

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2004/HCV2920

BETWEEN DONOHUE MONTGOMERY STOCKHAUSEN CLAIMANT
AND VALDA WILLIS DEFENDANT

Mrs. Suzanne Risdén-Foster instructed by Livingston, Alexander and Levy for the Claimant/Applicant; the Defendant/Respondent not present nor represented.

Heard July 8 and 16, 2008

THIS REPLACEMENT PAGE 1 NOW CONTAINS THE SUMMARY OF POINTS INVOLVED IN THE INSTANT CASE. IT IS BEING ADDED IN THIS WAY TO AVOID HAVING TO RE-PRINT THE ENTIRE 20 PAGE JUDGMENT.

Application to amend previous Consent Order with respect to custody and access of unmarried parents of child; whether access is right of the child or the parent; Under existing Order, Child subject to periodic psychological/psychiatric evaluation with reports to be sent to the Court; Paramountcy of interests of child; Evidence of circumstances placing child at risk where access unsupervised. Jurisdiction of court to order supervised access only, where in the interests of the child. Children (Guardianship and Custody) Act section 7 and 18..

Anderson J.

In this highly unfortunate matter involving a claim for custody of a minor child (to whom I will refer as A) the claimant, father of A, seeks a variation of a Consent Order which I made when the matter first came before me about three and a half (3 ½) years ago. At that time I signed off on a consent arrived at between the Claimant and the Respondent, the matter of A in terms of an Order which gave custody to the father. The order also gave to the mother, the right to have access to the child between midday Saturday to midday Sunday, on four (4) weekends per month; as well as two weeks in the summer and a week during the Christmas vacation.

As part of that Order, at paragraph three (3) I ordered that A was to be subject to "educational and psychological – psychiatric evaluation at the end of each school term for the next two (2) years up to Summer of 2007 and a report sent to the Court on each occasion."

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The reports have been duly submitted and A's father, based partly upon these reports, as well as on his own observations of the child who is now about to go High School, having been successful in the annual Grade Six Achievement Test (GSAT), seeks a variation of the Order to withdraw the rights of unrestricted access enjoyed by the mother. The application seeks to substitute supervised access, and is supported by two (2) affidavits of the father as well as one (1) by his common law companion, Mrs. Joy Crawford.

The grounds being advanced in support of this application are as follows :-

- (A) The Application for variation of the consent order of 11th February 2005 with respect to access of the Respondent to the child is sought pursuant to the court's inherent *parens patriae* jurisdiction over children and pursuant to section 7(5) of the Children (Guardianship and Custody) Act) which permits and order for custody and access to be varied or discharged by a further order.
- (B) The Application is made under liberty to apply which was granted to either party.
- (C) That, over the three-year period since the order was made in February 2005, the child's access to his mother on the scheduled weekends and periods during the vacation is having a detrimental effect on the child's physical stability, emotionally and spiritual well being and development.

- (D) The Defendant's home environment continues to represent a danger to the child in that the child, who has been now diagnosed with Attention Deficit Hyperactivity Disorder, is still continuously exposed to the smoking of marijuana by his brothers when he visits his mother. The combination of his prescription drugs used to control the disorder and the exposure to second-hand marijuana smoke is most likely psychotropic, results in the child misbehaving when he returns from his mother's home and causes the child to experience pronounced severe mood swings where he presents a danger to himself at home and to his school mates at school which is evidence by the fact that he has been suspended from school a number of times over the past three years for violent conduct and use of a foul language.
- (E) Further, due to the fact that the existing order dated 11th February 2005 provides access to the respondent mother for four weekends per month, the child's spiritual development is being hindered as he is not able to go to Church to receive much needed religious counseling and guidance, as the Respondent does not see to this aspect of his upbringing when is with her on the weekends which coincides with the time when the child would normally go to Church.
- (F) Additionally the child does not take his medication during his access periods with his mother.

(G) Further, the evidence from the child's school reveals that the child is at a critical juncture in his development, in that he is poised to commence secondary level education in September 2008 having just sat the Grade Six Achievement Examination (GSAT). In preparation for a new educational environment, it is critical to his development and stability that he remain on his medication and avoid situations which will distract him from his regular daily routine which is in danger of being jeopardized due to contact with the mother which results in his experiencing and becoming distracted, moody and unable to settle down for educational instruction.

I should point out that although service of the Notice of Hearing as well as the supporting affidavits had been effected on the Respondent, she neither appeared nor was she represented. Nor were any affidavits filed on her behalf. All the evidence before me is therefore the uncontradicted averments in the affidavits of the claimant and Ms. Crawford together with the supporting exhibits.

The evidence from the affidavits

The evidence available is to be gleaned from the affidavits of the Claimant father and his companion who lives with him. The evidence which I have accepted is that on the occasions when he visits with his mother pursuant to the terms of the previous order, he is generally in the company of two older sons of the Respondent who are much older than A is. Those brothers allegedly are smokers of marijuana. The Claimant avers that on occasions when he has been to the

residence of the Respondent, the air is so thick with ganja smoke that it stings the eyes and assaults the nasal senses..

It is also averred that through discussions with A on his return from visits to his mother, it is apparent that these older siblings of A also watch pornographic movies in the presence of A. There have also been violent incidents at the Respondent's home involving one brother stabbing the other as well as violent exchanges involving the Respondent.

The evidence also reveals that A, who is now about to commence his secondary education, has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and is on medication for this condition. It appears that whenever A is with the Respondent, he does not take his medication, and there is also some concern as to the possible effect of ganja smoke on his medical condition. While he is visiting with his mother, he also does not attend church and so does not benefit from religious instructions. Among the recent developments which have emerged since the order of 2005 is that after visits with his mother, A is often subject to severe mood swings and fits of violent temper which places both himself and his schoolmates at risk. This is confirmed by a letter of April 8, 2008, from the principal of the Holy Childhood School Preparatory and Academy, which A attended before sitting the GSAT Examination. He has been accused of throwing objects at fellow students at his school and has had to be suspended from school after cursing at a teacher. In addition to the foregoing, there is some

evidence that the child has been encouraged to disobey authority figures including his father and the father's companion. There have also been incidents of the Respondent having intercepted A on his way from school and keeping from going home for several hours. Finally, the Respondent has now moved from her previous address in the hills of St. Andrew to the Grant's Pen area, a community colloquially described as an "inner city community". The view has been proffered that in such a community the child is at greater risk than he had been before. Equally disturbing are the allegations which have been made that A has been refusing to purchase lunch with money provided by his father for that purpose, but has instead been starving himself in order to give his money to his mother. The result of this has been that A has developed medical complaints with his stomach. I should note that there is no medical report making the alleged link.

Before considering the implications of the evidence I wish to note with some measure of concern the apparent willingness of the Claimant to treat as more morally acceptable what is described in his fifth affidavit as "regular pornography" involving heterosexual couples, as opposed to pornography involving homosexual behaviour. I hope that this is a misunderstanding of the Claimant's views, as if it correctly represents his views it would raise legitimate questions about his own appreciation of the need to protect A from any age-unsuitable material. But although I voice my concern, I must focus my attention on the evidence before me and seek to determine:-

(a) what is in the best interest of the child A;

(b) whether those interests will be served by granting the application brought by the Claimant; and

(c) If the application is to be granted, how is the order to be framed.

The Claimant's attorney-at-law submits that there are compelling authorities to show that the court has the power to grant the application. Counsel submitted that sections 7 and 18 of the Children (Guardianship and Custody) Act permits the court to vary a previous order.

The relevant sections provide as follows :-

7(5) Any order so made may, on the application of the father or mother of the child, be varied or discharged by a subsequent order.

Section 18:-

Where in any proceedings 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.

Perhaps the first question that needs to be determined is whether this court does, in fact have jurisdiction to vary the previous order, it having been a "consent

order” agreed then by both parties. At the hearing in 2005, the Respondent attended and agreed to the consent order which I had then made. I am of the view that the absence of the Respondent’s participation in this hearing makes it even more critical that the court ensure that justice is done as between the litigants but moreso in respect of the interest of the minor child. It is settled that, as a general rule, an order arrived at by and with the consent of all parties to an action, where in effect, it embodies the conclusion of negotiations between parties, the court will give effect to it and will not vary it. (See the judgment of Smith J.A. in SCCA 129/2002, Michael Causwell and Richard Causwell (Appellants) v Dwight Clacken and Lynne Clacken (Respondents), judgment handed down on February 18, 2004, an appeal from a judgment I had given earlier). On the other hand, as the learned Judge of Appeal, in dealing with a consent order, stated:

“In a case of a final order which embodies or evidences a real contract, as said before, the court will not normally interfere with it. Where, however, in the case of a final judgment or order the necessity for a subsequent application is foreseen, it is usual to insert in the judgment or order words expressly reserving liberty to any party to apply to the court for further directions”

In the instant case, at the earlier hearing in 2005, I had specifically included as one of the orders, “Liberty to Apply to either party generally” and it seems to me that that may be sufficient to give this court the jurisdiction to make the variation of the order sought. But, it also seems that section 7(5) of the Children (Guardianship and Custody) Act cited above specifically places the matter

beyond doubt by appearing to allow any variation of “any order”. Indeed, counsel for the Claimant submitted that the subsection was authority for the proposition that this court did in fact have the authority to vary the consent order. It may be sufficient to uphold this proposition to say that in matters involving the welfare of the child, no order, whether or not it was by consent, can be considered final and irrevocable.

In the unreported Trinidadian case of Stephen v Stephen, (M – 255 of 2000 dated March 17, 2003, in the Trinidadian High Court) Tam J was asked to vary an order for maintenance of children by reducing the amount which had been previously ordered, by consent. The application was made under section 31(1) of the Matrimonial Proceedings and Property Act. That sub-section provides that “*Where the Court has made ... an order to which this section applies, then, subject to this section, the Court shall have power to vary... the order...*” His lordship opined that since the previous order was one to which “this section applied”, it was therefore capable of being varied.

In this regard, I have also found useful dicta in a Malayan case, Kelvin Yeoh v Liew (Case 10 HCM, reported at [2005] 3 AMR 272) decided in the High Court of Malaya on October 8, 2004. There, the judge, Faiza Tamby Chik J, had to consider the power of that court to vary orders for maintenance under Section 83 of that jurisdiction’s Law Reform (Marriage & Divorce) Act 1976, a provision similar, though by no means identical, to our section 7(5). The relevant section of that Act gave the court power to vary orders for custody and maintenance as well as custody orders for children. His lordship stated that under the Malayan

legislation in respect of custody and maintenance orders, it did not matter whether the order is an "interim order" or a "final" order or a consent order, as the power to vary such orders (for custody and/or maintenance) was expressly given to the court. Once there was this express power to vary, it did not matter that the order sought to be varied was a consent order. He cited **Rayden on Divorce**, 14th Edition at page 847 (paragraph 144). There the authors expressed the view (after setting out the court's powers to vary certain orders) that "the same basic approach applies to variation of consent orders", and went on to state the power to vary reflects changes in circumstances subsequent to the date of the order.

His lordship also referred to Halsbury's Laws of England, 4th Edition in Vol 13, paragraphs 1168-1170 which deal with variation of orders. After setting out (in paragraph 1168) what orders may be varied, and (in paragraph 1169) the procedure, the authors deal (in paragraph 1170) with the principles on which the court acts in consent orders. At p 550, the learned authors state: "A consent order may be varied if there is material change in the position of one of the parties etc". His lordship's view, with which I concur and adopt for these purposes, is that although that paragraph deals with financial orders by consent, the same principles apply to custody orders for which the court has also been given power to vary. Indeed, the power to vary should be considered even more crucial in matters relating to children, as orders for custody and access are never final, and the primary consideration is always the welfare of the child. Even the parties cannot oust the jurisdiction of the court in such matters.

In support of this latter proposition, Faiza Tamby Chik J cited a decision of the English Court of Appeal, Thwaite v Thwaite [1981] 2 All ER 789. There Ommrod

LJ stated that (in relation to consent orders):

their legal effect is derived from the court order and dealt with, so far as possible in the same way as non-consensual orders. So, if the order is one of those listed in s 31(2) of the Act of 1973, it can be varied in accordance with the terms of that section: see B(GC) v B(BA) [1970] 1 WLR 664. In that case, (B(GC) v B(BA)) the court stated, at p 916, that:

The cases referred to in the Supreme Court Practice 1970 are all cases arising out of judgments or orders made by consent by parties litigating in other divisions in which the court makes final judgments. The reasoning in these cases must be applied with great caution to cases such as the present, where no final judgment is or can be made; and the court retains its powers to adjust the orders in the light of all the circumstances of the case.

In light of the foregoing, I therefore conclude that this court has jurisdiction to vary the previous order, albeit one made by consent, in the instant case. I adopt the dicta of the learned judge Faiza Tamby Chik J. for the purposes of this judgment, where he summarizes the position:

The power (i.e. the court's power to vary) is not limited to non-consensual orders. Indeed) if consent orders may not be varied even if these are for custody or maintenance, then the primary principle of the welfare of the children would have to be disregarded in favour of a perceived notion that parties are bound by consent orders, no matter what the consequences — even when there is a material change in circumstances. That cannot be the law. There is, however, a provision to vary orders and that power ought to be exercised where ss 83 and/or 96 apply, so as to preserve the *parens patriae* position of the court in relation to

all children within the jurisdiction. I, therefore, conclude that as custody and maintenance orders may be varied, under our legislation, it does not therefore matter whether the order sought to be varied was a consent order or not.

I am persuaded that our section 7(5) is clearly wide enough and intended to allow the court to vary any order made under the legislation and that the evidence elicited also shows sufficient changes in the circumstances since the order of 2005, to justify such variation. The Australian case In the marriage of D'Agastino (19760 2 FAM. LR 11), is support for the submission of counsel for the Claimant that while the court does have the jurisdiction to vary orders, it should be constrained to resist the inclination of parties to re-litigate issues over and over again by successive applications, by restricting such applications to vary to cases where there had been a change in circumstances since the grant of the order sought to be changed.

I should point out that the citation from B(GC) v B(BA) above, provides support for another submission of counsel for the Claimant that the court has an inherent *parens patriae* jurisdiction which cannot be defeated merely by the fact of the parties having consented to an order previously..

I turn now to consider the issues I identified above namely, what are the interests of the child? Will those interests be served by granting this application and if it is granted, how is the order to be framed?

It is trite law that access as between a parent and a child is properly to be regarded as the right of the child, and that it is normally in the best interests of the child that he have access to both parents. The right of a child to have access to both parents is re-inforced by the provisions of Article 9 of the United Nations Convention on the Rights of the Child, Article 9, a convention to which Jamaica is a signatory. The article provides that:

State Parties shall ensure that a child shall not be separated from his or her parents against their will except when competent authorities subject to judicial review determine in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case, such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

In exceptional cases, however, the court may even order a complete cut off of access to a non-custodial parent, where the interests of the child demand it. Thus, in M v M, {1973} 2 All ER 81, the child in question, A, was born in 1965 and adopted by H and W in October 1966. In April 1969 an order was made placing A under the care of the local authority. In April 1970 W left H and A. In June 1970 W complained to the justices of H's cruelty and asked for custody of A. The justices found that cruelty by H was not proved, and they awarded custody of A to H, with "reasonable access" to W. W visited A at first twice a week, later once a week, but the evidence showed that from soon afterwards access was never successful. This was because both H and W resented the fact that the other was having anything to do with the child. In April 1971 W became pregnant and H refused to allow access to continue although he was himself

living in adultery. In May 1972 W applied for a definition of "reasonable access" and H applied for all access by W to be ended. The justices heard evidence that A was found by his schoolteacher to be disturbed after access by W, and that since access had ceased his general development had greatly improved. They concluded that "it was in [A]'s best interests that access should be discontinued completely at the present time." W appealed, contending that every parent had a right to some access to her child unless she was a criminal or likely to be cruel to her child (which was admittedly not the case).

It was held, dismissing the appeal, that (1) access is a right of the child, not of the parent; (2) it is a harsh step to deprive a child of all access to one parent; (3) but the interests of the child are paramount, and as the justices had applied this test correctly, and there was evidence before them justifying their conclusion, their decision would not be disturbed, especially as A was still young and a different order could be made in the future if appropriate. (My emphases)

The court must now consider whether the best interests of this child A, will be served by granting the application in the terms applied for in the application of the Claimant. In particular, the Claimant has requested that the access of the non-custodial Respondent be supervised. The court is not aware of any orders for supervised access having been previously made in this jurisdiction and none was brought to its attention. In those jurisdictions where supervised access is widely practiced as part of the family law landscape, such as in Canada and Australia,

and in many states in the United States of America, there are state-operated "Access Centers". In such jurisdictions as in Ontario and Saskatchewan in Canada, the approach is that generally, the court starts with the proposition that a child has a right to see and have a relationship with the parent who does not have custody, in the instant case, the Respondent. A child has a right to access that parent. In many cases, when a court orders supervised access, it places some conditions on how the visit may take place, including who will be present. Supervised access may be ordered when there are concerns for the child's well-being if access is not supervised. This could include situations where the parent in respect of whom the order is sought has limited parenting skills or there are other reasons to conclude that the environment in which access would otherwise be granted, may be prejudicial to the best interests of the child.

It was submitted that the court could get some assistance by reference to an 1999 article by Professor Martha Bailey entitled: "Supervised Access: A long term solution"? published in 37 Family and Conciliation Courts Review at page 478. There the learned author posited the view that "Supervised access is ordered to develop, re-establish, or maintain a relationship between a child and a parent or other relative, generally with the expectation that unsupervised access will at some point become possible". It is the view of the author that each court has to weigh the particular circumstances of each individual case before it to determine what is in the best interest of the child, including the suitability of supervised access.

In Re C (Minors)(Access) [1985] FLR 804, the English Court of Appeal dismissed an appeal by a father who had, at first instance, been denied access on the basis that the minor children regressed emotionally after visits with him. Three years after the father had last seen the children (because the mother terminated the father's access to the children on account of the father's attitude), the father sought to have an order to allow him access. There was some evidence that the father's attitude had improved but the trial judge formed the view that it was unlikely that the father could offer a benefit to the children commensurate with the risk that access would involve. The trial judge therefore denied any access by the father and observed that there should be no access until the children could make up their own minds. The Court of Appeal upheld the order of the trial judge except insofar as it disagreed with the view that access could re-start when the children could make up their own minds. The Appeal Court felt that a court should not impose such a heavy and sensitive decision upon children. It also held that a relevant factor was the impact on the mother and her cohabitee of the way the father had behaved when he had access.

There is compelling evidence in the instant case that the A's behaviour and how he relates to his father and his cohabitee, as well as his schoolmates, after returning from visits with the Respondent, is unacceptable. It is clear from the case of Re C (Minors)(Access) cited above, that in determining the question of access in a matter such as this, the court ought to pay very close attention to the

potential effect of the behaviour or environment being called into question, on the emotional development of the child. In general there is a pronounced unwillingness to deny all access to a parent. In Cantrill v Cantrill (1969) 15 F.L.R. 10, a court in New South Wales stated: "We think that, prima facie, it is not in the interest of a child that it should be brought up without a father. It would require a strong case indeed to justify a contrary conclusion although, doubtless, there are cases where it may be proper for the court in its discretion to refuse a parent access". It seems that such a drastic order would only be made in the most egregious cases, probably involving sexual and/or physical abuse.

In the instant case, while there are real concerns for the psychological, emotional and spiritual development of A should he continue to subject to the environment at his mother's home each weekend, I have formed the view that the risk may be reduced by an appropriate supervised access order. I have indicated above that no case of such a order being made locally was brought to my attention. I am left therefore to the wisdom and ingenuity which I can summon, to provide an order which achieves the result required. I am prepared to order that supervised access is to be granted to the Respondent on the following bases:

The Respondent shall be allowed to have the child with her on the first and third Saturdays, in each month for period between 1:00 p.m. and 6:00 p.m.

The time is to be spent at public areas of entertainment such as Devon House, shopping centres such as Sovereign Centre including the cinemas therein, Hope

Gardens, or other places approved by the person designated to supervise the access.

The access between these hours shall be in the company of a person (the "Accompanist") approved by an agency such as Family Life Ministries in Kingston, or such other similar agency approved by the Court. The Accompanist should be an adult over twenty-one years of age and a person with some training in counseling and/or psychology or dispute resolution.

All reasonable costs of the accompanist as well as the entertainment and activities of the Respondent and A during the access periods, shall be borne by the Claimant and shall be paid by the Accompanist out of funds provided therefore by the Claimant. Where A has either extra curricular activities or extra lessons in these time periods, the time is to be adjusted to allow him to attend to these activities. As with the previous order, there shall be liberty to apply. I make no order as to costs.

There is one other matter which I believe I should mention. This relates to the allegation that the Respondent has been a trespasser at the home of the father when the father and his companion are away and the child is left with a next-door neighbour. There was also the question of the Respondent having showed up at A's school and at the National Stadium where A was with his school participating in a track meet, causing considerable unease to the dismay of his principal. An oral application to bar the Respondent from the vicinity of the home of the Claimant as well as A's school was made and I believe that it would be further in A's interest that the Respondent be restrained from coming within two hundred

yards of the Claimant's home or two hundred yards of his school or any place at which he may be taking private lessons, from time to time. Accordingly, I would make such an order. I would strongly warn the Respondent that she runs the risk of proceedings being taken against her for trespass and that she is liable to be incarcerated for failure to abide by this prohibition by encroaching upon the rights of the Claimant and his common law spouse. Those who have ears to hear, let them hear.

Finally, I would wish to ensure that A attends church and has the benefit of religious instruction on an ongoing basis.

I invite counsel for the Claimant to prepare a draft order consistent with the terms of this ruling, for my signature.

ROY K. ANDERSON
PUISNE JUDGE
July 16, 2008