[2022] **JMSC Civ 219**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2020CV03794

BETWEEN	**S L**	**CLAIMANT**
AND	**K S**	**DEFENDANT**

IN CHAMBERS

Ayana Thomas instructed by Nunes, Scholefield and Deleon for the Claimant

Joerio Scott instructed by Samuda and Johnson for the Defendant

Heard: November 10th, 2022 and November 14TH, 2022

Application for Leave to Appeal- Real Chance of success, overriding objectives, Strict adherence to the Case Management time lines, best interest of the child, welfare of the child

O. SMITH, J (AG.)

[1] This is an application for leave to appeal filed by the Claimant as a result of the orders made by Mrs. Justice Reid-Carr on November 3, 2022.

[2] The orders were made pursuant to a Notice of Application for Court Orders filed on July 6, 2022 and an Amended Notice of Application for Court Orders filed on October 27, 2022. The applications sought among other things, permission

> *"…to file and serve further affidavits in the Claim herein and that the affidavits filed herein by the claimant after the 1st of February 2022 be allowed to stand namely Affidavit of Kali Leslie in support of Fixed Date*

Claim Form filed on May 30 2022, Affidavit of Shana Kay Hanson in support of Fixed Date Claim Form filed on June 3, 2022 and Affidavit of S L in support of Fixed Date Claim Form filed on July 6, 2022".

[3] The Amended Notice also sought to have the affiants Kali Leslie and Shana Kay Hanson give evidence by video link. In terms of relevance to the current proceedings, it also sought to have

> "… Dr. Kai A Morgan, Registered Clinical Psychologist, be appointed as an expert witness and the Claimant be given permission to rely on the report of Dr. Kai Morgan dated 26th of October 2022 at the trial without calling let me come thereof."

[4] Having heard the submissions Justice Reid-Carr made the following orders:

> "1. The amended Notice of Application filed on the 27th October 2022 is permitted in terms of (sic) graph 3 only.
>
> 2. The amendment to the Fixed Date Claim Form is permitted as per the draft amended Fixed Date Claim Form in terms of paragraph(sic) 1 - 9 and under the heading particulars pursuant to rule 8.8 of CPR 2022(sic) in terms of paragraph(sic) (1) i, ii, iii and V.
>
> 3. The amended Fixed Date Claim Form is to be filed and served by 4:00 PM on the 4th of November 2022.
>
> 4. The issue of cost of this application is reserved to be determined by the Trial Judge at the conclusion of the trial.
>
> 5. Claimants attorney-at-law to prepare, file and serve this order.

[5] On the day the ruling was handed down no leave to appeal was sought. However, on the following day, November 4, 2022, the Claimants Attorney-at-law filed a Notice of Application for Court Orders for leave to appeal.

[6] The Notice of Application seeks permission for leave for the applicant to appeal the orders of Mrs. Justice T. Carr made on November 3, 2022 namely;

[7] "a. the refusal of the Claimant's application for leave to rely on the Affidavit Evidence of Kali Leslie filed on May 30, 2022.

"b. the refusal of the Claimant's application to appoint Dr. Kai Morgan as an expert witness and rely on her report dated the 26th of October 2022.

2. The trial of the claim herein be stayed pending the outcome of the appeal".

[8] At paragraph 3 of the Notice of Application, in the alternative, that if the court refused to grant the order sought in paragraph 1 of the Notice of Application for leave to appeal then it sought;

"An order that the Court appoints a clinical psychologist or psychiatrist as an expert witness to assess the following:

a. The impact of weekly weekend visitations with K. S on P, a minor and
b. the impact or effect on P of removing her from her current home environment.

[9] The Applicant/Claimant also seeks for the matter to be transferred to the Family Division of the Supreme Court of Jamaica and that a further Pretrial Review be scheduled in the Family Division of the Supreme Court at which time a trial date is to be scheduled. The Affidavit of S. L addressed her application for leave to appeal the judge's refusal to allow Affidavit of S L filed on July 6, 2022 to stand. Although this was not included in the Notice of Application for Court Orders filed on November 4, 2022, counsel addressed the matter in her oral submissions to the Court. There were others orders sought however they were not pursued, in particular, the Applicant Claimant was not seeking leave in relation to the affidavit of Shana Kay Hanson.

BACKGROUND

[10] This application cannot be properly considered without a brief history of the matter. The Applicant/Claimant, S L, is the biological aunt of P, a minor, born on the 24th of April 2020. The Defendant/Respondent, K S has accepted paternity of the said child and is registered on her birth certificate as her father.

[11] On October 7, 2020 a Fixed Date Claim Form was filed on behalf of Ms. Lloyd pursuant to section 3(2) of the **Children (Guardianship and Custody) Act,** CGCA, seeking inter alia, to be appointed Legal Guardian of P. However, rather than commence there, I will start with the Case Management Conference on November 30, 2020. On that day Justice Kirk Anderson made a comprehensive set of Court Management Conference Orders. The orders gave deadlines for the filing of Affidavits and responses to the affidavits. Those deadlines were by and large met with the exception of those to be filed by the Respondent/Defendant which did not meet the deadline as K. S had self-quarantined due to exposure to the Novel Corona Virus. The matter was fixed for trial on May 17, 18 and 19, of 2021. Those dates were subsequently vacated on March 24, 2021 and new trial dates were fixed for February 1-3 and 7-10, 2022.

[12] However, as fate would have it, the trial did not commence on February 1, 2022, as an application for change of attorney was been filed on behalf of the Applicant/Claimant. Consequently, the trial dates were again vacated. Justice Kirk Anderson made yet another set of orders geared towards managing the matter and ensuring that it was trial ready. They are in part, set out below and are numbered in accordance the orders as given:

> "1. …
>
> 6. No further affidavit evidence shall be filed or relied on by either party or by the Office of the Children's Advocate as Intervener but at the Trial, it shall be open to the trial judge to permit amplification of affidavit evidence in accordance with the principles as set out in Rule 29.9 of the

Civil Procedure Rules as regards amplification of witness statement at trial.

7. The Intervener/Office of the Children's Advocate, shall file and serve before March 31, 2022, Supplemental Submissions specifically addressing the following:

    i) Making recommendations as to who should be granted custody as well as/or alternatively, to care and control of the child who is the subject of this claim.

        i. Specifying why it is that said recommendation(s) has been made.

        ii. Making recommendation (s) as to whether any of the parties to this claim are suitable persons to whom access to the child who is the subject of this claim should be granted by this Court and if so why and under what conditions or subject to what stipulations.

        iii. Specify the reason for the recommendation(s) made as regards access to the said child.

        iv. …"

[13] There are two Affidavits of Keisha Rodriques-Mills filed March 25, 2021 and April 26, 2021. She is the Director of Investigations at the Office of the Children's Advocate, OCA, the Intervener. Both affidavits exhibit Investigation Reports, the first ordered by Justice Kirk Anderson on March 21, 2021. However, having received the two reports, the Court on February 1, 2022 made further orders for the OCA to file supplemental submissions as set out above. These submissions were filed on March 31, 2022. It is those submissions counsel informed the court which confirmed that the Defendant did not have four but five children. The 5th child being the product of carnal abuse for which he was convicted in 2009.

[14] It is these supplemental submissions, counsel indicated, in addition to the documents listed in the submissions that led the Claimant's attorney to conduct further investigations which culminated in the filing, of an affidavit from Kali Leslie on May 30, 2022, Affidavit of Shana Kay Hanson, former student of the Respondent/Defendant on June 3, 2022 and supplemental affidavit of S L filed on June 6, 2022. Kali Leslie, based on her affidavit is the mother one of S. L's children, (the 5th child) and complainant in the Carnal Abuse case for which the defendant was convicted.

[15] The listed documents are:

a) Certified copy of the indictment charging Carnal Abuse
b) Statement of K. S
c) DNA Report – paternity analysis
d) Witness Statement of Nora Finnikin
e) Witness Statement of Annie Anglin
f) Witness Statement and further statement of Kali Leslie (complainant)
g) Statement of Winnifred Finnikin
h) Report of Jamaica Constabulary Force (JCF) Rape Investigation Unit

[16] On July 6, 2022 the Claimants Attorney filed a Notice of Application for Court Orders seeking permission for the affidavits of Kali Leslie, Shana Kay Hanson and Supplemental Affidavits of S L to stand as filed. No date was received up to October 27, 2022 when an amended application was filed for the appointment of Dr. Kai Morgan, Clinical Psychologist, as an expert witness and for her report dated October 26, 2022 to be relied on without calling the maker thereof.

[17] This Application was placed before the court on the eve of the trial on November 3. 2022. The application was refused. However, by November 4, 2022, as previously stated. the Applicant/Claimant filed an Application for Leave to Appeal. With the fast approaching trial date, the Registry accepted the documents but no

date for hearing was given nor could one have been given before the scheduled trial date of November 7, 2022.

SUBMISSIONS ON BEHALF OF THE APPLICANT/CLAIMANT

[18] The foundation of Counsels submissions seems to be, that the documents listed by the OCA in their supplemental submissions are not properly before the Court. Although they were listed in the Supplemental Submissions the documents were not attached to the submissions nor are they exhibited in any affidavit. The OCA also subsequently included the documents in their List of Documents filed on March 31, 2022, however, the documents were not attached. It was only upon their request to the OCA for copies of the documents, that the documents were provided. Counsel submitted that based how this information came to light and particularly because it was not revealed at the Case Management stage when the order was made for Standard Disclosure to be done on or before January 29, 2021, the Court should have granted the orders sought as it was beyond the control of S. L. She reiterated that the information was revealed after all affidavits were filed and as such the Claimant had no opportunity to act on the information.

[19] It was pointed out that all the information revealed by the OCA was within the knowledge of the Respondent/Defendant, yet he did not disclose any of this information to the OCA when they conducted their two previous investigations nor was it contained in any of his five affidavits. As such, if the Applicant/Claimant is not allowed to adduce the evidence in the further affidavit of S. L and the Affidavit of Kali Leslie, K. S would now benefit from this nondisclosure.

[20] Counsel submitted that the appeal has a real chance of success and in so submitting relied on the Court of Appeal decision of ***Garbage Disposal and Sanitations Systems Ltd. v Noel Green & Others*** [2017] JMCA App. 2. She indicated that the affidavits in question could not have been provided before due to the nondisclosure of the Defendant. Even so, they were filed and served long in advance on the Defendant and as such there would be no prejudice to him.

Moreover, all the information in affidavits were within the knowledge of the Defendant.

[21] It was argued that the information contained in the affidavits were directly relevant to the issues in dispute as they addressed the character of the Respondent/Defendant and his means to support his children. The filing of the Notice of Application was not a deliberate disregard of the Case Management orders. The Applicant/Claimant complied with all the Case Management Orders up to February 1, 2022. It was submitted that the matters, the subject of the Notice of Application and now Leave to Appeal, came to the knowledge of the Applicant/Claimant as a result of the OCA's compliance with the February 1, 2022 orders of Justice Kirk Anderson.

[22] In relation to the report of the Clinical Psychologist, there is no Court appointed expert" despite the "observations/recommendations of the OCA in its Investigation Report". In this regard*, "the learned judge erred in law and in fact in not finding that the overriding objectives and the overriding interest' of justice were aimed at determining a matter based on its merits and all relevant evidence and accordingly permitted the Applicant/Claimant to rely on an expert report in respect of a crucial issue before the Court which has not been addressed by any expert in furtherance of these objectives."*

[23] Counsel further submitted that the doctor demonstrated objectivity and was unbiased. The report directly impacts the effect of the weekly weekend access on the minor and the likely impact of her being removed from her present environment. She indicated that the Defendant would have the opportunity to put questions to the doctor. As such the learned judge erred in law and in fact in finding that strict compliance of case management orders and a desire to avoid delays outweighed the need to allow the evidence of the expert witness. ***Joan Allen Louise Johnson v Rowan Mullings*** [2013] JMCA APP 22.

[24] Counsel continued and indicated that the affidavit of S. L filed on July 6, 2022 outlines that no court ordered report from a Clinical Psychologist was done. In this regard she stated that S.L's further affidavit outlines her concerns and observations and explains why she requested that a Clinical Psychologist examine P. The case of ***Allen, Johnson v Mullings*** was also relied on in support of her submissions on how the Court should treat with late applications for the appointment of expert witnesses.

It is submitted that the learned judge misdirected herself as to the law in the following regard:

[25] Ms. Thomas argued that by virtue of Rule 25.1 (m) of the Civil Procedure Rules a Court is required in actively managing a case is to ensure that no party gains an unfair advantage by reason of that party's failure to give full disclosure of all relevant facts prior to the trial or the hearing of any application. In the circumstances, the defendant would gain an unfair advantage from his nondisclosure of the information that the November 3, 2022 orders would keep out of the trial.

[26] It was submitted that Rule 29.9 of the CPR does not allow the Claimant to amplify her evidence nor can she give evidence on matters that are not within her personal knowledge. This specifically relates to the evidence of Kali Leslie.

[27] Counsel argued that no regard was given to section 18 of the CGCA, which states that, in matters of this nature the welfare of the child is the paramount consideration and as such this should have been given consideration over and above any failure to comply with case management orders. The previous conviction was relevant when considering what was in the best interest of the child as such the existence of another child who is the product of Carnal Abuse and who was not being maintained by K. S was also relevant. Counsel pointed out that in the five affidavits filed by K. S, he denied the existence of M. S. He also averred that he budgeted for and maintained all his children. In this regard, he deliberately withheld the

information from the OCA. The information is not available in any of the reports exhibited in the affidavits filed by Keisha Rodriques-Mills. She specifically named all the children that the Respondent/Defendant disclosed to her and M. S was not one of them.

The Learned Judge also erred by misdirecting herself in law on the issue of relevance and admissibility of the evidence raised in the Affidavits of Shanice Lloyd and Kali Leslie.

[28] Counsel noted, that in assessing the welfare of the child the moral character of persons seeking custody, care and control ought to be considered. A number of cases were relied on in support of this ground: ***Dennis Forsythe v Idealin Jones*** SCCA No. 49 of 1999, ***Child, Youth and Family Services v EB FC Ashburton*** FAM-2004-003-261 [2005] NZFC 35, ***Harris & Cavanagh (No. 2)*** [2018] Fam CA 1147 and ***R (A Child)*** [2015] EWFC B140. She said that the Defendant put his character in issue in the several affidavits filed on his behalf which speak of his good character and moral integrity. As such the material which was excluded by the November 3, 2022 orders is very relevant in determining what is in the best interest of the child.

[29] Finally, Counsel acknowledged that an appeal does not operate as a stay, citing Rule 2.13 of the Court of Appeal Rules. However, Rule 2.12 gives a Judge of the Supreme Court the jurisdiction to stay proceedings pending appeal. In this regard the courts attention was directed to ***Cable &Wireless Jamaica Limited v Eric Jason Abrahams*** [2021] JMCA App 19 which counsel indicated enunciated the principles that should guide a court when considering whether or not to grant a stay. She submitted that the application for leave to appeal is in relation to critical evidence. It is not in the best interest of justice to proceed with the trial or to reschedule without the issue being determined. If the trial does proceed it would render the results of an appeal nugatory. This would involve cost and an unnecessary waste of time and resources.

SUBMISSIONS ON BEHALF OF THE RESPONDENT/DEFENDANT

[30] In response to the application for leave the Respondent's/ Defendant's Attorney filed an affidavit of Monique James, Attorney-at-Law in the firm Samuda and Johnson, in response. Ms. James set out five reasons that, in her view, were given by the Judge for her refusal. They are as follows:

> " a. That the court heard both arguments and finds that case management orders are to be followed strictly and that they are put in place for a reason; to manage the case and to ensure that there is management of evidence;
>
> a. that the court was of the view that the application should be refused because the affidavits were filed out of time and are of the view that the issues of fact can be challenged at trial;
> b. that the conviction is brought before the court by the Office of the Children's Advocate and can be treated with at the trial through amplification;
> c. the prejudicial effect of the Affidavit of Ms. Hanson outweighs the probative value.
> d. that it is unfair to have the expert report entered at this stage and that the child is 2 years old.

[31] In that light counsel went on to submit that the Claimants appeal had no real prospect of success. They relied on the case of ***The Attorney General of Jamaica v John MacKay*** [2012] JMCA App 1 in support of their submission that the Court of Appeal would not disturb a judge's exercise of discretion in an interlocutory application unless the decision was based on a misunderstanding of the law or of the evidence before him.

[32] They relied heavily on the February 1, 2022 orders of Justice Kirk Anderson. In particular, Order 6 which is detailed above. They argue that the orders were clear and therefore the plain and literal meaning should be given to the interpretation of

the order. They pointed to the order in relation to amplification and said that it was open to the Claimant while giving her oral evidence to seek the courts permission to include the information, the subject of this application.

[33] They submitted that the best interest of the child and the overriding objectives were the foundation of Justice Andersons orders. The orders were geared towards restricting the evidence put before that court, safe guarding the trial dates, ensuring the best use of the courts time and resources and protecting a party from having to respond to new evidence "at the proverbial eleventh hour."

[34] Counsel submitted that the evidence that the Claimant was seeking to have entered was irrelevant, inflammatory and scandalous. It amounted to an abuse of the Courts process and as such the appeal had no real chance of success. He relied on Rule 2.3 (1). Counsel also argued that the affidavits were not in keeping with the CPR, in particular Rule 30.3. They failed to state the source of the information and offended the rules of hearsay.

[35] He relied on the case of ***In Re Young Manufacturing Company Limited*** [199] 2 Ch. 753 and ***Arlene Elmarie Peterkin v Natural Resources Conservation Authority*** [2022] JMSC Civ 13 in support of his position that four paragraphs in S.L's affidavit, 22-25, should be struck out.

[36] He continued by indicating that the information was not relevant and was not in the best interest of the child. He relied on the text, **Zukerman on Civil Procedure Principles of Practice** 4th ed for its definition and application of relevance. Further, he argued that the information was disclosed in the supplemental submissions of the OCA. The conviction is an established fact, the relevance and weight of which should be considered at trial. What the Claimant was seeking to do was to duplicate the information and also to admit into court allegations from strangers who are not related to the parties in the matter.

[37] The issues for consideration before me are;

1. Whether the appeal has a real chance of success?
    a. Did the Learned Judge misdirect herself in terms of the law? (Adherence to the Courts Court Management Orders)
    b. Did the Learned Judge misdirect herself in terms of the evidence before the Court?
2. Whether or not the Report of Dr. Kai Morgan is relevant?
3. Whether or not a stay should be granted?

RELEVANT LEGISLATION

[38] Section 18 of **CGCA** underscores the fact that the welfare of the child is of paramount importance in Claims of this nature. It states:

> *"Where in any proceeding before any court the custody or upbringing of a child, or the administration of any property belonging to or held on trust for a child, or the application of the income thereof, is in question, the Court, in deciding that question, shall regard the welfare of the child as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father."*

[39] Throughout the legislation the Court is also urged to always consider the welfare of the child. In fact, section 7 speaks to the conduct of the parents, albeit in an application of either parent for custody. Case law has over the years interpreted what is meant by "…the Court shall have regard to the welfare of the child as the first and paramount consideration." This will be discussed in detail anon.

[40] Since this is an application for leave to appeal, Rule 1.8 (9) of **The Supreme Court of Jamaica Court of Appeal Rules 2002,** (CAR) is applicable. It provides that:

> *"The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success".*

Whether the appeal has a real chance of success?

[41] Both attorneys relied on the case of ***Garbage Disposal v Green*** for the definition of "real chance of success". In that case F. Williams JA had to interpret what the words "real chance of success" meant under Rule 1.8 (9) of CAR. He looked at the cases of ***Swain v Hillman*** [2001] 1 All ER 91 and ***Duke St. John-Paul Foote v University of Technology Jamaica (UTECH) and Wallace*** [2015] JMCA App 27A where Morrison JA, as he then was, stated,

> *"This court has on more than one occasion accepted that the words "a real chance of success" are to be interpreted to mean that the applicant for leave must show that, in the language of Lord Woolf MR in* ***Swain v Hillman*** *(at page 92), 'there is a realistic' as opposed to a fanciful prospect of success'. Although in that case Lord Woolf MR was speaking in the context of an application for summary judgment…this formulation has been held by this court to be equally applicable to rule 1.8(9)…"*

[42] The case ***Donovan Foote v Capital and Credit Merchant Bank Limited and Another*** [2012] JMCA App 14, an earlier decision Morrison JA is also instructive on the issue. See also ***William Clarke v Gwenetta Clarke*** [2012] JMCA App 2. The cases highlight the need for the Court to evaluate the issues that will face the court in determining the substantive matter.

Did the Learned Judge misdirect herself in the law? (Adherence to the Courts Court Management Orders)

[43] When this Application came before the Court, no reasons were on the file or noted on the Minute of Order. The attorneys in their submissions gave varying versions of what they considered to be the Judge's reasons. The Applicant/Claimant's attorney indicated that the ruling was prefaced with the statement that the Courts Case Management time table ought to be followed. This, in counsel's view meant that the Judge based her decision on the fact that the additional affidavits and the Doctor's Report were being placed before the court in complete disregard for the orders of the Case Management Judge. Counsel for the Respondent/Defendant had another view of the judge's reasons as outlined above. There was no meeting

of the minds in relation to the reasons and Counsel for S.L objected to reasons c to f as set out by Ms. James.

[44] They are in my view ad idem on the Judges' approach to the Case Management Conference Orders. However, without the benefit of any reasons I will consider this application in the context of the reason they both agree on. As a starting point, I am in agreement that the Court must ensure adherence to the Case Management timetables. This is the only way that we can hope to overcome the chronic affliction of adjournments in our Courts that inevitably lead to backlog. However, strict adherence to this principle is not always in the best interest of justice. The circumstances of each case must be examined.

[45] In ***Mortgage Corporation Ltd v Sandoes*** [1996] EWCA Civ 1039 the Court of Appeal in considering the issue of the purpose and importance of Case Management Conference time tables said the following:

1. "Time requirements laid down by the Rules and directions given by the Court are not merely targets to be attempted; they are rules to be observed.
2. At the same time the overriding principle is that justice must be done.
3. Litigants are entitled to have their cases resolved with reasonable expedition. Non-compliance with time limits can cause prejudice to one or more of the parties to the litigation.
4. In addition, the vacation or adjournment of the date of trial prejudices other litigants and disrupts the administration of justice.
5. Extensions of time which involve the vacation or adjournment of trial dates should therefore be granted only as a last resort.
6. Where time limits have not been complied with, the parties should co-operate in reaching an agreement as to new time limits which will not involve the date of trial being postponed.

7. If they reach such an agreement they can ordinarily expect the court to give effect to that agreement at the trial and it is not necessary to make a separate application solely for this purpose.

8. The court will not look with favour on a party who seeks only to take tactical advantage from the failure of another party to comply with time limits.

9. In the absence of an agreement as to a new timetable, an application should be made promptly to the court for directions.

10. In considering whether to grant an extension of time to a party who is in default, the court will look at all the circumstances of the case including the considerations identified above."

[46] In the circumstances, I bear in mind that the Applicant/Claimant has, from all indications, observed the Case Management timetables. They were ready, except for the issue of representation that was settled on February 1, 2022. On that day, the Court issued further Case Management Orders. The order that has led us here today is the Order Number 7 which ordered the Intervener, to file Supplemental Submissions on or before March 31, 2022. It could not have been known to the Court or to the parties that the supplemental submissions would have revealed the information it did. It must be borne in mind that the OCA had already submitted two Investigation Reports to the Court. The Reports were exhibited in affidavits as indicated previously. None of them contained the information the subject of this application.

[47] The circumstances surrounding the Application before me must be examined. What needed to be clarified for me was whether the information that the Applicant/Claimant is seeking to have introduced as evidence was already before the Court? The answer is no. The Supplemental Submissions filed by the OCA were just that, submissions, not evidence, nor were they exhibited in any affidavit before the Court nor could they have been exhibited in an affidavit based on Justice Anderson's orders. The Respondent/Defendant agrees with this despite what is contained in the written submissions.

[48] I agree that the matter of K. S's. Senior's conviction could perhaps have been introduced by the OCA through amplification. However, to say that the fact of the conviction is enough, trivializes or undermines the importance of the evidence surrounding and flowing from the conviction. This will be later considered in detail.

[49] Undoubtedly it is in the best interest of the child for the substantive matter to be concluded quickly. However, I bear in mind that this situation was created by the Respondent/Defendant, who did not disclose his conviction or the fact that he fathered a child with the complainant in the case. In fact, he denied the child's existence on several occasions. It is my view, that the existence of the child and the defendant's failure to maintain said child is relevant information that should be available to the Court from the source, Ms. Kali Leslie, when making a determination on what is in the best interest of P.

[50] Rule 25.1 (m) of the CPR is instructive, it provides guidance on what the court should take into consideration when executing its duty to actively manage cases. The court is to ensure that no party gains an unfair advantage as a result of their failure to disclose. The information is in my view relevant to the issue before the Trial Court. It is quite disingenuous for the Respondent/Defendant to argue that "the plethora of evidence which the Claimant wishes to introduce at this 11th hour will negatively affect the just disposal of the matter." This information was always known to the Defendant. He failed to disclose it. His attorneys were also served with the affidavits long in advance of November 3, 2022. There is no indication that he responded or that he made any attempt to approach the court to seek permission to respond. Is it in the interest of justice or in keeping with the overriding objectives, for K.S to now hide behind the CPR and say that Court Managements Orders should be strictly adhered to, when he did not disclose this information at the appropriate time or at all? The answer must be no.

[51] While it can be said that all evidence not in favour of a party may be described as prejudicial, the probative value of the information in this case, in my humble opinion, outweighs any prejudicial effect it may have. Therefore, in balancing

justice and in ensuring that K.S does not gain an unfair advantage from his deliberate nondisclosure, the Applicant/Claimant ought to be given the opportunity to take this matter to the Court of Appeal.

[52] The order of Justice Anderson indicated that the court could consider amplification of a witness statement at the time of trial. Rule 29.9 of the CPR allows for this in three circumstances: (1) where the statement has disclosed the substance of the evidence that the witness is seeking to amplify, (2) on evidence on new matters that have arisen since the filing of the witness statements and (3) comments on the evidence given by other witnesses.

[53] S.L, by virtue of the Rules cannot amplify her evidence in any of the three circumstances. In relation the affidavit of Kali Leslie, it is K.S who put his character in issue by repeatedly asserting both in his affidavits and in his response to the OCA investigators that he had only four children including P and that he maintained all his children. Nether S.L or Mrs. Rodriques-Mills can speak from their personal knowledge on those matters.

Did the Learned Judge misdirect herself in terms of the evidence before the Court?

[54] The case of ***Re K (minors) (wardship, care and control)*** [1977] 1 All ER 647 sets out what is required when a court is considering what is meant by the welfare of the child. At page 665 Sir John Pennycuick stated that;

> *"A judge, when deciding what is best for the welfare of a child, must take into account all the particular circumstances relevant to that child."*

[55] In ***F v B*** Claim No. 2010HCV2702, Mangatal J relied on Lord McDermott's interpretation of the words, '…shall regard the welfare of the infant (child) as the first and paramount consideration' in ***J V C*** [1969] 1 All ER. 788, where he stated,

> *"…reading these words in their ordinary significance and relating them to the various classes of proceedings which this section has already mentioned, it seems to me that they must mean more than that the child's welfare is to be treated as the top item on a list of items relevant to the matter in question. I think they connote a process whereby, when all the*

> *relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interest of the child's welfare as that term has no to be understood.*

[56] In **Re *McGrath*** (1893) 1 Ch. 143, the Court noted that the welfare of the child was not to be measured in money only or physical comfort but also that the moral and religious welfare of the child must be considered. See also ***Forsythe v Jones*** SCCA No. 49 of 1999 (unreported) (delivered April 6, 2001).

ANALYSIS

[57] Based on the guidance provided by the cases, the moral character of a party applying for custody must be taken into consideration when the court is making a determination into what is in the best interest of a child. I therefore bear in mind that a conviction in and of itself is not a bar to a party being granted custody. However, in this case, the conviction is for a sexual offence involving a female who was under the requisite age. This encounter with the underage female led to the conception and eventual birth of a child. This must be considered against the evidence already before the court that one of his other children is also as a result of relations with a person under the requisite age. In my mind, the evidence is pertinent to the substantial issue which will face the Trial Judge. See paragraph 48 supra on the matter of the conviction.

[58] The existence of M.S is also important in another light. The evidence of Ms. Leslie is in direct contradiction to the evidence of K.S who repeatedly averred to the privileged status/upbringing that all his children have been exposed to. Further, he also insisted that he maintains all his children. This evidence which speaks to the conduct of a party and his morals are matters that a court must have before it in determining what is in the best interest of the child.

Whether or not the Report of Dr. Kai Morgan is relevant

[59] In ***F v B*** Mangatal, J had to consider an oral without notice application for the child to be examined by a Child Psychologist. The application was refused for several

reasons, namely; that it was not in writing and there was no compliance with Part 38 of the CPR. Most importantly the Learned Judge considered that since the psychologist was to assess the impact that going to a new environment would have on the child, it would serve no useful purpose as both parents intended to relocate. She however, recognised that there were advantages in having a Report but weighed the impact of the delay alongside the considerations above.

[60] Mrs. Keisha Rodrigues- Mills in her affidavit filed on April 26, 2021 recommended that a child psychologist would be better able to speak to the impact of the weekend visits on P. In light of the fact that the Court was about to determine the issue of custody, that aspect of the report may not have been as helpful to the court. However, the Report also addresses the likely impact on the child should she be removed from her present environment and that in my view was pertinent information, provided by an expert that ought to be before the court. Unlike ***F v B***, the Report of Dr. Morgan was brought before the Court using the correct procedure as soon as it became available. The report is also in the prescribed format as required by Rule 32 of the CPR. More importantly, the affidavits do not disclose that S.L has any intention of relocating and so the issue of the impact of a new environment is live. In light of the fact that the Report was already available and had been filed and served on the Respondent/Defendant, it would not have led to any delay and indeed, the Respondent/Defendant could have been allowed to put questions to the Doctor with a strict timeline for submission of the responses. In the alternative, since the trial date was near, an order may have been made for the doctor to be present for cross examination.

[61] Least it be said that no consideration was given to the fact that K.S did not participate. It was. Dr. Morgan indicated that in conducting her assessment she attempted to include K.S without success. He was therefore given the opportunity to be a part of the assessment but played no part. I am of the view that the benefits of the Report would outweigh any disadvantage, if any, brought about by his lack of input.

Whether or not a stay should be granted?

[62] In relation to the application for a stay, Rule 2.14 of CAR states that an appeal does not operate as a stay of proceedings. Therefore, a party who has applied for leave to appeal or who has been granted leave to appeal must apply to the court for a stay of proceedings.

[63] I adopt in its entirety paragraph 76 of the judgment of McDonald-Bishop JA in the **Cable and Wireless** case**.** I have set it out below;

> *"The underlying rationale for a stay pending appeal is that it would aid the appellate process and make it more effective. It would ensure, as far as possible, that if the appealing party, is ultimately, successful in its challenge, it will not be denied the full benefit of its success (see **R (H) v Ashworth Special Hospital Authority** [2002] EWCA Civ 923, (albeit, that the primary principles were stated in the context of judicial review proceedings). So, the whole aim was to prevent the appeal being rendered nugatory as well as to avoid an unnecessary waste of time, costs and resources. This would be the result if the hearing below were to proceed to completion and was then adjudged to be a nullity for want of jurisdiction."*

[64] McDonald-Bishop JA in her Judgement also placed reliance on the case of ***Austrim Nylex Ltd v Kroll & Others*** [2002] VSC 168 *(**Austrim Nylex)*** which explained what a court should take into consideration when faced with an Application for Stay. Using the judgment of McDonald-Bishop JA, I have condensed the consideration as follows: (a) the appeal would be rendered nugatory; (b) The prospect of success of the appeal and (c)The risk of prejudice or injustice to either party.

[65] The basis for a stay of proceedings, is in my view, grounded in common sense. It would serve no purpose for a party to file an appeal in relation to a ruling in an interlocutory application which has direct implications on the substantive matter before the court, only to have the matter proceed without the benefit of the ruling of the Court of Appeal. It would be a waste of the Courts time and resources and would lead to the parties incurring unnecessary cost, for what would become to them, a useless ruling.

[66] Clearly, if the trial should proceed any subsequent decision of the Court of Appeal would be rendered nugatory. The subject of the appeal relates to information that is essential to the trial. The matter concerns a minor child. It is her custody and care that any decision of the court is going to affect. In arriving at its decision, the Court must have at its disposal all the relevant information that will assist it in making the most informed and considered decision. The granting of this application and reasons advanced are indicative of the Applicant/Claimant's prospect of success. Finally, in relation to any prejudice that may be occasioned by a stay to the other side, the dates in the Family Division are now in April 2023. A stay at this time would have little impact on the movement of this matter. Consequently, the Court should await the decision of the Court of Appeal before embarking on a trial.

[67] I am of the view that the Claimants ought to be given the opportunity to argue their case before the Court of Appeal.

[68] In the premises;

1. Paragraph 1(a) of the Notice of Application for Court Orders filed on November 4, 2022 is amended to include Affidavit of Shanice Lloyd filed on July 6, 2022.
2. Application is granted in terms of paragraphs 1 and 2 of the Notice of Application for Court Orders filed on November 4, 2022 as amended.
3. The matter is transferred to the Family Division of the Supreme Court.
4. Costs of this application is to be costs in the Claim.
5. Applicants Attorney to prepare, file and serve the orders herein.