



[2015] JMSC Civ.135

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO 2014 HCV 01479

BETWEEN **MICHELLE ANGELLA JOHNSON** **CLAIMANT**

AND **LAWRENCE MICHAEL PASSLEY** **DEFENDANT**

Ms. Marjorie E. Shaw, Attorney-at-Law instructed by Mesdames Brown & Shaw for the Claimant

Ms. Vivienne Washington for the Defendant

Heard: 14, 15 April and 17 July 2015

Family Law- Application for custody of child-principles to be considered in awarding joint custody

K. LAING J

[1] The Claimant by Fixed Date Claim Form filed March 26, 2014, sought, *inter alia*, an order that the Claimant be granted sole custody, care and control of the relevant child Raaef Passley born on March 3 2008 (“**Raaef**”) and that the Defendant be granted supervised access to Raaef.

[2] The Defendant by Notice of Application filed March 9, 2015 seeks joint custody of Raaef with care and control to the Respondent and access to the Claimant.

[3] Both applications were heard together since they required the same issues to be determined. The Court formed the view that they could conveniently be heard and dealt with in the same proceedings.

Background

[4] The Claimant and the Defendant are both businesspersons who met sometime in or about 2002. The Claimant at that time was living with her son Hussauni Blake (“**Hussauni**”) at her mother’s house. The Defendant was then married and living with his wife and son at Edgewater in the parish of St. Catherine. The Claimant and the Defendant commenced an intimate relationship despite the Defendant’s marital status and their son Raaef was born on March 3, 2008.

[5] It is common ground between the parties that the Defendant has played a very significant role in the life of Raaef since his birth. Notwithstanding the obvious demands of his marriage and existing family, the Defendant spent a considerable amount of time visiting with Raaef and reading to him at nights before leaving to his matrimonial home. The Defendant contributed financially to Raaef’s maintenance and also assisted with his transportation from school. As Raaef got older the Defendant would assist in supervising his homework and extra-curricular activities including football training and swimming. The Defendant assisted the Claimant in acquiring more appropriate living accommodation for herself, Raaef and Hussauni at 2 North, Greater Portmore in the parish of St. Catherine. The issue of the relative beneficial interests in that property did not fall to be decided and was of no material importance to the hearing.

[6] When the Claimant and the Defendant met in 2002, Hussauni was then 5 years of age. Hussauni’s father had not played a significant role in his life since he was about 6 months old and the Defendant, much to his credit, took a keen interest in Hussauni and his development. The Defendant took Hussauni along with Raaef on numerous trips with him abroad. The Defendant, himself being an alumnus of Kingston College, was instrumental in getting Hussauni transferred to that institution from Jose Marti High School in St Catherine. The Defendant also assisted in getting the Claimant’s nephew Lushawn Wilson (“**Lushawn**”) enrolled in Kingston College as well.

[7] The Defendant assisted the Claimant with her retail business in the clearing of goods which she imported and provided her with a motor vehicle for her use. That motor vehicle was involved in an accident in or about March 2013 and it was suggested

to the Claimant by the Defendant's Counsel, that it was after that accident that her relationship with the Defendant started to deteriorate. This was denied by the Claimant. Whether the accident and damage to the vehicle was the cause of a change in the nature of the relationship or merely exacerbated existing problems is uncertain. What appears is clear that the Claimant was very unhappy with the Defendant's response to her requests to expedite the repair of the vehicle and she concluded that it was an attempt on his part to force her to stay home. The Claimant in her affidavit filed March 26, 2014 states:

"That I felt immobilized and frustrated by my inability to move about and address the transportation needs of the children, myself and my business, without reference to the Defendant".

She purchased a vehicle of her own and states that the relationship between the Defendant and herself further deteriorated after this acquisition.

[8] Despite the challenges to the relationship arising from the damage to the Defendant's motor car, it appears that the romantic embers remained and in September 2013, the Claimant, the Defendant and Raaef travelled to Florida, United States. The Claimant, Defendant and Raaef evidently had a fun-filled time which included a sightseeing tour by helicopter. The Defendant asserted that the primary purpose of the trip was to have Raaef satisfy a precondition of his anticipated change of immigration status, which was that he submit to a medical examination. The Claimant while accepting that Raaef did have the medical examination, said that this was not done with the expectation that he would shortly be changing his immigration status and she was not aware that the result of the medical examination would only be valid for 6 months. The Claimant insisted that the Defendant took her on that trip as a present for her birthday and that was the main purpose, the medical examination being done merely as a matter of convenience.

The January 2014 Trip

[9] On January 24, 2014, the Defendant took Raaef to the United States of America. The Defendant is a dual citizen of the United States and Jamaica. The Defendant's

case is that it was agreed between himself and the Claimant that they would take the appropriate steps to effect the changing of Raaef's immigration status to that of a United States resident alien and eventually, a citizen. There had been an unsuccessful attempt to obtain a United States passport for him and the parties had agreed that they would delay the application for his change of immigration status. The Defendant states that both he and the Claimant had subsequently agreed to pursue the necessary application because of the anticipated changing of the United States immigration laws and the medical examination in September 2013 was in furtherance of that agreement. The Defendant states in paragraph 7 of his affidavit filed 7 January, 2015 that it was the understanding of the Claimant and himself that notwithstanding this change of status, Raaef would have continued to reside in Jamaica with his mother and would only live permanently in the United States when he attained the age of majority.

[10] The Defendant avers that the Claimant was at all material times well aware that the purpose of his trip on January 24, 2015 was to finalise the process of Raaef obtaining his resident alien status and "green card". Consequently Raaef would have had to spend an extended period of between three to six months in the United States in order to complete the immigration process, and the Claimant was well aware of that. The Defendant said that in light of the understanding between the parties he was therefore shocked to hear that he was being accused of having "abducted" Raaef.

[11] The Claimant painted a much different picture. Whereas she conceded that there was agreement that Raaef's immigration would eventually be changed, there was no agreement that this would have been done in the early part of 2014 and vehemently denies that she agreed that the purpose of the Defendant taking Raaef to the United States on January 20, 2014 was in relation to his immigration status. She averred that the Defendant asked to take Raaef to the United States for the weekend of January 24, 2014 to January 26, 2014 which was not unusual and for that reason she consented and provided his travel documents. She said that when she contacted the Defendant by telephone on Sunday January 26, 2014 to find out what time their flight would be returning, she was told for the first time that Raaef would not be returning.

[12] A considerable amount of time was spent at the hearing in cross examination of the Claimant and the Defendant on the issue as to whether the Claimant agreed for the Defendant to take Raaef to the United States for an extended period, for purposes of his immigration matter, or whether the Defendant took Raaef under the pretence of it being a usual weekend trip and thereafter kept him without the Claimant's consent. Having read the affidavit evidence of the parties, having observed their demeanour and assessed their responses during lengthy cross examination, I accept the evidence of the Claimant on a balance of probabilities that, she was not aware that the purpose of the Defendant taking Raaef to the United States on the 24th January 2014 was in any way related to the intended change of his immigration status. I accept that she did not consent to the Defendant keeping him in the United States for an extended period or any period beyond the weekend ending on the 26th January 2014.

[13] The Defendant asserted that the Claimant had agreed that both herself and the Defendant would stay alternately with Raaef over the anticipated period of 6 months while the immigration issues were resolved. He said that this arrangement did not go through because "for some reason" the Claimant decided to "quit". I do not accept this. It is noteworthy that there has been no explanation proffered by the Defendant as to what might have caused or triggered the alleged *volte-face* on the part of the Claimant. On the evidence as a whole, there is nothing to suggest why the Claimant would have had this immediate change of position, especially in light of the fact that the relationship between the parties did not change between the 24th January 2014 and the Claimant's call to the Defendant on 26th January 2014. The Claimant was also used to Raaef being away with the Defendant so it is unlikely that there was any kind of immediate separation anxiety over that weekend. I accept that there was no change of heart on the part of the Claimant, and find that there was simply no understanding or agreement between the Claimant and the Defendant that the trip was to pursue Raaef's immigration-status change.

[14] I find that the Defendant deceived the Claimant in his explanation to her that he was only taking Raaef to the United States for that weekend. In a similar manner, the Defendant by his own admission deceived the United States Immigration authorities by

lying about the residence of Raaef, giving them the address of a friend as being the Residence of Raaef, while in fact, Raaef, save for a few days spent with relatives, resided at a Holiday Inn Hotel for the period of approximately 4 months while he was in the United States. What is worse however is that fact that after the Defendant became aware on his admission, in April 2014, of the order of this Court dated 24th March 2014 requiring him to produce Raaef to the Claimant, the Defendant refused to comply with the order until June 3, 2014. However I have not factored this flagrant breach of the Court's Order into my consideration as to whether the Court should grant the relief claimed by the Defendant and whereas the Court abhors such conduct, there is no need to address it further.

[15] There are a number of bases on which the Defendant submits that the Claimant ought not to be awarded sole custody care and control of Raaef and why there should be an order for joint custody with care and control to the Defendant. The main reasons may be summarised as follows:

- (a) The Claimant has de facto care and control of three boys, one of whom is a maternal nephew and they all are exhibiting behavioural problems.
- (b) The Claimant sometimes delegates the care of Raaef to her mother especially when she goes abroad for shopping and the Mother's home is not a fit environment for Raaef.
- (c) The Defendant is the one who spends time teaching the child to read and do his homework.
- (d) The Defendant is the party who has more time on his hands to spend in the care and upbringing of Raaef.
- (e) Raaef has indicated a preference to live with the Defendant.

[16] The phrase "behavioural problems" was used often and rather loosely during the hearing. Clearly there is a continuum of behavioural problems. The Court did not have sufficient evidence to assess precisely where on that continuum one could place the behaviour of Raaef, Hussauni or Lashaun. There are also a myriad of complicated

factors which can lead to behavioural problems and the assessment of which factors might be responsible for any alleged behavioural problems of these three males is clearly outside the realm of expertise of this court, without the assistance of appropriate expert evidence. It was suggested that the absence of the fathers of both Husauni and Lashaun is responsible in part for their challenges. If this is so, that is not the fault of the Claimant. Lashaun is her Nephew and she has no control over his father's conduct. She is trying to provide assistance, being an Aunt. The fact that Husauni's father abdicated his responsibilities is unfortunate but blame for this ought not to be laid at her feet. On the evidence it would be improper for the Court to find that any behavioural problems which these 3 boys have, if indeed there is any, is as a result of any fault of the Claimant or any neglect or lack of parenting skills on her part.

[17] The Court cannot be oblivious to the challenges faced by single parents and in particular single mothers in Jamaica. In the case of the Claimant, she is a business woman with a retail store. There are considerable demands placed on her time by her business, her children and nephew. She must do her best to balance both. She sometimes has to spend long hours at her store. The Claimant is therefore in many respects no different than other single mothers including professionals with serious demands on their time. In order for most single mothers to effectively cope, they need a support mechanism. This may take the form of friends, family members and a reliable taxi-driver to do the pick-up from school, or if wealthy enough, a paid helper or nanny and a driver.

[18] Christmas period is by far the time when most businesses earn a substantial proportion of their annual revenue and this period naturally places an added burden on the Claimant's time. The Claimant's mother is an important part of her support group, being the person who often stays with Raaef when the Claimant is unavailable because she is at her store or has to travel overseas to purchase goods for her store. I do not find that the Claimant by availing herself of the assistance of her mother is doing anything which diminishes her profile as a fit and proper parent, nor do I find that the home of the Defendant's mother is an inappropriate environment for Raaef. I do not accept the Defendant's evidence that marijuana is openly sold from that home. It is

instructive that although the Defendant asserts this and says this is one reason for him assisting the Claimant in obtaining alternative accommodation, the Defendant does not appear to have firmly insisted that Raaef does not visit that home. One would have expected this and would have expected this to have been another major source of disagreement between the parties if in fact the Claimant's mother's home was as inappropriate for Raaef as the Defendant claims.

[19] I accept the evidence of the Claimant that it was both herself and the Defendant that read to Raaef and assisted with his homework. The Fact that the Claimant might at one time have allowed the Defendant to play a greater role in this regard should not be held against her in the Court's assessment. It is quite important to note that since the relationship between the Claimant and the Defendant has soured, the Defendant has played a much reduced role in this regard, however notwithstanding this, Raaef's latest school report indicates that he is doing very well. I accept the Claimant's evidence that she has been assisting him with his schoolwork and accordingly find that she must be given some credit for her assistance in enabling him to have achieved these results.

[20] The Defendant in the usual condescending manner he adopted in his references to the Claimant, indicated during cross examination that he knows he is more equipped academically than the Claimant, having graduated from the College of Arts Science and Technology (CAST), now the University of Technology (UTECH). However the point was well made by Counsel for the Claimant that many successful and influential persons (including the Defendant) came from humble beginnings without the benefit of parents who were college educated. I formed the opinion that the Claimant is an intelligent and ambitious individual and notwithstanding the fact that she may not be as well educated as the Defendant is clearly sensible enough to have grasped the importance of education to ones social mobility. I have formed the view that she loves Raaef and will continue to do her absolute best to ensure that he gets the best education given available resources. If she is not equipped to personally assist Raaef with his schoolwork as he gets older, she has the option of providing him with paid extra lessons which is an aid utilised by parents on almost every rung of the social ladder, irrespective of their educational achievements.

[21] It must be appreciated that the Claimant having care and control and the Defendant assisting Raaef, are not mutually exclusive. The Defendant does not have to be awarded care and control in order to assist in this regard. If he does have the flexibility and time he can make appropriate arrangements to help Raaef and if he does not have the time, then he has the option of increasing his financial contribution to a sufficient level which will ensure that Raaef receives extra lessons or has the paid assistance of a tutor if needed.

THE LAW

[22] The children's (Guardianship and Custody) Act, provides as follows:

“Where in any proceeding before any Court the custody or upbringing of a child or the administration of any property belonging to or held on trust for 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, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father.”

[23] The Court has been referred to the decision of **Forsythe v Jones SCCA 49 of 1999**, in which at page 8 of the Judgment, Harrison JA offers the following helpful guidance:

“A Court which is considering the custody of a child, mindful that its welfare is of paramount importance must consider the child's happiness, its moral or religious upbringing, and social and educational influences, its psychological well-being and its physical and material surrounds, all of which goes towards the true welfare. These consideration, 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.”

[24] The evidence clearly discloses that the Claimant and the Defendant both love Raaef and have his best interest at heart. This was also the view expressed by the Probation Officers in the Social Enquiry Report dated November 2014. Unfortunately the current state of the relationship between the Claimant and the Defendant does not lend itself to an award of joint custody. In her evidence the Claimant said:

“Mr. Passley is not a reasonable person and we cannot co-operate in the upbringing of Raaef.”

[25] It does not appear that the parties will be able to put aside their personal differences and reasonably work together for Raaef’s best interest if they are required to jointly make decisions that will impact him.

[26] The governing principle is accurately reflected in the unreported decision of **Fish v Kennedy Claim No. HCV 373 of 2003**, where Marsh J. stated the following:

“As rule, joint custody orders do not serve the best interest 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...”

On the particular facts of that case the learned Judge concluded that:

“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 the child is hard to achieve.”

[27] In this case, the Court is of the firm view that it is inappropriate to make an award of joint custody and after considering all the relevant factors in the round and for the aforementioned reasons concludes that the best interests of Raaef are served by awarding custody care and control to his mother the Claimant, in whose custody care

and control he has been for effectively, his entire life. The familiarity and stability of those systems and surroundings should enure to his benefit and with the Defendant continuing to play an important part in his life he ought to continue to develop as a well balanced child.

[28] The Court has considered the fact that the Defendant is in a better position than the Claimant financially and as a consequence has a greater degree of flexibility with his time and therefore has more time to spend with Raaef. The Court is of the view that these are not factors which outweigh the benefits to be had by Raaef continuing to reside with his mother the Claimant. The Court has also considered also Raaef's preference to reside with the Defendant as expressed to the social worker but in the circumstances of this case and given the child's age, the Court has not attached any significant weight to this preference in assessing what is in the best interest of the child.

[29] It is axiomatic that it is difficult to regain a person's trust once lost, but it is hoped that with time the Defendant will regain the Claimant's trust and that the relationship between them will improve for the benefit of Raaef.

[30] The Court is not of the view that there is a real risk that the Defendant will seek to remove Raaef from the Jurisdiction in breach in order to frustrate the order of custody to the Claimant. He is sufficiently intelligent to be aware of the negative consequences of that, not just for Raaef but for himself since he would be exposing himself, not only to the judicial sanctions of this Court, but to the long arm of the United States justice system as well.

The Court therefore orders that:

[31] Custody care and control of the Child Raaef is granted to the Claimant with reasonable access to the Defendant and the Defendant is allowed residential access every alternate weekend, from Friday 2.30 pm to Monday 7:30 am plus half of all major school holidays.

[32] Costs to the Claimant to be taxed if not agreed.