IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2016 HCV 04456

IN THE MATTER OF THE CHILDREN (GUARDIANSHIP AND CUSTODY) ACT

AND

IN THE MATTER OF AN APPLICATION BY 'S' FOR AN APPOINTMENT OF GUARDIANSHIP FOR A MINOR 'F'

RE: APPLICATION FOR GUARDIANSHIP OF A MINOR CHILD F

Application for Guardianship- The Children (Guardianship and Custody) Act - Whether parens patriae jurisdiction is to be exercised where adoption process has been initiated- Both parents alive.

Mr K Bishop, Mr A Graham and Mr R Tulloch instructed by Bishop and Partners for the Applicant

Heard: October 28, 2016 and November 4, 2016

IN CHAMBERS

BATTS J,

[1] On the 28th day of October, 2016 I refused the Applicant's ex-parte application for legal guardianship of a minor born on the 2nd of December, 2011. This judgment contains the reasons for the refusal of the said application. In an effort to protect

the identity of the child I omitted certain details in respect of the parties and, I have referred to the Applicant as **S** and the minor as **F**.

[2] The Applicant is the second cousin of the minor child, who is the subject of these proceedings. The Applicant has an address within the United States of America where she is employed. Her application was supported by three affidavits one of which was sworn to by the Applicant herself. The other affidavits were by persons familiar with the Applicant who consider her a "fit and proper" person to be **F's** legal guardian.

[3] It is important to highlight that the Applicant is currently in the process of adopting the child under the provisions of the **Children (Adoption of) Act**. The application before me is made pursuant to the **Children (Guardianship) and Custody Act**. There is a distinction in the legislative regime of both statutes which it is important to state. A statutory order for guardianship and custody is reversible and can only be granted where either or both parents are deceased. Adoption on the other hand permanently relinquishes the rights of the parent who may or may not be alive. It is significant that the **Children (Guardianship) and Custody Act** was enacted in July 1957 and the **Children (Adoption of) Act** in January 1958. They have both been amended several times most recently in 2011. Section 15 of the **Children (Adoption of) Act** states :

> *"15-(1) Upon an adoption order being made, all rights, duties, obligations and liabilities of the parents or guardians of the child in relation to the future custody, maintenance and education of the child, including all rights to appoint a guardian and to consent or give notice of dissent to marriage, shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as if the child were a child born to the adopter in lawful wedlock; and in respect of the matters aforesaid the child shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock."*

[4] The **Children (Adoption of) Act** at section 12 provides for the grant of interim orders relating to the custody of a child who is the subject of the process of

adoption. That statute also establishes the Adoption Board which by virtue of section 5 has a duty to:

> (a) Make arrangements for the adoption of children and for that purpose to receive applications from parents, guardians and adopters.
>
> (b) Do such things and make such investigations concerning the adoption of children for the consideration of the Court as may be prescribed under section 8.

Section 8 allows the Minister to make regulations under the Act.

[5] The Applicant provided evidence on affidavit that the process of adoption had commenced. She is in possession of a "Form of Licence" granted under section 24 of the **Children (Adoption of) Act** by a Judge of the Family Court for the parishes of Kingston & St. Andrew. This order which was granted on the 6th of January, 2016 has authorized the care and possession of the minor child to be transferred to the Applicant. The licence states expressly that the Applicant resides overseas and attaches to it conditions and restrictions. They are as follows [my emphasis added]:

> *"1. **S** is to contact Jewish Child Care Association, 120 Wall Street, New York, NY 10005, U.S.A. within two weeks of the child joining the Adopter abroad.*
>
> *2. Jewish Child Care Association, is to supervise the placement of **F** until completion of the adoption within two (2) years.*
>
> *3. **Written reports are to be submitted to the Adoption Board in Jamaica every six weeks during the first three (3) months and thereafter every three (3) months until the adoption is completed;** and*
>
> *4. In the event that there is disruption in the home prior to the completion of the adoption, the Adoption Board is to be notified immediately so that suitable alternative placement of the child can be considered with the approval of the Adoption Board. Failing this, the child is to be returned to Jamaica forthwith."*

[6] The Application does not expressly state the section of the **Children (Guardianship) and Custody Act** on which the Applicant relied. The relevant provisions however allow for the granting of orders only where either or both parents are deceased. They are as follows;

> *"3- (1) On the death of the father of a child, the mother, if surviving, shall, subject to the provisions of this Act, be the guardian of the child, either alone or jointly with any guardian appointed by the father. When no guardian has been appointed by the father or if the guardian or guardians appointed by the father is or are dead or refuses or refuse to act, the Court may if it thinks fit appoint a guardian to act jointly with the mother.*
>
> *(2) On the death of the mother of a child, the father, if surviving, shall, subject to the provisions of this Act, be guardian of the child, either, alone or jointly with any guardian appointed by the mother. When no guardian has been appointed by the mother or if the guardian or guardians appointed by the mother is or are dead or refuses or refuse to act; the Court may if it thinks fit appoint a guardian to act jointly with the father.*
>
> *4-(1) The father of a child may by deed or will appoint any person to be guardian of the child after his death.*
>
> *(2) The mother of a child may by deed or will appoint any person to be guardian of the child after her death.*
>
> *(3) Any guardian so appointed shall act jointly with the mother or father, as the case may be, of the child so long as the mother or father remains alive unless the mother or father objects to his so acting.*
>
> *(4) If the mother or father so objects, or if the guardian so appointed as aforesaid considers that the mother or father is unfit to have the custody of the child, the guardian may apply to the Court, and the Court may either refuse to make any order (in which case the mother or father shall remain sole guardian) or make an order that the guardian so appointed shall act jointly with the mother or father, or that he shall be sole guardian of the child, and in the latter case may make such order regarding the custody of the child and the right of access thereto of its mother or father as, having regard to the welfare of the child the Court may think fit, and may further order that the mother or father shall pay to the guardian towards the maintenance of the child such weekly or other periodical sum as,*

> *having regard to the means of the mother or father, the Court may consider reasonable.*
>
> *(5) Where guardians are appointed by both parents, the guardians so appointed shall after the death of the surviving parent act jointly.*
>
> *(6) If under section 3 a guardian has been appointed by the Court to act jointly with the surviving parent, he shall continue to act as guardian after the death of the surviving parent; but if the surviving parent has appointed a guardian, the guardian appointed by the Court shall act jointly with the guardian appointed by the surviving parent."*

[7] The **Children (Adoption of) Act** in section 12 states;

> *"12.- (1)Subject to the provisions of this section, the Court may, upon an application for an adoption order, postpone the determination of the application and make an interim order giving the custody of the child to the applicant for a period not exceeding two years by way of a probationary period upon such terms as regards provision for the maintenance and education and supervision of the welfare of the child and otherwise as the Court may think fit.*
>
> *(2)All such consents as are required to an adoption order shall be necessary to an interim order but subject to a like power on the part of the Court to dispense with any such consent.*
>
> *(3)An interim order shall not be deemed to be an adoption order within the meaning of this Act."*

This section allows for the grant of interim orders by the Court where an adoption order has been applied for. The Applicant does not appear to have made such an application to the court. It must therefore be assumed that the Applicant seeks either a more permanent status, when electing to proceed under the **Children (Guardianship) and Custody Act,** or a more expeditious route to legal custody.

[8] The Court's inherent jurisdiction to grant orders for custody and guardianship whether or not both parties are alive is preserved by section 20 of the **Children (Guardianship) and Custody Act** in the form of a savings law clause, which states:

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

[9] The Court of Appeal in **B v C and the Office of the Children's Advocate** [2016] JMCA Civ 48 restated the court's inherent jurisdiction to grant such orders. This jurisdiction is grounded in the doctrine of "parens patriae". The Court stated at paragraphs 19 and 20 of its judgment that;

> *"[19] The Supreme Court does have an inherent jurisdiction to appoint and remove guardians for children. The jurisdiction of that court, in this context, has a rich history. That history includes the history of the Court of Chancery, which had exclusive jurisdiction in equity, providing relief where the common law offered no remedy. It is a history that is not without some uncertainty, but the more accepted view, in this context, is that the jurisdiction of the Court of Chancery, over children, was founded on the prerogative of the Crown as parens patriae .*
>
> *[20] The term parens patriae is defined in the ninth edition of Black's Law Dictionary as meaning:*
>
> > *"...parent of his or her country'…The state regarded as a sovereign; the state in its capacity as provider of protection of those unable to care for themselves…"*
>
> *Based on that doctrine, the Sovereign was regarded as having the right to make decisions concerning people who were not able to take care of themselves."*

[10] The issue in this matter is not jurisdictional. The issue is whether the Court's jurisdiction is to be exercised in the circumstances of this case. Having heard submissions it is manifest that this is not an appropriate case for the exercise of the Court's "parens patriae" jurisdiction.

[11] The "parens patriae" jurisdiction is to be exercised where the parents (or guardians) of the child are unable, unwilling or incompetent to take proper decisions in relation to the care and wellbeing of the child. It developed at a time when there was no specified agency of the state to take such decisions. The court continues to have this residuary power which the Act expressly preserves. It no doubt can and should be exercised where the agency of the state proves

unable or incapable or where there are no parents or guardians or where the parents (or guardians) prove unable, or fail to, act in the child's best interest. There is no evidence before me in that regard nor is there any evidence of urgency or that the child is in such peril as to require that she become a ward of the Court. In the words of Brooks J in **B v C and the Office of the Children's Advocate** :

> *"....It is permissible for the court, even during the lifetime of the biological parents, to award guardianship of a child to a person who is not a biological parent of that child. It seems, however, that it is only in extreme circumstances that the court will exercise that discretion."*

[12] It is important to consider the cautionary words of Brooks JA as it relates to the legal consequence of a child being made a ward of the Court. At paragraphs 61-62 he puts it thus;

> *"[61].....The appointment of guardian, would mean that the child remains a ward of the court until the child either attains majority, or until further order of the court. The guardian, upon appointment as such, becomes an officer of the court, for the purposes set out in the appointment.*
>
> *[62] The result of the status of wardship was also briefly described in* ***In re N (Infants)*** *at page 530. There, Stamp J said:*
>
> > *"...**the effect of the infant becoming a ward of court was that he or she could not be taken out of the jurisdiction without the leave of the court and could not marry without the leave of the court**; and I have no doubt whatsoever that many infants were married and taken out of the jurisdiction of the court without their parents being aware that a contempt of court was being committed..." (Emphasis supplied)*
>
> *In addition to those restrictions, the court is also obliged, where the child has property, to ensure that the circumstances of the child and the plans for the child's future must be carefully set out and mentioned. Those obligations must not be taken lightly or blindly."*

The significance of these restrictions was restated at paragraph 75 by Brooks JA;

> *"That status places severe restrictions on the child, and where the order is made, on the guardian. The disregard of those restrictions, even innocently, may place them, or either of them, in the position of having committed a contempt of court."*

[13] In this case both parents are alive. If they wish to grant temporary care and control to the Applicant they may do so by agreement, as is done when a child is sent to boarding school, or when sending the child off to visit relatives abroad. The parents remain ultimately legally responsible and the temporary custody/ guardianship is revocable at will.

[14] The practice of appointing guardians, effective after death by deed or will, is recognised by section 4 of the **Children (Guardianship) and Custody Act**. The **Children (Adoption of) Act** defines the guardian in the following terms;

> *"in relation to a child means a person appointed by deed or will or by a court of competent jurisdiction, to be his guardian"*

The **Children (Guardianship) and Custody Act** does not therefore displace the power or authority of the parents to appoint guardians. That Act also makes specific provision in section 4(4) for the guardian to act alone where a guardian so appointed considers that the surviving parent is unfit to have custody .In this case both parents are alive and therefore if this Applicant is to succeed it is only by virtue of the Court exercising its "parens patriae" jurisdiction.

[15] In the case at bar, two documents labelled "irrevocable consent" were attached to the affidavit of the Applicant. They were dated the 23rd of June, 2014 and 26th of June, 2014 and were purportedly signed by the parents. They read:

> *"By virtue of my rights as a parent of the said child I hereby irrevocably consent to her emigration and to her adoption by suitable adopters. I am relinquishing the said child for adoption for the child's best interest and welfare which I am unable to provide.*
>
> *I fully understand that I am hereby releasing my rights to the custody of this child and I understand that once the legal adoption has been completed the adoptive parents will assume all the legal*

> *responsibility for the child and will acquire all the legal rights incident to the relationship of parent and child."*

[16] These consents were given in relation to proceedings before the Parish Court and were sworn on a date over two years ago (see paragraph 5 above). Those proceedings were pursuant to section 24 of the **Children (Adoption of) Act** which states;

> *"24-(1) A Resident Magistrate may grant a licence in the form appearing in the Third Schedule, and subject to such conditions and restrictions as he thinks fit, authorizing the care and possession of a child for whose adoption arrangements have been made to be transferred to a citizen of a scheduled country resident outside the Island;....."*

In the case before me therefore, not only where the parents alive and physically able to give consent, but they were already participating in processes connected to the agency established by law to consider issues related to the voluntary relinquishing of legal responsibility, on a permanent or temporary basis, for their child. These issues include among other things:

a. *The fitness of the intended custodian*

b. *The preparation of the parents for separation on a permanent or temporary basis from all legal responsibility for their child and that they knowingly consented.*

c. *The physical, mental and economic circumstances of the parents and the intended custodian, and*

d. *Whether it is in the best interest of the child for the adoption and/ or interim custody to occur*

It seems to me that save in exceptional circumstances, the statutory agencies are best able to enquire into and determine those issues. The comprehensive statutory regime of the **Children (Adoption of) Act**, its many schedules and the Regulations thereunder speak eloquently to the care required before an application can be made to the Court.

[17] There is a further reason to decline the exercise of the court's inherent "parens patriae" jurisdiction in this case. Applications for guardianship and custody of children involve the exercise of the discretion of the Court. This discretion is not exercised in a vacuum. There must be sufficient evidence placed before the Court. In the case before me the child is of tender years. The evidence focused on the economic circumstances of the parents, the willingness of the intended guardian and her economic well being. The main portions of the Applicant's affidavit in support of the ex parte application for guardianship stated that;

1. Her income which is over seven million dollars per annum, is derived from a position that she has held for many years at an institution of higher learning in the United States of America.

2. **F** currently attends basic school and has expressed that she has a desire to become a medical doctor.

3. **F** attends the church where she receives her religious instructions.

4. The parents of the child are welcome to visit **F** at any reasonable time and from time to time the child has been allowed to visit her mother, father and other siblings.

5. **S** sometimes travels abroad and would wish to take **F** with her. Additionally if there is any medical emergency concerning the child **S** would like to be of assistance as the child now resides with her and the parents are not available.

6. Although **S** has a licence to live with **F** in the United States of America that process she says may take a few years and in the interim she needs to care for **F**.

[18] The Applicant exhibited to her affidavit a report from the Child Development Agency. The report underscores the economic disparity between the Applicant and the parents. It recommends that the child continue to reside with the Applicant. The report states that **F** currently resides with and is being cared for by her paternal grandmother who is supported financially by the Applicant. Her grandmother, according to the report, expressed an inability to continue caring for **F** as she has two other children to care for. The report indicates that **F's** father sees her daily and her mother sees her monthly. The report concludes,

> *"**F's** parents have expressed that they are incapable of catering to her physically,(sic) emotional and financial needs. Child and applicant are said to share a close parental relationship; whenever **S** visits Jamaica she is reported to spend her vacation time with **F**. From all indications it appears that **S** has taken on full responsibility for **F** since she was placed in the care of her paternal grandmother. Case worker suggests that child be allowed to reside in the care of her proposed adoptive parent **S**."*

The additional two affidavits submitted spoke to the Applicant's suitability by persons known to her. In an appropriate case, such as one of urgency where the child has to be removed from a position of peril, a Court can and should exercise its "parens patriae" jurisdiction on such or even less evidence. However in the circumstances of this case more is required.

[19] It is of utmost importance that the parents, so long as they are alive and can be located, attend these hearings. Particularly because the Court must be assured that they understand the order to be made. Parents should be respondents to the application. The child should be independently represented where, as here, the application is by the guardian. Any "consent" by the parents must be proved to be an informed consent whether by independent legal advice or otherwise. In this case the parents were not parties to the application, nor was it proved that they had obtained independent legal advice. The document indicating their consent is two years old and was prepared in relation to other proceedings. Similarly the child the subject of the application was not independently represented. This may be done by a specialised agency such as the Children's Advocate.

[20] In an appropriate case, the court prior to exercising its "parens patriae" jurisdiction, might adjourn for the above described evidence to be provided. Similarly, the Court could direct that relevant agencies, such as the Child Development Agency or the Adoption Board or even the Office of the Children's Advocate be served. All with the intent of assisting the Court, in the exercise of its inherent jurisdiction, to come to a decision which is in the best interests of the child.

[21] In this case to adjourn for that purpose would be unnecessary. This is because the child is already the subject of proceedings before the Adoption Board. The intended guardian has already obtained a “licence” pursuant to that Act. Decisions as to whether the intended guardian is “fit and proper”, whether interim custody is in the best interest of the child and whether it is understood and agreed to by the parents, can and should be made under the auspices of the Adoption Board which is charged with certain responsibilities by statute. Here there is no urgency. There is no evidence that the child is in peril imminent or otherwise. It is in the child’s best interest that the relevant state agencies be allowed to complete their task. If this court were to exercise the “parens patriae” jurisdiction it would be to pre-judge matters now already under deliberation by the Adoption Board. It would mean that **S** is a fit and proper person who is able, to the exclusion of the parents, to take all legal and other decisions in relation to the child. It is not appropriate to do so, save in exceptional circumstances and none have been alleged or proved.

[22] For the reasons stated herein I dismissed the application. Leave to appeal was also granted. Whereas I take full responsibility for the entire content of this judgment, counsel will I trust pardon me if I express gratitude to Ms Carissa Mears, a judicial clerk, whose able assistance facilitated its timely preparation and delivery.

BATTS J
PUISNE JUDGE`