[2015]JMSC Civ. 54

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
(In Chambers)

CLAIM NO. 2013 HCV 04793

BETWEEN	**MARK WEST**	**CLAIMANT**
A N D	**EVELYN WALDEN-WEST**	**DEFENDANT**

Mr. Gordon Steer instructed by Chambers, Bunny & Steer for the Claimant.

Ms Katherine Minto: Instructed by Nunes, Scholdfield, DeLeon & Co. for the Defendant.

Heard on: 17th October 2014, 14th November 2014, 9th January 2015 & 26th March 2015

CORAM: G. FRASER, J (Ag.)

Application for Custody – Governing principle: welfare of the child is the first and paramount consideration - Application for Maintenance – Parties means for the purpose of determining capacity to pay maintenance.

INTRODUCTION

[1] The parties are separated from each other after a brief period of marriage. The husband has applied for an order seeking joint custody of the infant, the only product of the union. He further proposes that he pays to the Defendant; the sum of $15,000 per month towards the infant's maintenance and half educational and reasonable medical expenses incurred on her behalf. In the interim he was granted access by a consent order.

[2] The Defendant in a cross application had initially sought joint custody of the child and an order for maintenance. Thereafter the application was amended[1] and Mrs. West is now asking the court to grant her sole custody of the infant and an order that the Claimant pay the monthly sum of $75,000 for child maintenance as also half of all medical, extra-curricular and educational expenses.

THE LAW

[3] The law relating to child custody and maintenance can be found in several pieces of legislation:

a. The Children (Guardianship and Custody) Act – Here the Court is conferred with the power to hear and determine matters of custody arising under this Act by virtue of section 7; which provides that:

> ***"The Court may, upon the application of the father or mother of a child, make such order as it may think fit regarding the custody of such child and the right of access thereto of either parent, having regard to the welfare of the child, and to the conduct of the parents, and to the wishes as well of the mother as of the father..."***

In the Supreme Court an application for custody under this Act can be freestanding or can be an ancillary and related issue in proceedings for the dissolution of marriage.

[1] By way of an amended Notice of application dated 15th October2014.

b. Matrimonial Causes Act – Pursuant to section 23 as an ancillary claim in matters involving dissolution of marriages and other claims arising under this Act, an application for maintenance can be made and :

> ***"(1) The Court may make such order as it thinks just for the custody, maintenance and education of any relevant child ...***
>
> > ***(a) in any proceedings under section 10, or in any proceedings for dissolution or nullity of marriage before, by or after the final decree..."***

c. The Maintenance Act, 2005 - This statute imposes an obligation on parents, as distinct from fathers alone, to support their children; and states explicitly that:

> ***"Every parent has an obligation, to the extent that the parent is capable of doing so, to maintain his/her unmarried child who is a minor..."***

The Children (Guardianship and Custody) Act pursuant to section 7(3) further provides that:

> **"Where the Court under subsection (1) makes an order giving the custody of the child to the mother, then, whether or not the mother is then residing with the father the Court may further order that the father shall pay to the mother towards the maintenance of the child such weekly or other periodical sum as the Court, having regard to the means of the father, may think reasonable".**

THE CLAIM FOR CUSTODY

[4] If during the subsistence of a marriage, where children are produced, both parents have joint guardianship over that child and the parental rights are equal; and each parent has an equal right to the custody of the child when they separate.

[5] When determining the home in which to place the child, the court strives to reach a decision in "the best interests of the child." The Children (Guardianship and Custody) Act in fact mandates in section 18 that:

> ***"Where in any proceeding before any Court the Custody or upbringing of a child... is in question the Court in deciding that question, shall regard the welfare of the child as the first and paramount consideration..."***

[6] A decision in "the best interest of the child" requires considering the wishes of the child's parents, the wishes of the child (not applicable in this case), and the child's relationship with each of the parents, siblings, other persons who may substantially impact the child's best interests; the child's comfort in his home, school, and community and the mental and physical health of the involved individuals. I find support in this regard in the case of ***Forsythe v Jones***[2] SCCA 49 of 1999 per Harrison, JA. (as he then was); at page 8 adumbrated as follows:

> ***"A Court which is considering the custody of the child, mindful that its welfare is of paramount importance must consider the child's happiness, its moral or religious upbringing, the social and educational influences, its psychological and physical well-being and its physical and material surroundings, all of which go towards the true welfare. These considerations, although the primary ones, must also be considered with the conduct of the parents, as influencing factors in the life of the child and its welfare".***

[7] This Court has the option of choosing joint or sole custody for a child. Where a parent is awarded sole custody, he or she controls decisions pertaining to the child's education, religious upbringing, and health care etc; whereas joint custody grants the parents equal rights in making decisions regarding the child's upbringing. As a rule Courts award joint custody in cases where both parents can properly perform their duties as parents and where such orders serve the best interest of a child and the full promotion of his/her welfare. Conversely; unless both parents have demonstrated a reasonable degree of maturity and an ability to communicate and cooperate with each other; so as to inspire a Court's confidence that the order of joint custody will be workable then joint custody will not obtain.

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[2] Unreported judgement delivered on 6th April2001.

[8] I have found support for the above premise, in the decision of ***Robert Fish v Fenella Victoria Kennedy*** 2003HCV0373 (February 2, 2007) in which Marsh, J. at page 13 after citing the cases of ***the marriage of Foster, GG and Foster K.M.*** Full Court of the Family Court of Australia at Parramatta and ***Money v Money*** (1977) FLC 76 90-284 stated that:

> ***"It cannot be in the child's best interest to have the order for joint custody continue when the relationship currently existing between his parents is such that communication, where it takes place between them is acrimonious and agreement on matters relating to the child so hard to achieve".***

[9] When a court is confronted with custody disputes, the parent's emotional baggage often clouds the issues; so an analysis of the facts will be necessary to determine what outcome will be in the best interest of the child. The rationale for this is that no court order will address the parents' inability to communicate effectively or the selfish motives which often underscore the claim for custody. Ultimately, a court must decide whether an order for joint or sole custody would be appropriate, given all the circumstances of that particular case, since the outcome of any application for custody must be decided on its own peculiar facts.

[10] In the instant case the defendant/mother is applying for exclusive custody, there is therefore an onus on her to rebut a presumption that joint custody is in the child's best interest. In her affidavit evidence she indicates that the claimant/father while resident within the jurisdiction is hardly ever present within the jurisdiction; her evidence in this regard is not disputed. His work as an airline pilot she avers requires that he spend a considerable amount of time away from home. The frequent absences and spotty communications at those times she is saying precludes effective joint decision making. The claimant himself at paragraph 11 of his affidavit dated 20th August 2013, states that he is not guaranteed weekends, nor holidays but has available to him four (4) days off every 28 days on the job. He further indicates a desire to have greater participation in the decision making process concerning the infant's welfare.

[11] In her affidavit dated 28th February 2014; the defendant further indicates that joint custody is not feasible as communications between herself and the claimant are at best strained and at worst acrimonious. She contemplates that a joint custody arrangement is not workable because of the party's inability to:

- Engage in cooperation, consultation and dialogue concerning the child's educational progress and development,

- Engage in active consultation and shared responsibility for decisions concerning health and general wellbeing and emotional and physical upbringing and welfare.

[12] Counsel Mr. Steer has pointed out in his written submissions that the defendant under cross examination has testified that yes she discusses with her husband the child's care and wellbeing, that she communicates with him and that she has not given any indication that she does not wish for him to play a part in the decision making of the child's life and indeed will continue to do so. While there is not a denial on the defendant's part as to communication, I understand in the circumstances of her affidavit that she is saying that there is no meaningful communication between the parties with respect to matters concerning the child.

[13] I have gone through the 'whatsapp' message history and it was not an easy feat and although there seems to be hostility between the parties, it seems to me that all the hostility is about man and woman issues and the relationship that has gone sour. Counsel Miss Minto has highlighted that where there has been communication it has been hostile and not conducive to meaningful dialogue, certainly not of the kind or quality contemplated by an order for joint custody.

[14] Mrs. West has also described Mr. West as being "selfish, manipulative" and "in need of professional help" and further that she is "unable to communicate openly and rationally with him". The Claimant in turn has dubbed Mrs. West as being;

“unreasonable, not easy to work with, bitter, cold and quite evil and stubborn”. He himself admits that he finds it “difficult” and has a “hard time communicating with” his wife and negotiating issues in relation to their child.

[15] The ‘*whatsapp’* messages appended to the affidavit of both parties are quite instructive; but do they support the interpretation that counsel, Miss Minto ascribes to them? Do the messages demonstrate that the parties both lack the maturity and ability to communicate and cooperate with each other; so that this Court would have no confidence that an order of joint custody will be workable?

[16] My interpretation of the communications in the ‘whatsapp’ history is that it has not really been about the infant, or rather the parties have not evidenced any meaningful dialogue about the infant but rather the parties have attempted to use the infant as a tool. As it relates to the welfare of the child I have not seen anything in the ‘whatsapp’ message history which would suggest that the parents cannot both make decisions about such matters as school, religion, health care and so on. In fact there is no evidence that the parties have attempted or engaged each other in relation to such issues. There is therefore no evidence presented to this Court which would justify an award of sole custody to Mrs. West.

[17] There is another school of thought that an award of joint custody might be equally appropriate even when there is a challenge in respect of communication as it might force the parties to recognise their responsibility and focus their concerns on the welfare of the child. Such a joint award will also allow the parent who does not have the day-to-day control of the child some measure of participation in the decision making process. I am of the view that an award of joint custody in this case would achieve such an end, and therefore I would decline the defendant’s application for sole custody.

THE CLAIM FOR MAINTENANCE

[18] Mr. West is not taking issue with the fact that he is obliged by law to pay maintenance for his child; indeed he has indicated a willingness to do so and has offered to pay the monthly amount of $15,000. What he disputes however is the quantum sought by the defendant in the sum of $75,000 which he indicates he is unable to afford. Where a parent asserts that he is unable to afford the quantum demanded by the other parent the Court is enjoined by law to make a maintenance order for the support of the child and such order; **"shall apportion the obligation according to the capacities of the parents to provide support"[3].**

[19] The onus is on the claimant to make full and frank disclosure of his means as he is disputing capability to pay. The rationale for this is because the court has to be satisfied that any order it makes relative to the maintenance that the claimant must pay is one that is reasonable; having regards to the means of the Claimant. Clearly the welfare of the child requires that the defendant who currently has the day to day responsibility, receives adequate provision by way of maintenance from the claimant, failing which, the infant's well being would be impaired.

THE MEANS OF THE PARTIES

[20] A means report was ordered by the Court with a view to making a determination of Mr. West's ability to pay but this has proven unhelpful. I say unhelpful because I am of the view that Mr. West has been less than frank and forthright as to his total income as also in giving an account of his monthly expenses. He has sought to raise a number of new issues which were not raised in his evidence and I will therefore totally disregard those allegations freshly raised and this includes allegations of pre-natal expenses for the impending birth of another child by his new "spouse" and allowance for girlfriend. I find this belated claim of having to pay $25,000 per month in this regard to be insincere. In any event this was not the evidence that was put before the court for consideration and any such change in circumstances would have to be contained in an affidavit

[3] Section 9 (1) (a) of The Maintenance Act [2005]

and be subjected to cross-examination by the other party if required. This court is therefore considering the evidence of the capabilities of both parties, only in relation to the evidence already presented.

[21] Mr. West is a pilot employed to Caribbean Airlines. His income from that source is stated to be $416,000 monthly. Additionally he has at his disposal income earned from a vessel or a boat which he testified that he operates both commercially and as a source of leisurely pursuits. As to the amount of the income earned from this source he declares to be approximately $15,000 per month. Mr. West though admitting to the ownership and operation of this vessel as partially commercial has negated any earnings there from when he testifies that the cost of maintaining this vessel is greater than its earning capacity. I do not believe him. I believe that the earnings from this source should be taken into account by this court in determining Mr. West's capability. Here I am relying upon ***Mc Ewan v Mc Ewan*** [1972] 2 All ER 708, where the Court of Appeal, held that when assessing whether or not the maintenance sum to be paid is, "reasonable in all the circumstances of the case," the justices were entitled to take into account, not only the husband's actual earnings, but also his potential earning capacity".

[22] Mrs. West is employed as a civil servant by the Ministry of Education and her monthly income as verified by her salary slip is a net amount of $146,104 and which she has declared as her sole source of income. At a glance it is readily apparent that Mr. West earns more than three times what his wife earns. As urged by the Defendant's counsel I have had regard to the provisions of section 14(4) (a) and (b) of the Maintenance Act, as to the circumstances which the Court must take into account in determining the amount of support. This includes the present and future assets and means of the parties. Both parties have provided a schedule of monthly expenses and in the view of the Defendant's means and expenses the sum of $15,000 offered by the Claimant is grossly inadequate to ensure that the child is maintained at a reasonable standard of living. In am further of the view that contrary to Mr. West's assertions he

can comfortably afford the amount requested and has a greater earning capacity then he has admitted.

REASONABLE MAINTENANCE

[23] The court in assessing maintenance for Lillian, has sought to achieve a result which is fair, just and reasonable, based on the realities, practicalities and circumstances of the parties. I looked at the line items of Mrs. West's expenditure and it seems to me that the mother was entirely reasonable in suggesting that the home to be provided for the infant should be in an area where she would be reasonably safe and distanced from the kind of problems that occur in some inner city and other depressed areas. Certainly Mr. West would not feel comfortable in his gated community knowing that his daughter's safety and security is not assured.

[24] While I am acutely aware that child maintenance is a joint and shared obligation of both parents; I have taken note that presently Mrs. West is not making ends meet and that she has another child which she is partially responsible for as also she is wholly responsible for herself and contributes to the upkeep of a parent. In the circumstances I have accorded the greater responsibility for the infant's maintenance to Mr. West as in the circumstances it is fair and reasonable so to do; taking into account his greater means and capabilities.

[25] Having regard to the evidence disclosed from the several affidavits filed, the evidence in cross-examination of the claimant and defendant and also submissions of both Counsels I find:

1. That the gum of fifteen ($15,000) in these times for the maintenance of the infant is grossly inadequate.
2. That the average monthly net income of the Claimant is in excess of $416,000 and the Defendant is $146,104.

3. That the earnings of the parties are significantly disproportionate so an apportionment that leans heavily on Mr. West's income is fair and reasonable in all the circumstances keeping in mind the paramount consideration being the welfare of the child.
4. That after the claimant's monthly expenses are taken care of, he retains a sum of $51,000 approximately (more if I ignore girlfriend allowance and pre-natal costs for new "spouse"), which could be regarded as surplus.
5. That having regarded to the evidence of the commercial earning capacity of the fishing boat this can be regarded as income or potential income and ought properly to be contemplated by the Court as a part of the means and circumstances of Mr. West.
6. That the expenses listed in relation to groceries, household help, electricity, water and cooking gas must be apportioned having regard to the benefit which the child would derive from these heads.
7. That the accommodations sought by Mrs. West is not extravagant.

[26] Having regard to my findings above, I have enumerated those items that I consider Mr. West should contribute to and in what amount as set out hereunder:

1.	Housing	$30,000
2.	Utilities (water/light/cable)	$5,000
3.	Food	$20,000
4.	Helper	$9,750
5.	Cooking gas	$1,000
6.	Petrol for child's transportation	$10,000
	TOTAL	**$75,750**

[27] **DISPOITION**

1. The Claimant's application for joint custody of the infant Lillian is granted.

2. The Claimants Application to pay maintenance for the infant Lillian in the monthly sum of fifteen ($15,000) monthly is refused.

3. The application by the defendant for sole custody of the infant Lillian is refused,
4. **Evelyn Walden-West** and **Mark West** shall have joint custody of infant **Lillian Cathryn West**, born on 21st September 2012

5. **Evelyn Walden-West** shall have care and control of infant **Lillian Cathryn West** and who shall reside with **Evelyn Walden-West**

6. Mark West shall have access on such terms as already agreed by the parties

7. The Claimant is ordered to pay the sum of $75,750 per month to the Defendant as maintenance for Lillian and also to pay half of all reasonable educational and medical costs incurred for said child Lillian.

8. The said sum of $75,750 is payable to the Defendant on the 28th day of each month commencing on the 28th of March 2015. The half share of educational and medical expenses are reimbursable on presentation of receipts to the Claimant.

9. Each party to bear their own costs.