full Court of the Family Court of Australia at Parramatta.*** Judgment handed down 31 August, 1997. ***Money v Money (1977) FLC 76 90 -284***

The relationship between claimant and defendant has broken down to the point where communication, where it takes place, is in writing. The mother, the defendant has care and control of the child and has exercised such care and control since the child was born. She left the U.K. with the child when he was approximately 15 months old. It is a fact that the claimant resides in the United Kingdom, several thousand miles away. The defendant has since married and the husband is taking care of the child as father.

It cannot be in the child’s best interest to have the order for joint custody continue when the relationship currently existing between his parents is such that communication, where it takes place between them

is acrimonious and agreement on matters relating to the child so hard to achieve.

The child is settled in a home with his mother, the defendant and her husband David Holland. It is not contested that the child is provided at home with a stable and nurturing environment with age appropriate activities.

The welfare of this child is paramount and it is my opinion that the welfare of the child is best served by varying the consent order made on the 14th July, 2003 by granting sole custody of the child to his mother the defendant Fenella Victoria Kennedy-Holland.

The fact that the consent order is varied to award sole custody of the child to his mother, is not a bar to access to the child by the father claimant Robert Fish. The defendant however has expressed fears that the court should make an order granting the father access to the child outside of Jamaica unaccompanied by her.

The reason for this is a fear of the child being taken to the U.K. or elsewhere and not returned to her in Jamaica.

To allay this fear, the claimant has exhibited the letter from his lawyer in the United Kingdom Miss Julia M. Stanczyk of the firm

Miles Preston & Co. The relevant particulars of the letter are as follows:-

*R. Fish Esq.
43a Danehurst Street
London
SW6 6SA*

JMS/JN

12 June 2003

Dear Robert,

I refer to our meeting last week concerning your son, Charlie, born on 9th July and aged almost 4. I have been advising you about your contact rights since July 2001 so I know the background well. You consulted with my firm then, and have continued to retain us, because we are considered to be experts in family law.

The UK is signatory to the Hague Convention. As far as I am aware, Jamaica is not yet a signatory. The Hague Convention has been incorporated into English Law by the Child Abduction and Custody Act 1985. One of the principal purposes of the Hague Convention is to ensure reciprocity of children related orders between the countries who have acceded to the convention. For example, if children are abducted from Iceland to England and the Icelandic court orders the return of the children, the English court will enforce that order in England and will take whatever steps are necessary to ensure the prompt and safe return of the children.

It is well known that the UK courts are committed to the full and proper implementation of the provisions of the convention, probably more so that some of the other signatories which are less zealous in their approach.

The Court will apply the principles of the Child Abduction and Custody Act 1985 to non convention countries in the Court's overall assessment of what decision will best serve the child's welfare which remains its paramount consideration in non convention cases.

I know that Charlie's mother was expressed a concern that you might either keep Charlie in England or taken him elsewhere. Insofar as you keep him in England, I have no doubts that the court will ensure his swift and safe return to Jamaica, his country of habitual residence.

It seems far fetched for Charlie's mother to worry that you might take Charlie elsewhere then you have such a commitment to England which is long standing and secure. To take but some examples of your ties to England as follows:-

- 1. You came to England from South Africa, your country of origin, in 1986 and you have lived there permanently since, a period of 17 years.*
- 2. Your South African passport expired in 1990 and you have not bothered to renew it.*
- 3. Your twin brother lives here and has done since 1979.*
- 4. You have owned a property in Fulham, London since 1994.*
- 5. You work for Reuters in Fleet Street and have done since 1998.*

You have an excellent and responsible position there.

If I can be of any further help, please let me know.

Yours sincerely,

Julia M. Stanczyk (Miss).

This legal opinion expressed by the writer from Miles Preston and Co. ran counter to that of defendant's attorney-at-law Mr. Allan Wood. Mr. Wood submitted that the opinion was inaccurate and grounded his contention on a recent House of Lord's decision ***Re J (A child) Return to Jurisdiction: Convention Right's 2005 3 All E.R.***

291. This case, he submitted decided that

“There is no warrant either in statute or authority, for the principles of the Hague Convention to be extended to countries, which are not parties to it.”

Further and more importantly, the father's application for the summary return of his son to Saudi Arabia who had been abducted to the United Kingdom was refused. This thereby conclusively demonstrated that the claimant's solicitor's opinion is entirely inaccurate and does not reflect the current legal position in the United Kingdom, with respect to children from non-convention countries to the United Kingdom.

It is also submitted that defendant could not afford the costs to seek the return to Jamaica of her child from the United Kingdom, South Africa or elsewhere.

The father/claimant will find it cheaper to pay for the defendant's plane fare to accompany the child to visit him.

Exhibited to the defendant's affidavit is a report from Dr. Gillian-Lowe, a consultant child and adolescence psychiatrist who had seen and interviewed the child on or about October 26, 2006 and had further telephone interviews with him.

She opined and recommended that the taking out of the child from Jamaica, unaccompanied by the mother "should be denied at this time because in my opinion, such a change is too drastic and sudden for this seven year old child to accommodate. He needs gradual and systematic adjustment."

Mr. Wood submitted that "it is also recognized that the child's father ought to have access in terms of the order made on the 28th July, 2003 ("The Consent Order").

The child's welfare is served by an increasing relationship with his father which the access sought in the Amended Notice of applications for Court order dated the 15th August 2005 can give.

The recommendation of Dr. Lowe has not been contradicted. The request for the claimant to be allowed to have the child every other Christmas will not now be granted.

On the Amended Notice of Application for Court orders dated the 15th of August 2006, the order of this Court is as hereunder:

1. That the defendant has sole custody of the child "Charles Williams Kennedy-Holland with day to day care and control to the said defendant, subject to the following orders as to access:
 - (a). The claimant is to have telephone access to the said child (3) three times per week on Mondays and Thursdays at 5:00 p.m. or at any other convenient time nearest to 5:00 p.m. Jamaica time or at any other convenient time nearest to 5:00 p.m. on the said days. Further and on Sundays at 10 a.m. or at any other convenient time nearer to 10 a.m. on the said day.
 - (b). The claimant is to have residential access to the said child approximately every three months for a period of up to 10 days during school time and in Jamaica for a period of up to 31 days during vacation time with defendant and claimant taking and collecting the child during the access period.
2. The claimant undertakes not to take the child out of Jamaica save as indicated in Clause 3 hereof.
3. The Claimant is to have access to the said child once per year in the United Kingdom for a period of up to 21 days to commence in August, 2007. The claimant to pay the airfares for the defendant and the child to travel to the United Kingdom to commence in August 2007.

4. During this period while in the United Kingdom and while the claimant's at work the defendant will supervise the child during the days; and
 - (a) The claimant is to have residential access to the child on some nights in the week;
 - (b) The claimant to have residential access to the child on the weekends.
 - (c) The claimant is to pay to the defendant an allowance of £200.00 pounds sterling per week for the duration of the access period while child is in the United Kingdom
5. The claimant undertakes not to take the said child out of the United Kingdom during the period of time that the said child is in that jurisdiction.
6. The claimant is to pay the monthly sum of £500 pound sterling per months towards the child's maintenance in addition to all educational, medical, dental and optical expenses reasonably incurred.
7. Each party to bear their own costs.
8. Liberty to apply.

Notice of Application for Court Orders dated 19th October, 2006.

Order made in terms of paragraph, of the Notice of Application for Court Orders dated 19th October, 2006.