[2019] **JMSC Civ 156**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU 2019 CV 01689

IN THE MATTER of an application by **R** and **M**

AND

IN THE MATTER of an appointment of guardianship in respect of the infant child **"KP"**

AND

IN THE MATTER of the Children (Guardianship and Custody) Act**.**

BETWEEN	**R**	**APPLICANT**
AND	**M**	**RESPONDENT**
AND	**THE CHILDREN'S ADVOCATE**	**INTERESTED PARTY**

IN CHAMBERS

Yolanda Kiffin for the Applicant

Michael Peart in person

Children Advocate absent-unrepresented

Heard: May 28, 2019

Family law – Application for legal guardianship of a minor – Declaration of paternity - Parens partriae - Removal of child outside of the jurisdiction – Ward of court - Welfare of the child Section 14 of the Children (Guardianship and Custody) Act

T. HUTCHINSON, J (AG.)

INTRODUCTION/BACKGROUND

[1] This matter concerns an application for legal guardianship of KP a minor, which has been made by RP his older sister. The background to this application is both RP and KP were born to SDS being her second and third children respectively. There is an older sister SE who is SDS's first child. On the 9th day of May 2017, SDS passed away as a result of certain medical complications. On the passing of his mother KP began living with SE who sought to care for him out of her own resources, but the lion share of his maintenance was provided by RP the applicant herein.

[2] Although MP, who attended these proceedings as an interested party, had accepted that RP was his biological child he never accepted KP as his and as such his name does not appear on KP's birth certificate even though the child bears his surname. He has been candid with the Court in acknowledging that his surname was given to KP without his approval and he stated that he only learned of this after the fact. As a result of his doubt on the issue of paternity he kept his distance from both child and mother. As such, although he sees KP on a regular basis, he has never had a conversation with him, he has never interacted with him and he certainly has never contributed towards his maintenance or general welfare. On being served with notice of this application however, he has attended to indicate his objection to the grant being made. He has asked that a DNA test be done and if the results indicate that the child is his that he be awarded guardianship of him.

[3] In outlining her application RP has referred in her affidavit to the circumstances in which KP resides and indicates what she is able to provide for him were the application to be granted. These are set out below under the headings current circumstances and prospective circumstances/opportunities.

[4] The application of RP is supported by that of her older sister SE who confirms the situation in respect of their mother and her own challenges, financial and otherwise in caring for the minor. She expressed the view that the granting of this application would be the best course of action where KP is concerned as it would place him in an environment where he is loved and cared for. Additionally, it would give him the attention he needs but which her circumstances do not permit her to give.

[5] It should be noted that in raising his objection and desire to have guardianship of the child, if he is in fact his, MP has not presented to the Court what his proposal for the care of the child would be except to say the child could reside with him. I consider this however, in light of the fact that he appeared without representation. In response to this assertion, it was pointed out by RP that his accommodations are unsuitable as he resides in a 'board house' but more importantly his house does not have the usual amenity of running water and is otherwise unsuitable. No denial of this was raised by MP.

LAW/DISCUSSION

[6] In ***B and C [2016] JMCA Civ 48*** at paragraph 19, Brooks JA recognised the inherent jurisdiction of the Supreme Court to appoint and remove guardians. It was noted in the same decision that this inherent jurisdiction was specifically preserved in Section 20 of the Children Guardianship and Custody Act (hereinafter CGCA) which states;

> *"Nothing in this Act contained shall restrict or affect the jurisdiction of the Supreme Court to appoint or remove guardians."*

[7] At paragraph 24 of ***B and C,*** the Court noted that the merged common law and equitable jurisdictions of the Supreme Court of Judicature allowed them to supersede a parent's common law rights where they were in conflict with the best interest of the child. The authority for this was found in the dicta of Lord Esher MR in ***Queen v Gyngall 1893 2 QB 232.*** In its ruling in that matter, the Court refused to return the minor child to her biological mother even though the child was under the actual guardianship of strangers.

[8] The guiding principle to be followed by a Court faced with this type of application was highlighted at paragraph 33 of ***B and C,*** where the provision at Section 18 of CGCA was adopted, this being summarized as 'the welfare of the child is paramount'. It is of interest to note however, that in its review of the authorities on this point the Court made reference to ***Re Nevin 1891 2 Ch 299, 303*** where it was observed that in treating with applications such as these preference is actually given to the child's nearest blood relation. In the instant case the application of this principle and/or approach would certainly give the Applicant preference over MP as there is nothing before me to show that there is any connection by blood between he and KP.

[9] In any event, it is worthy of note, that even if there are close blood ties in ***Re Besant 1879 11 Ch D 508*** a minor was removed from the custody of her mother because of concerns about the mother's morals and the negative impact of same on the child. This removal was done in-spite of the fact that there was a settlement agreement in existence between the parents as to the custody of the child.

[10] The Court's power to award guardianship of a child to a person, who is not a parent, during the lifetime of a parent or parents was acknowledged at paragraph 41 of ***B and C*** but it was noted that it was to be exercised only in extreme circumstances.

[11] In considering this application, I note that SDS the mother of the child passed away in May 2017 and this application is being made in 2019. It is clear from the candid responses provided by MP to this Court that at no point prior to following the death of SDS was any attempt made by him to seek a declaration of paternity in order to have his parental rights recognized and his parental responsibilities enforced. In fact, it was only upon the hearing of this application brought by RP that MP has made this request.

[12] In these circumstances apart from considering whether the application satisfies the guiding principle required at Section 18 of the relevant Act the Court also has to consider an additional question;

a. In the event that MP could be shown to be the father of KP, on confirmation by a DNA test, would it best in the best interest of the child to deny this application and to grant him custody?

Best interest/ welfare of the child – Application of the Parens Patriae principle

[13] In continuing my examination of this application, I am guided by the dicta of Batts J in ***Re: Application for guardianship of Minor Child F 2016 JMSC Civ 193*** where in examining the role of the Court he stated as follows;

'Parens patriae jurisdiction is to be exercised where parents/guardians are unable, unwilling or incompetent to take proper decisions in relation to the care and well-being of the child' (emphasis supplied)

[14] As such, while the economic realities of all the relevant players ought to be taken into account, it is not the sole determining factor on which a Court will base its decision.

[15] In considering this issue the Court takes note of the current circumstances under which the child resides and the prospective circumstances and opportunities open to him were this application to be granted.

Current Circumstances

[16] Since the passing of his mother, KP has been residing with SE his older sister in Armstrong District, Balaclava. His sister is gainfully employed as a front line associate and she works seven (7) days per week. She is unable to spend time with her brother as her financial realities require her to work full time. KP attends school and he is in Grade 9.

[17] In her affidavit SE outlined that while she tries to give KP what he needs to include material provisions, values and morals, she believes the Applicant is better suited to have care of him. In support of this she highlights their relationship as well as the financial contribution which the Applicant provides even now to ensure that KP is taken care of.

[18] In concluding her evidence, SE noted that while she has had physical care and custody of her brother since the passing of their mother, MP has never assisted, neither financially nor emotionally.

Prospective Circumstances and Opportunities with Applicant

[19] The Applicant is employed as a Supervisor at Tim Horton's restaurant in Alberta, Canada. In her affidavit she states that the relevant child is her younger brother who was residing in Balaclava District in St. Elizabeth with their mother prior to her passing. After their Mother's death KP began residing with their sister SE.

[20] RP outlined that not only does she share a close relationship with KP but she believes she is in a better position to provide for him. Her address in Canada is at 50 Street, Alberta, Canada where she occupies a two-bedroom apartment with all the usual amenities. She also lives alone and as such KP would have his own bedroom.

[21] She disclosed that her income is CAD $2460 per month and her expenses amount to CAD 1,175 leaving a surplus to assist with expenses related to the maintenance of her brother. She also averred that currently she sends JA

$18,000 per month to SE to meet KP's expenses and her estimated cost for those same needs in Canada is CAD $200.

[22] In respect of continuing KP'S education, RP noted that she has identified placement for him at Willow Park Elementary which is in close proximity to her home and his medical issues, should any arise, would be attended to by her private medical practitioner a Dr Jana Holden. She has outlined that it is also her intention to add him to her Health Card.

[23] In respect of MP, RP said that she knows him but he was an absentee father who has played no role in KP's life. She also averred that not only is his name absent from the birth certificate but his contribution has also been absent in the maintenance of KP.

[24] It goes without saying that the set of circumstances which exists in respect of the parental relationship fits squarely within the parameters outlined by Batts J in ***Re: F*** supra. Not only is KP's primary parent unable to care for him, having passed on in May 2017, but there are also unresolved questions as to whether he shares a biological relationship with MP.

[25] Additionally, in the 14 years of KP's existence he has never had any sort of interaction with MP as the latter has, on his own admission, kept his distance. This is a factor that a Court hearing his objection would have to give careful consideration to as the best interest of the child does not mean adding to the trauma and loss that KP would have already suffered with the passing of his mother.

[26] Having considered the relevant law, as well as the attendant circumstances, it is readily apparent that it would be in the best interest of the minor child KP for the Court to award guardianship to RP. The Court has come to this view, not only because the current circumstances where he is often left to his own devices are far from ideal, but he is also getting older and will need that additional support and oversight that SE has admitted she is unable to provide.

[27] In respect of the alternative offered by MP it is clear that not much thought has been given by him as to how this would work. He is a stranger to the child who is still adjusting to life after the loss of his mother and on MP's proposal he would be taken away from the arms of those who are familiar and placed to reside with an individual who has never acknowledged his existence.

[28] It is the Court's view that far from being in the best interest of the child, awarding custody to MP could have the deleterious effect of further traumatizing KP, given all that he already has to be coping with at the tender age of 14. I am not persuaded that even if MP were to obtain a DNA result that proves him to be the father of KP that he has laid a convincing foundation on which he should be given custody of him.

[29] The situation with MP is akin to what is outlined in Section 14 of the Children, Guardianship and Custody Act which provides;

> *Where the parent has-*
>
> *(a) abandoned or deserted his child; or,*
>
> *(b) allowed his child to be brought up by another person at that person's expense for such a length of time and under such circumstances as to satisfy the Court that, the parent was unmindful of his parental duties,*
>
> *the Court shall not make an order for the delivery of the child to the parent, unless the parent has satisfied the Court that, having regard to the welfare of the child, he or she is a fit person to have the custody of the child.*

[30] As stated above I am far from satisfied that any such order should be made.

Ward of the Court – taking child out of the jurisdiction

[31] Upon this application being made, the authorities are clear that the minor child automatically becomes a ward of the Court and the guardian appointed is an officer of the Court for the purposes set out in the appointment (paragraph 61 B and C). ***In Re N (Infants)*** a decision reviewed ***B and C***, it was noted that the

effect of this designation was that the child in question could not be taken out of the jurisdiction without the leave of the Court.

[32] Given that the Applicant resides outside the jurisdiction and wishes to have the minor reside with her it is clear that the leave of the Court would have to be applied for and obtained before the minor could be taken overseas by her.

[33] While the decision of ***Re F:(A Ward) (Leave to remove ward out of the jurisdiction) [1988] 2 FLR 116*** was in relation to an application by a parent to remove a child who had been designated a ward of the Court out of the jurisdiction; the guiding principles expounded therein are relevant and have been adopted by this Court in consideration of this issue.

[34] The first of these principles is that the Court has to consider if the approved guardian's decision is reasonable in all the circumstances. Having examined the fact that the Applicant primarily resides abroad where she is gainfully employed and able to provide accommodation as well as other opportunities for the child, it is entirely within the bounds of reason that she would wish to have him there with her. Unlike the situation in ***re: F (A Ward)*** there is no parent or guardian in existence whose interest would have to be weighed in coming to a decision neither would it be practical to have the child remain in circumstances where the care and protection provided to him is far from ideal.

[34] The second principle which is of relevance to these proceedings is whether the child's well-being and future happiness would be incompatible with allowing the approved guardian to carry out her wish of taking the child out of the jurisdiction. In order to arrive at an answer to this question, I have carefully reviewed the affidavits of SE and RP which were filed on the 18th of April 2019 as well as the Affidavit of RP filed on the 18th of July 2019 in which she addresses the situation in respect of MP and discloses the view of the minor himself. It is clear that this is an application which the child hopes will be favourably considered as the quality of his life can only be improved thereby. It would have the effect of placing him in

a stable environment where the Applicant is fully prepared to meet his needs and provide the required attention to all areas of his life. Accordingly, I am satisfied on a balance of probabilities that granting this leave could only enure to the child's well-being and future happiness.

[35] The orders of the Court then are as follows;

1. RP is declared the Legal Guardian of KDP born December 28th, 2004, by virtue of the Children (Guardianship and Custody) Act.

2. Leave is granted to take the relevant child outside of the jurisdiction.

3. Child Protection and Family Services Agency (CPFSA) to be contacted by Registrar and advised of the ruling so as to establish contact with the guardian to monitor progress of the child.

3. Child to be returned to the jurisdiction once per year perhaps during the summer for one and one contact with CPFSA if so required.

4. Liberty to apply.

5. Applicant's Attorney to prepare, file and serve order herein.