



[2013] JMSC Civ.41

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. M01008 OF 2009

BETWEEN                    SHARIFA FREDERICK-JOHNSON                    PETITIONER/APPLICANT

AND                                    TIJEAN TEAP-JOHNSON                                    RESPONDENT

Mrs. Jacqueline Samuels-Brown and Ms Tamara Malcolm instructed by J. Samuels-Brown for Applicant

Mr. Gordon Steer instructed by Chambers, Bunny and Steer for Respondent

Heard on: 31<sup>st</sup> October, 2011, 23<sup>rd</sup> April, 2012 and 27<sup>th</sup> March 2013

***Application for maintenance of child – Application for custody by mother – Access to father – Nature and type of access***

**CORAM: MORRISON, J**

From holy matrimony to the sharp descent of acrimony.

[1] The issues emanating from the applications at bar and the facts from which they emerge are of relative simplicity. However, as I will demonstrate, through a chronology of events, conjugal congress which was less than easeful between the litigants, certainly before March 2008, has spawned several legal challenges between them. Litigation commenced on March 18, 2008 with an application by the wife, filed in the Resident Magistrates' Family Court, for Protection Orders against the husband. The orders were sought pursuant to the Domestic Violence Act. This was followed by an Application by the wife for Orders against the husband for maintenance and custody of the relevant child, Thierry Johnson, born on February 17, 2006. In the result, the Family Court made an order granting interim access to the husband while, at the same time

refusing the application to make orders for maintenance. This occurred on May 29, 2008.

[2] Thereafter, the Wife made an application for Judicial Review in which she challenged the orders made by the Resident Magistrate of the Family Court Division. This was on June 10, 2008. An order granting leave for Judicial Review was made by the Supreme Court on June 20, 2008. However, no substantive hearing by the Judicial Review Court took place. This was so in spite of the husband's application to intervene in the Judicial Review proceedings, his application having been granted.

[3] Meanwhile, both parties filed their respective Petitions for Divorce in May and June 2009 with the wife filing in August 2010, an application for custody and maintenance of Thierry Johnson.

[4] In the upshot, the Wife obtained interim orders on her application for custody and maintenance in the terms set out hereunder:

1. The Respondent, Ti'Jean Johnson pays to the Petitioner the following sum towards the maintenance of the relevant child Thierry Johnson.
  - a) Five Thousand Dollars (\$5,000.00) per month retroactively from June 2009 to February 28, 2011 with payment to be made on or before March 11, 2011.
  - b) Commencing the 4<sup>th</sup> day of March 2011, ten thousand dollars (\$10,000.00) per month and thereafter on or before the first Friday of each succeeding month until further ordered.
2. Interim access of the relevant child Thierry Johnson, to the Respondent, Ti'Jean Johnson, as follows:
  - a) Commencing March 5, 2011 each Saturday for (2) hours at Burger King, Barbican in the parish of St. Andrew from 12.00 noon to 2.00 p.m.
  - b) Access to be in the care of Mary Hudson or such other caregiver employed to the Petitioner. The Petitioner shall be responsible to have Thierry Johnson taken to Burger King, Barbican, as aforesaid and to have

him collected from same. The access shall be for four (4) weeks ending on March 26, 2011.

- c) Commencing April 2, 2011 access to be every other Saturday from 11.00 a.m. to 4.00 p.m.. Such access not to be limited to Burger King, Barbican referred to above. Access to be in the presence of Mary Hudson or such other caregiver employed to the Petitioner. The Petitioner shall be responsible to have Thierry Johnson taken to the Respondent at Burger King, Barbican, in the parish of St. Andrew and to have him collected from the said location.

The aforesaid order is to remain in place subject to any further or other order by the Court.

- d) The Applicant/Petitioner to prepare, file and serve this order.

[5] Subsequently, the Wife made a further application to the Supreme Court in which she sought orders pursuant to a Request for Information filed on 21<sup>st</sup> March, 2011. The order was granted on 5<sup>th</sup> April, 2011. The basis of the sought order being the Husband's lack of credibility concerning his earnings vis-à-vis his maintenance contributions for Thierry.

### **The Submissions**

[6] The Applicant's main thrust is as to the credibility of the Respondent and forms the platform from which the Respondent's suitability for access to Thierry and of Thierry's maintenance has been launched.

[7] Mr. Steer has striven to throw discredit upon the reasons given by the Applicant in thwarting the orders made by the Family Court on May 29, 2008, namely, where relevant:-

- i) custody, care and control to the Applicant, Sharifa Frederick;
- ii) liberal access to father, Ti'Jean Johnson with residential access to father on alternate Saturdays and Sundays from 9.00 a.m. to 6.00 p.m.;
- iii) father to collect child at mother's address and to return child to the same address;

iv) access to begin on May 21, 2008 effective May 29, 2008.

[8] Further submits Mr. Steer, no evidence emerges from the wife as to why the father, T'Jean Johnson should be denied unsupervised access and overnight access, to Thierry that the denial of access by the wife to the father has to do with the wife's being piqued at the break up of their marriage and that to deny access to the father constitutes an unwarranted departure and denial of parental bonding. In that context he asserts, any supervised access to the father ought only to arise where the father is a threat to the child or to the child's care. Further, he advances, the wife's expenses contained in her affidavit of 10<sup>th</sup> September, 2010 are not only exaggerated and unrealistic but are in parts, not relevant as they pertain to the child.

[9] The Applicant rebukes the Respondent's credibility and has urged this court to continue the Interim Orders made by the Court as it affects custody, access and maintenance.

### **Analysis of Evidence**

[10] Generally speaking, I have to say that the Respondent's delivery and presentation of his evidence has failed to carry upon its face the highest certificate of truth. That being the case where there is a conflict on the evidence between their respective testimonies, I prefer that of the Applicant to that of the Respondent.

[11] I am of the view that, in the face of the virtual unchallenged application for custody by the wife, I need not grapple with that aspect of the application. Suffice it to say, that to displace the custody order made in favour of the mother requires good evidence to do so. That was not forthcoming from the father.

[12] In engaging the aspects of access and maintenance I am to say that I am unpersuaded that the supervised access order should be discharged. It is my view based on the affidavit evidence of the Applicant and her unshaken evidence under cross-examination that the Respondent is not a fit and meet candidate for unsupervised access. This is against the background not only of the Respondent's past verbal and

physical abuse of his estranged wife in the presence of Thierry, their son, but also because of his being an alcohol abuser, which seemingly indicates a proneness to violence or the threat thereof, behavior which I think is quite inimical to an impressionable mind such as Thierry's. I am particularly troubled by paragraphs 9 and 10 of the Applicant's affidavit of 3<sup>rd</sup> June, 2008: "Additionally, on the 19<sup>th</sup> March I left out son with his father for a visit where he then lived at 6 Louisville Road, Kingston 8, when I went to collect my son as pre-arranged at 3 O'clock in the evening my estranged husband had changed the locks on the grill and refused to return him to me." What follows in the ensuing paragraph of the affidavit is an un-prepossessing example of unveiled defiance notwithstanding the presence of the police: "I had to seek the assistance of the police and my parents. The police came and they together with my parents pleaded with Mr. Johnson to uphold his end of the agreement and return my son to me, but for three hours he refused . He was very aggressive, boisterous, and ranted about death and being willing to die." Strong emphatic words with pregnant meaning to boot.

[13] The Respondent's demeanour, during the hearing of the application, failed to close the credibility gap as to his abusive and violent behavior towards the Applicant, certainly from the Applicant's deponing to same on the 25<sup>th</sup> October 201. I could not find even a hint or trace of evidence that he had taken steps to reduce or eshew his aggressive conduct towards the Applicant insofar as it bears the actual or potential character of impacting Thierry.

[14] In *M & M (child: access)* 2 All E.R. [1973] Family Division, p. 81, it was held that no court should deprive a child of access to either parent unless it was wholly satisfied that it was in the interests of the child that access should cease, and that was a conclusion at which the court should be extremely slow to arrive. Access was to be regarded as a basic right of the child rather than a basic right of the parent. Save in exceptional circumstances to deprive a child of an important contribution to his emotional and material growing up the long term.

[15] In the course of his judgment Wrangham, J did not doubt that where the question of access or no access fell for determination that “whether that form of access should be replaced by some other form of access or whether it should cease altogether.” So there so here, except that, in consideration of the welfare of the child I consider that interim moderated access is apposite.

[16] In B.A.M. v C.G. RE: “D” (An Infant), (1985) 22 J.L.R., p. 9, it was held that in cases on family law, while access to the child is the basic right of every parent, exceptional circumstances might justify a Court in its decision to make an order to deprive a parent of access to his child.

Again, I wish to stress that, this Court, in harkening to the extracted principle, has only sought to mediate, not to deny nor to disrupt, the Respondent’s access to Thierry.

[17] While I am still of the view that the Respondent is not a credible witness it does not translate into giving wholesale credence to every item proposed by the Applicant. The sum proposed for maintenance by the Applicant is one such. That he is not a credible witness is borne out on the evidence of Mrs. Allison Morgan, Acting Operations Manager for the Victoria Mutual Building Society and Mr. Michael Lee, Branch Manager of the Liguanea branch of the Bank of Nova Scotia. The combined effect of each witness’s affidavit evidence sets out defiance any notion on the part of Mr. TiJean Johnson as to his ability or wherewithal to pay maintenance for Thierry. It’s effort in engaging this aspect of his evidence can best be described as an attempt at truth obfuscation or else as a *suppressis veri*. From the affidavit of the Applicant sworn to on the 23<sup>rd</sup> August 2010 she avers at paragraph 5 that “At present expenses I incur on our son’s behalf are on an average as follows:

i.	groceries	\$48,000.00
ii	grooming etc.	700.00
iii	services of a helper	30,000.00
iv	Transportation	6,000.00
v	Clothing	4,000.00
vi	School fee per year	

	\$225,000.00 - per month	18,750.00	
vii	Electricity per month - 1/3 Apportioned to Thierry	5,666.66	
viii	Water - \$2,500.00 per month 1/3 apportioned to Thierry	833.33	
ix	Telephone calls - \$17,000.00 per month 1/5 apportioned to Thierry	3,400.00	
x	Mortgage - \$97,000 per month 1/3 apportioned to Thierry	<u>32,333.33</u>	= \$149,683.32

[18] Be it recalled that the Applicant is asking this Court to make an order in respect of the tabulated figures, that is \$149,603.32. There can be no denying that the Applicant's postal address, according to her 23<sup>Rd</sup> August, 2010 affidavit, is 8 Lenark Close, Kingston 8, which she shares with her parents. Thus, the household at 8 Lanark Close is composed of four persons, inclusive of Thierry.

[19] Again, it is to be noted so as to be borne in mind, that the salary of the Applicant is not stated. Additionally, the sum claimed for mortgage appears to be the joint responsibility of the Applicant and one of her family members.

[20] Under the Maintenance Act 2005, Section 9(1), the Court is considering maintenance order for the support of a child shall, *inter alia* apportion the obligation according to the capacities of the parents to provide support.

[21] It seems to me that there can be no question of the capacity of the Respondent to provide support for Thierry. Equally, *ex silento*, is the capacity of the Applicant so to do.

[22] Accordingly, a household comprising four persons must each share one fourths of the expenses of running the household. Thus viewed I determine that with respect to

the enumerated items as appears in the Applicant's affidavit an alteration to the proposes figures:

a)	Groceries of \$48,000.00 ÷ ¼	=	\$12,000.00
b)	Grooming of \$700.00 ÷ ½	=	350.00
c)	Services of helper \$30,000.00 ÷ ¼	=	7,500.00
d)	Transportation of \$6,000.00 ÷ ½	=	3,000.00
e)	Clothing of \$4,000.00 ÷ 2	=	2,000.00
f)	School Fee per month of \$18,750. ÷ 2	=	9,375.00
g)	Electricity of \$17,000.00 per month ÷ 4	=	4,250.00
h)	Water of \$2,500.00 per month ÷ 4	=	625.00
i)	Telephone calls	=	<u>3,400.00</u>
	Total	=	\$ 42,000.00

[23] In sum I make the following orders:

1. Legal custody care and control to the Applicant.
2. Access to the Respondent twice monthly on the 2<sup>nd</sup> and 4<sup>th</sup> Saturdays of each month from 10.00 a.m. to 4.00 p.m. Said access to be supervised by some-one appointed by the Applicant.
3. Maintenance of the relevant child to be shared between the parties equally, the Respondent contribution being \$42,000.00 per month commencing on
4. Liberty to apply

