[2016] JMSC Civ. 224

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013M00454

BETWEEN	**MRS. S**	**PETITIONER/ RESPONDENT**
AND	**MR. S**	**RESPONDENT/APPLICANT**

IN CHAMBERS

Mrs. Tamara Francis Riley-Dunn and Ms. Melissa Watson instructed by Nelson Brown-Guy & Francis for the Petitioner/Respondent

Gordon Steer and Mrs. Kaye-Anne Parke instructed by Chambers, Bunny & Steer for the Respondent/Applicant

Heard: 20th - 21st September, 11th November and 13th December, 2016

Family Law - Applications for Joint Custody and for Sole Custody - Application for Unsupervised Access - Removal of Child from the Jurisdiction - Sections 7 & 8 of the Children (Guardianship and Custody) Act - Welfare of the Child - Section 14 of the Property (Rights of Spouses) Act - Transfer of Heritage Education Plan

CORAM: JACKSON-HAISLEY, J. (AG.)

[1] The relationship between the parties began when they were both employed to the now defunct Air Jamaica. The Petitioner, Mrs. S was then a flight attendant and the Respondent Mr. S, an airline pilot. The parties solemnized their relationship in a ceremony of marriage which took place on the 21st day of June 2008. Just over a year later, on the 30th October 2009, the parties had a

daughter, Z. When Air Jamaica ended its operations Mr. S sought and obtained a position as an airline pilot with Air Malaysia. Inevitably this resulted in the parties moving from Jamaica to live in Malaysia, Mr. S first went and then Mrs. S followed with Z. The move to Malaysia saw the deterioration and demise of their relationship and on February 10, 2012 Mrs. S took Z and returned to this country. On February 21, 2013 she filed a Petition for Dissolution of Marriage. That Petition is still pending before the Court. Three Notices of Application for Court Orders are currently before me for consideration. As is the norm, these applications have to be determined before the Petition for Dissolution of Marriage can proceed. The first Notice of Application for Court Orders was filed on December 18, 2014 by Mr. S, pursuant to which he seeks the following orders:

1. That the Applicant/Respondent and Petitioner be granted joint custody of the relevant child, Z born on the 30th day of October, 2009 with care and control to the Petitioner, with reasonable access to the Applicant/Respondent;

2. That the Applicant/Respondent be granted residential access to the said child in Malaysia for four (4) weeks during the summer holidays;

3. That while the Applicant/Respondent is vacationing in this jurisdiction he be granted residential access to the said child on alternate weekends, with reasonable access throughout his visit; and

4. Either party shall give the other seven (7) days notice of an intention to remove the child temporarily from the jurisdiction, and must provide a contact number and address at which the child can be reached.

The sole ground on which he seeks these orders is that they are in the best interest of the child.

[2] A second Application was filed on April 30, 2015 by Mrs. S pursuant to which she seeks twelve orders. Nine of those orders were resolved amicably by the parties and so the remaining ones are as follows:

1. That the Claimant be granted custody, care and control of the relevant child ZS, born on the 30th day of October 2009 with access to the Respondent within Jamaica;

2. That the said child shall not be removed from the jurisdiction without consent of the Claimant; and

3. Such further and other relief as this Honourable Court deems just.

[3] By way of a Notice of Application for Court Orders filed by Mr. S on July 23, 2015 an Order is sought that the Petitioner/Respondent be ordered to sign the necessary documents to have her name removed from the Heritage Education Funds International as joint subscriber. The grounds upon which he seeks this Order is that he solely contributes to the Fund and that it is just, having regard to all the circumstances.

[4] These three applications were heard on the same date. Based on the substance of the first two matters, they will be dealt with together and the third will be dealt with separately. For the avoidance of confusion, in respect of all three matters, the term Petitioner when used will be in reference to Mrs. S and the term Respondent when used will refer to Mr. S.

APPLICATIONS FOR CUSTODY, ACCESS AND FOR THE REMOVAL OF THE CHILD FROM THE JURISDICTION

[5] The first Application of the Respondent is supported by his Affidavit filed December 18, 2014. He also gave testimony at the trial of the matter on September 20, 2016 and was subjected to lengthy cross-examination. Although much of the cross-examination related to the matters no longer before this Court, there are some aspects that affect the issues that remain to be resolved. He gave evidence that after they got married, Air Jamaica began downsizing their operations and that this was the catalyst for leaving Jamaica. An opportunity arose for him as an airline pilot in Malaysia and after having discussions with the Petitioner he took advantage of the opportunity and moved to Malaysia and the Petitioner and Z followed later.

[6] According to the Respondent the relationship between the two of them first improved and then deteriorated with the effect that in February 2012 the Petitioner uprooted Z and left for Jamaica, never to return to Malaysia. Further, that it was not until April 2013 that he returned to Jamaica and spent time with the Petitioner and Z and he was surprised that on the eve of his return to

Malaysia, he was served with a Petition for Dissolution of Marriage. He pointed out that he maintains Z and that despite his efforts to be a reasonable man, he is often prevented from accessing her.

[7] He alleged that in 2013 he returned to Jamaica for vacation and during that time Z spent a weekend with him and his mother at his mother's house in Mandeville. Further, that during the visit he bathed Z and himself at the same time. This he said was a common occurrence when the three of them lived together in Malaysia as they often took showers together. He expressed shock at being contacted by the Petitioner sometime later and accused of inappropriate behaviour towards Z, which according to the Petitioner was brought to her attention by teachers at Z's school. Despite this accusation he alleges that the following weekend Z came to his mother's house and spent the day with him.

[8] On subsequent trips to Jamaica he indicated that he was not allowed to see Z outside of the presence of the Petitioner and that he has only been allowed to access Z in public places and in the Petitioner's front yard. He has exhibited correspondence between himself and the Petitioner which according to him demonstrates difficulties faced when seeking access to Z. Below I have reproduced an excerpt from one of the conversations:

> *Mr. S: I think taking Z's things to school and giving them to her in the parking lot is not only demeaning but also quite inappropriate. To see her open the gifts, play with them, see if she likes them or not, just to spend some time with her to learn who she is becoming may be silly to you but those simple times are precious moments which I cherish. I'm not asking to spend the entire day with her but just to be allowed to spend what I regard as quality time with my daughter. You claim you would like her to have a relationship with her father yet you deny us every opportunity to bond. Based on your instructions, I have suggested the following options to you: Firstly, I can come to your house and stay out in the yard by the stairs as you have previously allowed me to do and watch her open the*

stuff. Afterwards, we can play in the yard where you can have us in full view at all times. Secondly, you may bring her too my mother's house. However you blatantly refuse to even consider any of these and in the same breath you have not offered any suggestion to resolve this issue. I have promised to take her for pizza and it is of paramount importance to me that this promise is kept and I think Friday would be good. As it pertains to Friday, Saturday and Sunday I am still awaiting your response as to where and who will be coming with her.

Mrs. S: After thoughtful conversation, I will allow you to come to the house and drop off whatever you have for Z this Friday at 4pm. Pizza on same Friday should be fine. As per our last conversation I will confirm venue for Saturday and Sunday as soon as possible.

[9] The Respondent has expressed that he is of the view that the Petitioner has no genuine basis to deny him access to Z and that her attempts to portray him as an abusive man are hurtful and demeaning and prevent him from bonding with his child. According to him, even his mother, Z's grandmother has difficulties accessing Z as she has had to meet the Petitioner at school to deliver gifts he has sent and she is not even permitted to go to the Petitioner's home. Further, that even his sister was not allowed to see Z on an occasion when she drove from Kingston to Manchester for the purpose of delivering a bicycle to Z.

[10] He mentioned an occasion when the Petitioner allowed Z to access a video on her tablet with an inappropriate scene which depicted a woman beating a naked man with a leather belt and when he contacted the Petitioner she advised him that Z had downloaded the clip and sent it to him.

[11] In his affidavit filed July 20th 2015 he indicates that he never ignored Z whilst in Malaysia and that he spent most of the time when not at work with her. He indicates that it is a fabrication to say that he suggested boarding school for Z. He insists that the three of them bathed together on numerous occasions. He denies ever sexually abusing Z and asserts that she has never touched his penis

and he will never harm her. He is of the view that Z is at an age that she can travel with him to Malaysia.

[12] He also indicated that he presently lives in Dubai and has been living there since February 2016. In cross-examination he indicated that Dubai is some nine hours ahead in terms of time and that it would take a day and a half to travel from Dubai to Jamaica or a little longer depending on the route and that he has no immediate plans to give up his job and return to Jamaica. His communication with the Petitioner, he says, is mainly by email as he does not have her cellular number.

[13] He was questioned about the incident when he bathed Z (referred to as the shower incident) and about the accusation of Z touching his penis without him reprimanding her. In describing the shower he indicated that the shower that they use is the one with the bath and indicated that it was Z who entered the shower whilst he was in the shower, having finished bathing and that Z would have been behind him. He was confronted with his affidavit evidence in which he had indicated that he bathed Z and himself at the same time, but he insisted that he had finished bathing, had come out and then bathed Z. He also insisted that it is not possible that Z could have touched his penis whilst they were in the shower. When asked if it would surprise him that Z told her mother that she touched his penis and he laughed he responded that it would surprise him. When asked if he found Z to be a dishonest child he replied that he hasn't spend that much time with her to be able to say. He maintained that whilst they lived together he would also bathe Z. He was also questioned about taking Z into her bedroom contrary to the directions of the Petitioner. He denied that this happened.

[14] In respect of the Heritage Fund he indicated that it is for Z's tertiary education and that at on maturity a cheque would be issued in both their names. He asserted that he does not believe that an eighteen year old should be given US$100,000.00 to do as she pleases if she is not pursuing tertiary education.

[15] In response to the Respondent's affidavit the Petitioner filed an affidavit on April 30, 2015. She requests that the Court refuse the Orders sought by him until and unless he participates in counselling sessions and parenting classes. She also gave sworn testimony and was subjected to lengthy cross-examination. It is her evidence that Z was one year old when they both arrived in Malaysia. Further, that whilst in Malaysia she became frustrated as the Applicant was not involved in Z's life and he was too busy to accommodate them and that when Z was two years old he even tried to convince her to send Z to boarding school in Malaysia. She indicates that it is not true that he bathed Z whist in Malaysia as it was she who attended to Z's personal care.

[16] In response to the Respondent's allegations of being denied access to Z, she asserts that while she does not deny him access, since August 2013 she has limited same to supervised access and that this is because of what transpired in August 2013. According to her on that occasion it was the Applicant who requested access to Z and was allowed access for two weekends. She said she had expressed to him her reservation in not having a female present to attend to Z's personal care and he assured her that his mother would be present. Despite that she says she subsequently discovered that his mother was not present and that Z had a bath with him during which she touched his penis and he laughed. She is of the view that it was inappropriate for the Applicant to bathe with Z and to allow her to touch his penis without reprimand.

[17] She indicated that she reported the incident to the Child Development Agency. She vehemently denied that whilst they lived in Malaysia they bathed together however she recalled two or three occasions when they were in Malaysia when he forced himself into the shower with her and Z and she had expressed her discomfort with that and he left. She reported that on another occasion in April 2014 the Respondent visited Z at her family home and she specifically told him that she did not want him to enter Z's bedroom but when she wasn't looking he took her to a bedroom at the back of the house and when she entered she saw both the Respondent and Z on the bed and he had a very guilty and suspicious

look on his face. She admits that she did on an occasion after the shower incident allow Z to spend a day with him but this was before she found out what had transpired.

[18] She admits that Z's paternal grandmother brought gifts to Z at school but says that was her choice and further, that the sister when she delivered the bicycle never indicated a desire to see Z. She pointed out that Z suffers from a condition known as "twenty nail dystrophy" which manifests itself when Z is under stress. She indicates she does not wish for Z to spend any extended period with the Respondent in Malaysia as he is incapable of taking care of her in the manner that Z needs to be taken care of. Further, that he has a violent temper and she had observed, on an occasion, him shaking Z violently when she was crying and loudly shouting at her to shut up.

[19] In cross-examination, when asked if she wished for the Respondent to play a part in decisions concerning Z she replied that all parents should play a part in their child's life and that it would be best for him to play a part in decision making. She insists however that access should be supervised. When questioned about whether the three of them would shower together in Malaysia she explained that it was the Respondent who would force himself into the shower with them but then went on to say that there were a few occasions, two or three times that they may have showered together which she allowed, but that it was not a regular, everyday thing.

[20] She agreed that they did attend counselling with a professional counsellor, but that this did not go well. She denied leaving before it ended and insisted that there was nothing more to discuss. She indicated that although the Respondent attended counsel pursuant to her recommendation, she would still not allow him unsupervised access because he betrayed her trust. She indicated that the same would apply to Z's paternal grandmother as she has threatened her and she has a drinking issue. She admitted that even before the time when these threats were made the grandmother was never allowed to take Z on her own. In respect of the

Respondent's siblings she also said she wouldn't allow Z to go anywhere with them as she doesn't know them in that way.

[21] With respect to the Heritage Fund she indicated that the Respondent has told her that he was subscribing to the fund for both of them and that she is not prepared to remove her name from it

SOCIAL ENQUIRY REPORT

[22] A Social Enquiry Report dated December 7, 2015 was prepared pursuant to a Court Order made on March 23, 2015. The probation officer interviewed both parties, the Petitioner in person and the Respondent by telephone. Based on the interviews the probation officer indicated that Mrs. S desires to have full custody of Z while Mr. S is not contesting that decision, but wishes to have regular contact with Z and less interference from the mother. The homes of both of Z's grandmothers were examined and it was confirmed that Z currently lives at the home of her maternal grandmother and would stay at her paternal grandmother's house when spending time with her father in Jamaica. Observations made at the home of the paternal grandmother revealed a room identified as Z's and that the sole person in residence is the paternal grandmother when Mr. S is away. Observations made at the home of the maternal grandmother revealed that Z shares a bedroom with her mother and at the front of the yard there is an expansive space to accommodate play.

[23] Based on the observations of Z the probation officer found her to be much attached to her mother but that she views her father mostly as a parent who gives gifts. Further, that Z did not appear to be negatively impacted by the breakdown in the family structure and seems quite settled in the maternal extended family home.

[24] In respect of Z's education that was found to be satisfactory. It was noted that a dermatologist diagnosed Z as suffering from "Twenty-Nails Dystrophy" but she is responding well to treatment. In respect of supervision it was noted that both

mother and grandmother are available to offer supervision. In respect of contact with father and extended family it was observed that the paternal grandmother participates in significant milestone moments of the child and is open to increased contact but the child's mother is hesitant. It was noted that the child interacts consistently with mother and maternal relatives but is not allowed to visit the paternal grandmother regularly. The mother when confronted expressed feelings of not being accepted by the paternal grandmother.

[25] The probation officer mentioned that the mother had reported the father's actions to the CDA and that when probed, she confirmed that while married, the father would shower with her and the child on occasions. As a result of the investigation it was found that this action was a normal practice for the family because parents and Z would shower together before the parents separated. The probation officer recommended that the restriction on unsupervised contact with paternal relatives should be reconsidered and that the child be given an opportunity to form friendships with paternal cousins to create balance in identity formation.

The probation officer articulated her conclusion in this way:

> *"Z..., in the formative stage of her development, could benefit from the presence of both parents in that they could participate cooperatively in her upbringing. ...It is evident from child's interactions with mother that, she is accustomed to being in her care and she is closely bonded to her....She (meaning Z) reportedly enjoys having contact with her father via Skype but gets distracted easily, this is normal for her age. But direct contact should be facilitated and encouraged through visits...To ensure a healthy development of self, Z...needs to be given the opportunity to interact with both sides of her family. The recommendation is therefore made that Z...remain in the full custody of her mother S and father S be given visitation for time specified by him due to his work schedule..."*

THE HERITAGE PLAN

[26] By way of Affidavit filed July 23, 2015 the Respondent (now Applicant) indicates that he took out a Heritage Plan for Z when she was born and that the Petitioner's name was added to it but she has not made any contribution to the plan. Further, that it is his intention that only Z benefit from this investment and that he has asked the Petitioner to remove her name from the plan but she has refused. He points out that with her name on the plan she has certain rights if Z does not pursue higher education and would be entitled to collect the funds or at least half of it. He is of the view that if Z does not pursue tertiary education the fund should properly be considered an investment which should revert for his sole benefit. He expressed the view that if he were to close the plan now Z would lose the benefit that the plan would afford in pursuing tertiary education as said benefits are non transferable and are for the sole and singular purpose of allowing parents to make provisions for their children's future educational pursuits. A copy of the Heritage Plan was exhibited to his affidavit. The current value was then US$20,027.06.

[27] In response, the Petitioner has indicated that she has no intention of personally benefitting from the Plan and agrees that the entire fund shall be solely for Z's benefit. Further, that on making contact with the Heritage Office she received information that on maturity, whether Z pursues tertiary education or not, two cheques will be issued, one in Z's name and the other in the name of the Respondent and her and that if she did not wish the cheque to be issued in her name she could direct them not to do so. She has expressed that she is prepared to direct the Heritage Fund to issue the cheque in Z's name and trusts that the Respondent will also agree. In the circumstances, she sees no reason why her name should be removed from the fund. If Z does not attend a tertiary institution she is of the view that Z should receive that money to assist her in forging her way as an adult.

[28] She requests that the Court make an Order that both she and the Respondent sign all documents required to give Z all monies held in the Heritage Fund on maturity.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

[29] Counsel for the Respondent submitted that the issues for the Court's consideration should be as follows:

1. Whether the Court should grant the parties joint custody of the relevant child;
2. Whether the Respondent is to be given liberal residential access to Z within or outside of this jurisdiction; and
3. Whether the Court is to compel the Petitioner to remove her name from the investment Heritage Education Funds International.

[30] In respect of the first issue it was submitted that the welfare of the child must be the paramount consideration. In arguing that joint custody was in the best interest of the child, reliance was placed on the case of **Jussa v Jussa** [1972] 2 All ER 600 where it was established that joint custody is preferred to sole custody as each parent ought to be encouraged to play an active part in the life of their child and because it encourages the parties to make an effort to get along for the sake of their child and that one should only resort to sole custody when the relationship between the parties is acrimonious. Counsel submitted that there was no acrimony between these parties and the tenor of their conversations reflects that.

[31] It was also submitted that the Petitioner has proferred no reason why sole custody should be granted in her favour and that the fact of the Respondent living and working overseas does not preclude him from playing an active role in Z's life. Further, the fact of the Respondent's occupation should not preclude him from being able to share custody. Reliance was placed on the recent decision of **Mark West v Evelyn West** [2015] JMSC Civ.54 where the facts were somewhat

similar. The father was also an airline pilot seeking joint custody with the mother and the relationship between the parents seemed to be somewhat similar as well.

[32] On the issue of access counsel submitted that again the welfare of the child is the paramount consideration and that the principles outlined in **AH v JH** [2014] JMSC Civ. 68 should be of great assistance in providing guidance on whether access should be supervised. Counsel also relied on **M v M** [1973] 2 All ER 82, where the court pronounced that no court should deprive a child of access to either parent unless it was wholly satisfied that it was in the interest of that child that access should cease. In another case **In Re F (a minor)** [1995] 3 All ER 641 the court made an order permitting the child to travel outside of the jurisdiction. Further, that the Court should not place reliance on the allegation of impropriety on the part of the Respondent because the Petitioner cannot speak with accuracy as to what Z told her teachers and the words used by the Petitioner in describing what she alleges took place are inflammatory. It was submitted that in any event the Respondent was never charged or arrested and he maintains that Z did not touch his penis. Counsel asked the Court not to bend to the whim and fancy of the Petitioner but to place Z at the focal point of the analysis.

[33] Counsel asked the Court to place significant weight on the social enquiry report which suggests that the Petitioner is seeking to maintain control and has blocked normal bonding between father and child.

[34] In respect of the Heritage Fund it was submitted that the Court should treat with it as an investment in accordance with section 14 of the Property (Rights of Spouses) Act and find that since the Petitioner has made no contribution to its acquisition then it should not be for her benefit.

SUBMISSIONS ON BEHALF OF THE PETITIONER

[35] Counsel for the Petitioner outlined the issues she found relevant for the Court's determination. They are set out below:

1. Whether N should be granted sole custody of Z;
2. Whether J's access should be supervised;
3. Whether Z should be allowed to visit the respondent in his home of residence in Malaysia; and
4. Whether N's name should be removed from the Heritage Fund.

[36] In determining the question of custody counsel submitted that the Court should consider what is in the best interest of the child and that whilst the conduct and wishes of the parents are also considered, the welfare of the child is of first and paramount importance. She cited sections 7 and 18 of the Children (Guardianship and Custody) Act which give the court power to make orders for custody and access.

[37] Reliance was placed on the case **Dennis Forsythe v Idealin Jones** SCCA 49 of 1999 (April 6, 2001) in which the paramouncy of the child's interest was emphasized. Further, that in the context of this case the conduct of the parties in so far as that conduct has or may in the future impact Z's welfare must necessarily weigh heavily in the Court's deliberations. Counsel suggested that in light of J's job and circumstances he would not be able to play more than a spectator role in Z's life and so will not be able to participate in decision making concerning her day to day welfare. As such he should not be granted joint custody. Further, that the child's best interest will be served if the status quo were allowed to remain, that is, Mrs. S's de facto sole custody of Z ought to be formalized and she be granted care and control.

[38] In relation to the complaint of Z touching the Respondent's penis without any reprimand from him it was advanced that the Petitioner is of the view that her daughter's well being will be threatened if the child is left alone with the

Respondent. Further, it was submitted that there is absolutely no evidence of joint enterprise for Z's welfare. Counsel further highlighted the principle expounded in cases such as **Caffell v Caffell** 1984 FLR 169 that the best interest of a child is not generally served by an order for joint custody unless the parents demonstrate that degree of maturity and such an ability to communicate and co-operate with each other as to give the court some confidence that the order for joint custody will be workable. The case of **Fenton v Fenton** FD 1797/2003 was recommended for my consideration. In that case Brooks J expressed that parties who have joint custody of a child should be able to discuss together the welfare of the child in a manner which is best conducive to the welfare of the child.

[39] Counsel submitted further that the Respondent has been inconsistent with his account of what happened when he had Z for the weekend and so this has marred his image as a responsible and caring father who would not put his daughter's moral and physical welfare at risk.

[40] In respect of access it was submitted that access should not be granted where it is not in the welfare of the child and suggested that the Respondent has been dishonest in terms of what he said happened during the trial and what he swore to in his affidavit because in his affidavit he admitted that he showered with Z but denied that she touched him but during the trial when confronted he denied showering with Z. On the other hand it was submitted that the Petitioner was firm and consistent in her recollection that when she first confronted the Respondent he admitted that he had shared a shower with Z but didn't think it was a big deal.

[41] Counsel submitted that the instant case is similar to **Fenton v Fenton** (supra) in which the court only ordered supervised access. She asked that the court take into account the decision in **M v M** (supra) where the Court indicated that in order to achieve a balance it will not grant custody to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse. She submitted that Z's interest will be best served with supervised access.

[42] In respect of the Heritage Fund she contended that the request of the Respondent if granted could serve to exclude Z completely from the fund and to keep all the monies for himself if she does not pursue tertiary education and that since the fund was created for Z's benefit she should benefit from it whether or not she pursues post-secondary education. She submitted that it is best that the Fund remain intact. She further contended that the Heritage Fund should not be treated as property under the Property (Rights of Spouses) Act.

ISSUES

[43] I find the issues to be three fold. Firstly, whether joint custody should be granted to both parties or whether sole custody should be granted to the Petitioner. Secondly, whether the Respondent should be given unsupervised access and allowed to take Z outside of this jurisdiction and thirdly whether the Petitioner's name should be removed from the Heritage Plan.

WHETHER JOINT CUSTODY SHOULD BE GRANTED TO BOTH PARTIES OR SOLE CUSTODY TO THE PETITIONER

[44] Section 7 of the Children (Guardianship and Custody) Act makes provisions for the custody of children and provides as follows:

> "(*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."*

Section 18. also 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 children 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".*

[45] For the purpose of this analysis it is essential to get a sense of what is meant by custody. Sachs L.J. in **Hewer v Bryant** [1969] 3 All E. R. 578 at page 585 expressed his view of what is meant by custody in this fashion:

> *"In its wider meaning the word "custody" is used as if it were almost the equivalent of "guardianship" in the fullest sense-whether the guardianship is by nature, by testamentary disposition, or by order of a court....Adapting the phraseology of counsel, such guardianship embraces a "bundle of rights", or to be more exact, a "bundle of powers", which continues until (age of majority)...These include power to control education, the choice of religion and the administration of the infant's property. They include entitlement to veto the issuance of a passport and withhold consent to marriage. They include, also, both the physical control of the infant's personal property until the infant attains years of discretion..."*

[46] It should be noted that section 7 of the Children (Guardianship and Custody) Act confers on a mother and a father equal rights to custody of a child. Although several cases have mentioned the mother factor it does appear that less and less weight is being given to the mother factor and that the Court's concern should be what is in the best interest of the child. This is reflected in the decision of the Jamaican Court of Appeal in **Edwards v Edwards** (1990) 27 J.L.R. where Rowe P. pointed out that the preferred role of a mother is not a rule of law but rather a rule of common sense and in fact highlighted that in countries like Australia the mother factor is viewed as one of the factors to be weighed along with other

factors in the case. A similar position was reflected in the decision of **Christopher Buckeridge v Donna Shaw** RMCA No. 5/98 delivered July 30, 1999.

[47] Section 7 expressly provides for the Court to have regard to the welfare of the child. The other factors stipulated are the conduct of the parties and the wishes of the parents. In this case both parents wish to have custody of the child so this would not be a determinative factor. The wishes of parent would be relevant where for example, a parent may not wish to have custody then the Court would be hesitant to award custody to such a parent. On an assessment of the case law it seems that there are several factors that the Court should have regard to. Among the factors are the conduct of the parties, the relationship between the parties, the status quo and last and paramount among the four is the welfare of the child.

CONDUCT OF THE PARTIES

[48] Allegations of poor conduct have been by each party against the other. The fact that conduct of the parties is a relevant consideration was reflected in **Dennis Forsythe v Idealin Jones** SCCA No.49 of 1999 at page 8 where Harrison J.A. as he then was sets out the considerations for a court determining custody of a child. He listed what he viewed as primary considerations which he suggested must be considered along with the conduct of the parents, as influencing factors in the life of the child, and its welfare, with the welfare being the top item.

[49] I will examine firstly the conduct of the Petitioner. The Respondent alleges that on October 29, 2014 Z contacted him and asked him to watch a clip that was sent to his phone and that the clip showed a woman beating a naked man with a leather belt. He says he immediately contacted the Petitioner and spoke to her about this. The Petitioner's response is that Z had accidentally sent the clip to the Respondent and that on occasions Z would use her phone to communicate with the Respondent. She indicated that she felt horrible that Z saw the clip and used the opportunity to explain what it meant and that it was wrong for the woman to

be so cruel to her husband. She is satisfied that Z is not emotionally scarred as a result of this.

[50] This is only one allegation of poor conduct on the part of the Petitioner. Even on the Petitioner's account this smacks of some carelessness on her part in knowingly allowing the child to access her phone which contained material which is less than appropriate for children. However, this is a one off case and the steps indicated by the Petitioner to have been taken seemed sufficient to mitigate any damage that could have been caused. I do not think that this alone would take her into the category of being an undesirable parent nor do I think that this conduct should be used against her.

[51] There are allegations made by the Petitioner in respect of the Respondent that require more analysis. In summary, the allegations are that whilst the Respondent was showering with Z, Z touched his penis and he laughed and further did not reprimand her . On a separate occasion the Petitioner indicates that the Respondent was visiting Z at the Petitioner's family home and he took Z into a back bedroom although the Petitioner had warned him about taking Z into her bedroom. A third allegation made by the Petitioner is that the Respondent is abusive and on one occasion when the parties were living in Malaysia he was seen shaking Z whilst she was crying.

[52] These allegations, if found to be true, could potentially be serious and deserving of some further investigation. I will analyse them in the order in which I have referred to them above.

[53] The first incident referred to as the "shower incident" is said to have been reported to Z's teacher. There is actually no indication in the Petitioner's evidence that Z reported the "shower incident" to her directly. Although the suggestion was made in cross-examination of the Respondent, that he laughed when Z touched his penis, this is not a part of the evidence before me. The evidence is that a teacher brought the "shower incident" to the Petitioner's attention. There is no indication as to the exact words that were used by Z and

who was it that said that subsequent to Z touching the Respondent's penis he failed to reprimand Z and laughed at her action. This would have been important in light of the Petitioner's expression of concern about the Respondent's parenting skills in that he failed to reprimand Z about her inappropriate act. Not only is there no direct evidence on this issue but also no information on whether or not based on the circumstances Z's act was tantamount to a touch or caress of which the father was aware, or was a touch in passing. The evidence at best would be hearsay and so I have to view it with some caution.

[54] In any event the Petitioner is not a psychologist to be able to say if that a reprimand in those circumstances would have been the best response. She has commented on the inappropriateness of the Respondent showering with Z and has pointed out that although this occurred when they lived together in Malaysia she didn't consent to it and it was the Respondent who forced himself on them. However in cross-examination she admitted that there were a few occasions that they showered together which she permitted. The probation officer has indicated that the Child Development Agency in their investigations found that it was a normal practice for the family to shower together. This lends some credence to the Respondent's account. I therefore accept the evidence that it was a custom for the three of them to bathe together as a family and that this was not foreign in their family and so it is not for me to comment on the inappropriateness or otherwise of a joint family bath if this is what the parties were accustomed to during happier times.

[55] Counsel for the Petitioner has suggested that the fact that he chose to bathe Z in the shower as opposed to the bath which was larger and also available is suggestive of some sinister motive on his part. I have analysed those suggestions and I have to say I fail to see the impropriety in using the bath over the shower, nor am I able to impute any sinister motive to that choice.

[56] In any event these are mere allegations which have not been subject to any scrutiny, as Z was never called upon to give any evidence of this and the

allegations seem to be at best third hand hearsay. The danger inherent in accepting this evidence without more is evident. Moreover I have to juxtapose that position over the evidence of the Respondent who indicated that he had just finished bathing himself when Z entered the shower and he then bathed her. He denies any touch by Z of his private part. I have assessed his evidence and his demeanour and I have to say despite it being inconsistent with his affidavit evidence where he had indicated that he bathed Z and himself at the same time, on a balance of probabilities I accept that there was no touch by Z of his private part of which he was aware. Despite the custom of the family showering together, in light of the inherent curiosity of young children and the tendency to explore I think it is imprudent for this practice to continue.

[57] I also have to consider the incident in the back room. It is suggested by the Petitioner that he must have taken Z to the back room for some sinister motive, especially because of the look of suspicion on his face when found out. However I am unable to say that taking her from the living room to the back bedroom without more suggests that he either intended to or did anything adverse to Z.

[58] The Petitioner has indicated that the Respondent has a violent temper and was observed by her to be shaking Z when she was crying and loudly shouted at her. The Respondent did not specifically address those allegations in his affidavit evidence although he does say that he has never harmed Z or any other child.

[59] On a full assessment of the material before me I am of the view that insufficient evidence has been presented to me to satisfy me on a balance of probabilities that the Respondent has done anything adverse to the child or that his conduct towards her is less than desirable. I have assessed both parents and I have no doubt they love Z dearly and that if any of the alleged actions had occurred during a happy marriage they perhaps would not have been viewed in the manner in which they are now being viewed. I therefore find nothing in the conduct of either parent that would prevent me from making an order for custody in favour of either of them.

RELATIONSHIP BETWEEN THE PARTIES

[60] Although not expressly provided for in the Children (Guardianship and Custody) Act the relationship of the parties has featured as a relevant consideration in many authorities dealing with custody of children. This no doubt has its genesis in common sense because if the relationship between the parties is acrimonious, their ability to make decisions for the benefit of the child may be compromised. This was indicated by Marsh J. in the case of **Robert Fish v Fenella Victoria Kennedy** 2003 HCV0373 where at page 13 the following was highlighted:

> *"As a 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 would be workable....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".*

[61] In the case **Jussa v Jussa** [1972] 2 All ER 600**,** Wrangham J at page 603 expressed the following:

> *"...I recognise that a joint order for custody with care and control to one parent only is an order which should only be made where there is a reasonable prospect that the parties will co-operate. Where you have a case such as this the present case, in which the father and the mother are both well qualified to give affection and wise guidance to the children for whom they are responsible, and where they appear to be of such calibre that they are likely to co-operate sensibly over the children for whom both of them feel such affection, where you have that kind of situation, it seems to me that there can be no real objection to an order for joint custody".*

[62] From the discussions that follow this pronouncement by Wrangham J, it is clear that such an order is usually viewed as exceptional. Further, that such an order should only be made where both parents are unimpeachable. What is also patently clear is that the welfare of the child is the paramount consideration. If the parties are not on good terms this may militate against the interest of the child if the parties are not able to agree on important matters concerning the children.

[63] Similarly in the case **Michelle Angella Johnson v Lawrence Michael Passley** [2015] JMSC Civ.135, Laing J said:

> *"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".*

[64] Counsel for the Respondent has referred the authority of **Mark West v Evelyn West** (supra) to me. In that case despite the fact of difficulties in communication between the parties, the Court felt that an order for joint custody would force the parties to recognise their responsibility and focus their concerns on the welfare of the child. It has been suggested by the Petitioner that the relationship between the parties is acrimonious. The Respondent has indicated that this is not so. An assessment of their relationship requires an analysis of their conversations. There is some evidence of this through the emails exhibited and on May 11, 2011 the Respondent sent this message:

> Resp: Happy Mother's Day have a great day
>
> Pet: Thank you. Kindly reimburse funds for teacher's day gifts, totalling $3700.00.

[65] On an assessment of this and other emails, I do not find that there is evidence of acrimony, but rather strained, indifferent conversations. The use of the word acrimonious would be too strong a word to describe the relationship between the two, although it does appear that there is much love lost between them. Based on the authorities relied on, the fact of acrimony or no acrimony is not the only

test. I am guided by the words of Marsh J in the **Fish** case in which he cautions that the Court has to be satisfied that the parties have demonstrated a degree of maturity and such an ability to communicate and cooperate with each other so as to give the Court some confidence that the order of joint custody will be workable.

[66] What is clear from the conversations is that there is a lack of meaningful communication with respect to matters concerning Z on their part and the conversations seem to be generally about securing financial assistance from the Respondent. On the occasion when the parties were together at an arranged counselling session, the parties did not seem to be able to arrive at any common ground and there are suggestions that it was not even completed. Additionally, there is no evidence that they even share each other's telephone numbers and their communication is largely by way of email.

[67] In the **West** case the Court found that although an examination of the 'whatsapp' message history demonstrated some hostility between the parties, the hostility seemed to be about man and woman issues and not about the infant, and found no evidence that the parents cannot both make decisions about such matters as school, religion and health care and so found that there was no evidence presented that would justify an award of sole custody to the mother. The learned judge found that an award of joint custody would allow the parent who does not have care and control some measure of participation in the decision making process.

[68] In this case the conversations between the parents are mostly confined to the child. If the nature of the relationship were the only consideration for the Court I would venture to say that a finding similar to that of the **West** case would have commended itself to this Court based on the fact that the conversations seem not to reach the level of acrimony. There are however other considerations in the instant case.

STATUS QUO

[69] In the **Fenton v Fenton** (supra) **case**, Brooks J., in considering the question of custody, stated that one of the aspects to be assessed in considering the best interest of the child is whether the existing state of affairs should be maintained and then went on to award sole custody to the mother also taking into account the inability or unwillingness of the parties to work harmoniously for the child's benefit despite their personal differences. There is usually a reluctance on the part of the Court to adjust the status quo in respect of a child unless there are good reasons.

[70] The Petitioner herein now has de facto custody of Z. She is the one making all the decisions with respect to Z's education, religious affiliation and medical needs. The Respondent has not had a say in the making of these major decisions in Z's life. This is a consequence of the breakdown of the marriage, the distance between the parties and the restricted access. Based on the SER the child seems to be well taken care of and the de facto arrangement seems to have enured to her benefit and development. So then the question for the Court is whether or not a change in her custody arrangements will be in her best interest. Practically speaking, a change in her custody arrangements would mean that the Respondent would have a say in the choice of her schooling or her church going. He would also be able to veto the issue of her passport.

[71] I pay significant regard to the Social Enquiry Report in respect of this issue. Based on the report Z does not appear to be negatively impacted by the breakdown in the family structure as she seems quite settled in the maternal extended family home. The report spoke also of the child being accustomed to being in the care of the mother and that she is closely bonded to her. The recommendation is that she remains in the custody of her mother. As it relates to her schooling, education it appears that she is well taken care of. The Respondent has not suggested otherwise. Status quo however cannot be considered by itself and it certainly would not outweigh what is in the best interest

of the child. In this case though, since both parties are agreed that care and control should remain with the Petitioner any change in this status quo would be purely academic.

WELFARE OF THE CHILD

[72] This is the paramount consideration for the court. This should entail a consideration of the physical, emotional and educational needs of the child. Welfare is to be interpreted in the widest sense taking into account the needs, wants, characteristics and peculiarities of the child. Z is a little girl, just about seven years of age. She is clearly attached to the Petitioner. However, this is not so much a concern because the Respondent is not seeking to remove her from the care and custody of the Petitioner so even if he were to be granted joint custody there is a concession that care and control ought to be resident in the Petitioner.

[73] The evidence demonstrates that both parents love Z and they are concerned for her best interest. The Respondent has not developed a sufficient relationship with the child, largely because of the restricted access and also because he does not live within this jurisdiction. In fact in his first affidavit filed December 18, 2014 he indicated that he was living in Malaysia but since February of this year he lives in Dubai. He has not lived in Jamaica since 2010 and has no immediate plans to live here in the near future. In fact in his affidavit evidence he refers to Jamaica as the place where he spends his vacations.

[74] This fact has weighed heavily on my mind. He now lives in Dubai which is a day and a half away from Jamaica and nine hours ahead of Jamaica in terms of time, so it may be safe to say when it is day time here it is night time there. If for example an important decision needs to be made within a short space of time, contact with him may not be immediate and it would take him shortest travel time of 24 hours to travel to Jamaica if need be. Children are such that one cannot predict or even speculate on the number and nature of events that can take place in their lives. If there were even an emergency with respect to her education or

her health he would not be easily accessible. Technological advances have made communication so much easier and I am cognizant of this, however I am further concerned that he does not even have the Petitioner's cellular number and there is no evidence that she has his numbers in Dubai. Their only communication is via email which although instantaneous, unlike a phone call, is dependent on an individual making the necessary checks to their email account.

[75] I have to balance all of those concerns with what is in the best interest of Z. Z's health is not perfect. She may have need of a medical specialist at short notice. There are varying number of events that can take place in the life of a child that may affect their health, education and even their religious upbringing. In the **West** case the father was also an airline pilot yet the Court felt that joint custody was appropriate. The main distinguishing feature though is the fact that Mr. West although similarly an airline pilot and said by the mother to be hardly ever present in this jurisdiction, was resident in Jamaica. I find the **Fish** case to be instructive where the father lived in the UK and the mother had deponed that the great physical distance between them precludes joint decision making. The Court made a decision which resulted in a change in the status quo by revoking a consent order for joint custody.

[76] In light of what I have expressed I cannot say that I am convinced that an order for joint custody in these circumstances would be in the best interest of Z. In fact I am satisfied on a balance of probabilities that such an order would not be in her best interest. Regard should also be given to the Social Enquiry Report. It is of note that the probation officer indicated that Mr. S is not contesting joint custody although he has however contested it here in court. The recommendation of the probation officer with respect to custody is that Z remain in the full custody of her mother. Although this is not dispositive of the issue, it provides a useful guide.

[77] Whereas an order for joint custody may be in the interest of the Respondent and although in respect of the other considerations they weigh in his favour, in respect of Z I am of the view that an order for joint custody would not be in her

best interest because of the great distance that separates him from her. The words used by Winn LJ in **P (LM) (otherwise E) v P (G E) [1970]** 3 All E R 659 at 661(e) are of assistance when he said that "It is not because of any defect of the father, but merely for the sake of the child's own welfare and future...". Taking into account the distance that separates the Respondent and Z with the less than ideal level of communication between the parties I am of the view that an order for joint custody would militate against Z's interest. In all the circumstances the Respondent's application for joint custody fails. The Application of the Petitioner for sole custody succeeds.

ACCESS

[78] Similarly, section 7 of the Children (Guardianship and Custody) Act requires a Court, when considering making an order in relation to the right of access to have regard to the welfare of the child, the conduct of the parents and to the wishes of the parents. The parents here have conflicting wishes. The Petitioner wishes that access be supervised whereas the Respondent wishes to have unsupervised access. In determining whether or not the Respondent should be granted unsupervised access, again the paramount consideration is the welfare of the child. The welfare of a child usually dictates that a father should be able to preserve his natural links with his child. (See Principles of Family Law, S.M. Crete 4th Edition page 400). In the English decision of **M v M** (supra), 82 at page 88 Latey J. sets out what in his view is meant by access:

> *"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..."*

Latey J. went on to say that save in exceptional circumstances to deprive a parent of access is to deprive a child of an important contribution to his emotional and material growing up in the long term.

[79] Supervised access has been imposed by the Court in a number of decisions**.** The Court in **Fenton v Fenton** (supra) had to consider whether or not to grant supervised access and in fact made an order for supervised access in circumstances where allegations were made of the father exposing the child to drugs, and although the court found it to be based on hearsay, accepted that the child commenced using said substances whilst in the father's care. Another case in which supervised access was imposed was the case of **AH v JH** (supra) however in this case the father actually admitted that his hand came in contact with the child's penis and other allegations of sexual impropriety. Although the judge indicated that the allegations of sexual molestation were not established, he found that the state of affairs disclosed a degree of suspicion that one or more of the allegations could have occurred and in addition there were incidences of violence.

[80] This case is dissimilar to both the **Fenton** and the **AH v JH** case in respect of the allegations made. In any event I have found the allegations made to be lacking in foundation. I however still have to consider whether in the interest of the child supervised access is necessary. In my findings earlier I did accept that he showered with the child and suggested that this practice should cease. I bear in mind that the Petitioner has not only restricted access of the father but also of the grandmother and the child's aunt. She suggested a reason regarding the grandmother, that she is an alcoholic but no such reason has been proferred for restricting access to the aunt or Z's other paternal relatives except that the child doesn't know them. How would the child get to know and be comfortable with them without spending time with them? I have assessed the evidence of the Petitioner and I have formed the view that the Petitioner has deliberately restricted access for no good reason and I have even felt that the suggestions of the Respondent that she is fabricating tales may even be accurate. All of the Respondent's family members, according to her seem to be wanting and are restricted from accessing Z.

[81] It would not be in the best interest of Z that she is only allowed to foster relationships with one side of her family. I bear in mind that the child does not have a close relationship with the father at this point in time and in fact views the father mainly as a provider of material things. In light of this she may be reluctant to spend time with him without her mother's presence and so it may be wise to have the child's grandmother or aunt present initially. However, I do not think in the circumstances I would compel this, I would only recommend it. If the father-daughter relationship is to develop freely they may need to spend quality time together as a family unit without an overseer. I do not find that the material before me in respect of the conduct of the father is such that unsupervised access would be to the detriment of the child.

[82] The Petitioner had indicated that she is reluctant to allow the Respondent unsupervised access unless and until he undergoes therapy sessions and parenting classes. The Respondent has indicated that he did attend parenting classes with the Petitioner however this was not completed because the Petitioner walked out. The Petitioner has agreed that he attended counselling with her and although according to her the session was completed, she is still reluctant to allow him unsupervised access. Although I am of the view that the Petitioner has Z's best interest at heart I have also formed the view that she has used her own feelings to colour what is best for Z. It is noted that with respect to the "shower incident" she kept repeating that he breached her trust in him. The Respondent has also demonstrated that he has Z's interest at heart and that was no doubt one of the reasons he attended the counselling session and so I take that into account.

[83] The probation officer after interviewing the parties and conducting an in-depth examination into their circumstances and that of Z did not make any recommendation for restricted access. In all the circumstances, I see no reason to order that access to the child be supervised.

[84] The next issue that must be determined is whether the Respondent should be allowed access outside of Jamaica. The Respondent lives overseas and it appears he has no immediate plans to return to live in this jurisdiction. It would certainly be in Z's interest to be able to spend time with her father at his home and be exposed to other cultures. I am concerned however at this point in time about her travelling so far away from her mother at this tender age in light of the fact that she has not yet developed a sufficient relationship with the Respondent. However, I am of the view that with time she may be able to do so once they have developed a father-daughter relationship and may be comfortable travelling with him without her mother being present. She is now just seven years of age. I am of the view that perhaps when she is nine years old, she would be old enough to travel with her father outside of Jamaica and I am prepared to make an order designating that.

THE HERITAGE PLAN

[85] The question for me to determine in respect of the Heritage Plan is whether or not the Petitioner's name should be removed from the Plan. It has been submitted by the Respondent that this Plan should be treated as the property of the parties as it is an investment and should be governed by the provisions of section 14 of PROSA and determined based on the contributions made to it. It should be noted that at the time these three matters came up for hearing there was an application pursuant to PROSA before the Court and that was among the matters resolved amicably. It is therefore not farfetched for the Respondent to be relying on the provisions of PROSA for the determination of this issue.

Under section 14 of PROSA property is defined as follows:

> *"any real or personal property, any estate or interest in real or personal property, any money, any negotiable instrument, debt or other chose in action, or any other right or interest whether in possession or not to which the spouses or either of them is entitled"*

[86] The Petitioner is seeking an Order that all the funds be given to Z on majority if she does not pursue tertiary education. The determination as to how to treat with

the Fund must be based on the current state of affairs. At this point in time Z's interest in the Fund has not been determined as the funds are being held by both parents ostensibly on trust for Z. The Respondent gave evidence that when Z reaches eighteen a cheque would be issued in the names of the parents and I accept that that is so. It would appear from that, that the parents would have the first right to decide how to use the funds. Based on that I am of the view that it would fall under the definition of property and be subject to the rules under PROSA.

[87] If the Heritage Fund were to be cashed in now the joint subscribers would be the ones to benefit. The Petitioner and Respondent are the joint subscribers. This suggests to my mind that they are the joint owners of this property. The equal share rule is only geared towards the family home. Other property ought to be subject to the considerations in section 14 pursuant to which the court is obliged to divide such property other than the family home, as it thinks fit taking into account factors such as contribution as well as such other factor or circumstance which in the opinion of the Court, the justice of the case requires to be taken into account. The meaning of contribution under this section includes the acquisition or creation of property including the payment of money for that purpose.

[88] The Petitioner has indicated that at the time the Fund was acquired the Respondent told her it was for both of them despite her indication that she did not have a cent to contribute. It has been the custom of the Court that in determining these kinds of issues the Court should look to the common intention of the parties as well as have regard for what is fair in the circumstances. This is evident in cases such as **Carlene Miller et al v Harold Miller et al** [2015] JMCA Civ. 42 where Dukharan J. pointed out that section 15 of the PROSA is also important in emphasising the legislation's stress on fairness. It authorises the court to alter the interests of the spouses in property if it is just and equitable to do so. It expressly provides that in any proceedings in respect of the property of the spouses or of either spouse (other than the family home), the Court may

make such order as it thinks fit altering the interest of either spouse in the property.

[89] The uncontroverted evidence in respect of the Heritage Fund is that the Respondent has been the only contributor although the Petitioner is named as a joint subscriber. On all accounts this is an education plan. I have formed the view that the Petitioner's name was placed as a joint subscriber, not because of any intention for her to benefit but because the parties were then married and it would be in the best interest of the child for both parents to be subscribers in the event one parent becomes unavailable. This Fund commenced when the parties were still a family unit and has continued although they have now been separated for over three years. It is of note that the effective date of the Fund is July 1, 2010 and the last contribution date is to be July 1, 2026 and the maturity date is July 31, 2027. The parties have been separated since February 2012 less than two years after the effective date. The Fund, if it continues along the projected path, would come to maturity over fourteen years after separation. On the basis that all contributions are solely made by the Respondent I am prepared to say that he should be entitled to the full benefit of it if Z does not pursue tertiary education.

[90] In the event I am wrong in finding that the Heritage Plan falls under PROSA I would have to be guided by my duty regarding the rules of equity. This is provided for in Section 48(g) of The Judicature (Supreme Court) Act. McDonald Bishop J in the case **Graham v Graham** 2006 HCV 03158 emphasized this point in a case dealing with an application under PROSA. This is what she pointed out:

> *"It should be noted that while the Act has outlawed the operation of the former rules and presumptions of equity and common law, this is only to the extent of the parties' transaction in respect of matrimonial property. It has not taken away the general right and duty of the court to conduct proceedings in accordance with the rules of equity. Within this context, The Judicature (Supreme Court) Act, s. 48 becomes instructive. This section provides for the concurrent administration of law and equity by the court in civil matters..."*

[91] That case is instructive on how to deal with matters which are not properly brought under PROSA. I am mandated to consider what in the circumstances seems just. The justice of the case would require me to consider what is in the best interest of the child.

[92] This Fund as it is named is an education Fund. It becomes available to the child once enrolled in a tertiary institution, for funding of tertiary education. The Petitioner has requested an Order that the fund should go to the child whether or not the child pursues tertiary education. In other words this child on reaching the age of majority would come into over US$100,000.00 to do with it as she pleases. There would be nothing wrong with this if this was what the parties intended when the Fund was created. If the parents had intended the Fund specifically for the benefit of the child to glide into adulthood then they could have taken out some other fund that provided specifically for this. These days there is no shortage of plans that can be taken out for that reason. However, when this fund was commenced the intention was solely for the tertiary education of Z and in fact this is the purpose of this Fund.

[93] I am of the considered view that in this day and age where there are an abundance of institutions offering tertiary education and no doubt in the next eleven years there will be many more the world over for Z to pick, choose and refuse. If armed with the prospect of this benefit Z chooses not to pursue any tertiary education, I am of the view that it would not be in her best interest to give this fund to her for her to spend as she desires or according to the Petitioner to forge her way into adulthood. In fact not only am I of the view that this would send a wrong message but it would be to the detriment of the parent who has spent the last sixteen or seventeen years contributing to this Fund.

[94] If Z does not pursue tertiary education these funds should not go to her but rather to the subscribers and they can then decide how to apportion it. If the Petitioner's name remains on the Fund it would mean that she would stand to benefit from half of the Fund although not having contributed a cent to it. Would it then be

equitable and just for a non-subscriber to benefit in these circumstances? The Petitioner is saying that the Respondent told her the Fund would be for both of them. The parties have been living apart since 2012, by the time of the Z's majority they would have been separated for over sixteen circumstances I am of the view that it would not be just or equitable for the non contributing party, who has not been a spouse for approximately sixteen years to have an equal share. That is exactly what could happen if the Fund were to remain as is. I am of the view that the party who has contributed exclusively should be the one to benefit if Z does not pursue tertiary education and I am also of the view that if she chooses not to pursue tertiary education the entire fund should not be given to her but rather it should be dependent on the contributing party to decide how much, if any she should get. If the Petitioner's name remains on the fund it may result in the plan being closed which would also not be in the interest of Z.

[95] In all the circumstances I am of the view that the justice of the case and the interest of Z require that the Petitioner's name be removed from the Plan. If she fails to sign in order to cause this removal of her name then the Registrar of the Supreme Court is empowered to sign on her behalf.

DISPOSITION

1. That sole custody of the relevant child Z be granted to Mrs. S with care and control also to her.

2. That Mr. S be granted liberal, unsupervised access to the said child while in this jurisdiction on alternate weekends from 5pm on Friday evenings to 5pm on Sunday evenings and also with reasonable access during his visits.

3. That Mr. S be granted residential access to Z outside of this jurisdiction during the Summer holidays for four weeks commencing in the Summer of 2018.

4. That Mr. S shall give Mrs. S one month's notice of an intention to take Z outside of this jurisdiction and must provide a contact number and address at which the child can be reached.

5. That Z shall travel outside of this jurisdiction with either her father or a relative to be agreed on by the parties.

6. That the Petitioner shall sign the necessary documents to have her name removed from the Heritage Education Funds International as joint subscriber.

7. That if the Petitioner fails to sign the necessary documentation within fourteen days of the date of this Order that the Registrar of this Court is empowered to sign on her behalf.

8. Each party to bear his/her own cost.

9. Liberty to apply.

10. The Petitioner's attorneys-at-law are to prepare, file and serve the Order herein.