



[2016] JMSC Civ. 209

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014 M 02782

BETWEEN	CHRISTOPHER WILLIAMS	APPLICANT
AND	KAYDEON FRANCIS-WILLIAMS	RESPONDENT

IN CHAMBERS

Mrs. Angella Cousins-Robinson instructed by Robinson & Clarke for the Applicant
Mrs. Sharon Gordon-Townsend for the Respondent

Heard: 6th October and 25th November 2016

**Family Law - Sections 7 & 18 of the Children (Custody and Guardianship) Act -
Joint Custody - Residential Access - Welfare of the Children.**

CORAM: JACKSON-HAISLEY, J. (AG.)

[1] There is an application between the Petitioner/Respondent Kaydeon Francis-Williams and the Respondent/Applicant Christopher Williams, for dissolution of marriage, before this Court. That Application has been halted pending the resolution of an Application made by way of a Notice of Application for Court Orders filed December 19, 2014 by Christopher Williams, the Applicant herein, pursuant to which the following orders have been sought:

1. That the Applicant be granted residential access to the children of the marriage, G.L.C.W. born on the 26th day of November 2001, A.U.W. born

on the 21st day of January 2006, K.O.W. and C.A.W. both born on November 5, 2008 for half school holidays and on alternate weekends.

2. That the Applicant be granted joint custody of the said children.
3. That the application for dissolution of marriage be stayed until the arrangements for the children have been determined.
4. No order as to cost.
5. Such further and or other relief as this Honourable Court deems just.

The grounds on which the Applicant seeks the Orders are as follows:

- i. That the arrangements as set out in the Affidavit Accompanying Petition for the care and upbringing of the relevant children are not the best that can be devised in the circumstances;
- ii. For the welfare of the children;
- iii. For the fair and just disposal of the matter; and
- iv. Pursuant to 76.11 of the Civil Procedure Rules.

[2] The request to stay the Application for dissolution of marriage until the arrangements for the children have been determined seems redundant as in the normal course of things, where a Notice of Application for Court Orders is filed, pursuant to CPR 76.11, the Application for dissolution of marriage does not proceed until the determination of the Notice of Application for Court Orders. This is because of CPR 76.12(4), which provides that where a decree nisi is being granted the Judge must certify that, having regard to the evidence on oath of the applicant, the arrangements for the maintenance, care and upbringing of any relevant children are satisfactory or are the best that may be devised in the circumstances. The Judge also has the power to make such order as to the custody, care, maintenance and upbringing of any relevant children.

[3] If the issue of custody remains unsettled the Court would not proceed with the Application for dissolution of marriage. Therefore, in effect the Application for dissolution of marriage has already been stayed pending the resolution of this Application.

- [4] The evidence on behalf of the Applicant is contained in an Affidavit in support of the Notice of Application for Court Orders filed December 19, 2014 and also oral testimony. In the supporting affidavit the Applicant indicates that the relationship between himself and the Respondent broke down in or about June 2012 when she moved out of the matrimonial home, taking the children with her and went to stay with her mother. Further, that since that time it has been a struggle to see his children as he used to go to the Respondent's mother's house to visit them but then the Respondent left her mother's house in February of 2013 without advising him of her new address. He asserts that the Respondent has prevented him from seeing the children since she left the matrimonial home and that she does not consult with him in relation to the children. In fact he is of the view that she hardly wants the children to speak with him.
- [5] He disputes the Respondent's averment in the Affidavit Accompanying Petition that he has full and free access to the children and asserts that he does not get to spend any quality time with them as he doesn't see them unless he visits them at school. The Respondent, he said, refuses to allow them to sleep over at his house and he is seeking residential access to them for half of the holidays and on weekends at his request as well as an Order for joint custody so that he can be consulted on important matters in their lives.
- [6] In cross-examination, when asked if he had threatened to kill himself at the St. Catherine Resident Magistrate's Court he replied that he didn't actually threaten to kill himself but that he had commented that he understood how it felt when a man reached the brink point where he would kill himself. He was also asked if he had threatened to kill himself and also the Respondent and he replied that he had never said that. He admitted however that the Judge advised him to seek professional help and that he went to professional counselling. When asked if it is true that the oldest child doesn't want to see him, his reply was 'yes' but that it was because of the Respondent and pointed out that he had only learnt of the child's reluctance to see him from the Respondent.

- [7] In relation to the house in which he resides, he said it consists of only one bedroom as the other bedroom is not set up and is in fact used by him as a work room. He said he has plans to set it up but wasn't in any haste as he didn't see where he would have had the girls just yet, moreover he has financial challenges. He indicated however that he would try to finish it this year. When asked where the girls would sleep if they were to stay over at his house now, he replied that he would give them his room.
- [8] It was suggested to him that throughout the lives of the girls only the Respondent has been making decisions with respect to them. He replied firstly that that suggestion was a lie and then he said it was true in a sense but the reason for that is that the Respondent would make decisions without including him and that is why he wants that to stop and wishes for the children to realise that both mother and father are a part of their lives.
- [9] The Respondent filed an Affidavit in Response to the Notice of Application for Court Orders and also gave evidence. In her affidavit she points out that the eldest child, Gabrielle, fears the Applicant as during the marriage he would abuse the Respondent both physically and verbally and Gabrielle was old enough to appreciate what was happening. Further, that as a consequence Gabrielle does not want to sleep at his house.
- [10] She alleged that when she left the matrimonial home the Applicant called her on the telephone and threatened to kill himself, a fact which he admitted to the Resident Magistrate in the St. Catherine Resident Magistrate's Court. Further, that she requests that he be assessed regarding his mental state and that she doesn't believe that he has a genuine interest in seeing the children, but rather she believes that his interest is to come to her house. Based on that she expressed concern for her safety and that of the children but states that she is willing to take the children to him as he already has day access to the children on weekends whenever he requests it.

- [11] She says further that she is not consenting to joint custody as she is the only parent who makes decisions regarding the children and that has always been the case so her request is that the Court refuse the Application for joint custody and grant the Applicant day access to the children on weekends.
- [12] In cross-examination the Respondent was asked if prior to leaving the matrimonial home, the Applicant had ever mistreated the children and her response was that he didn't outwardly mistreat them but if she, the mother, did anything he would take it out on the oldest daughter, meaning he would shout at her unnecessarily for any little thing that she did. When asked if he was a good parent before they started having problems, she responded that he was present as a father but he wasn't good and that he was okay. She admitted that he doesn't drink in the house nor does he smoke and that he has never abused the children physically and that he goes to church.
- [13] When asked if she has ever heard of him making any attempts on his life she responded that she has never heard of that but indicated that he told her that he would do so and has even held her in the house with a cutlass. When asked why she doesn't want him to have residential access she said that initially she was afraid but now she doesn't have a problem with him coming to the house to see the children.
- [14] When asked what is the nature of the problem she has with the Applicant having the children at his house, she said that he keeps telling them negative things about her and he keeps putting the children against her and saying that she is a bad mother. When asked if that is the only reason she affirmed that that was the only reason.

Submissions on behalf of the Respondent

[15] Counsel for the Respondent asked the Court to consider the principle adopted by the Court of Appeal in **Dennis Forsythe v Idealin Jones** SCCA 49 of 1999 in which Harrison J.A., as he then was, said at paragraph 8:

“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 and religious upbringing, the social and educational influences, its psychological and physical well-being and its physical and material surroundings, all of which go towards its true welfare. These considerations, although the primary ones, must also be considered along with the conduct of the parents, as influencing factors in the life of the child and its welfare”.

[16] Reliance was also placed on **Stanley Clarke v Madge Cary** (1971) 12 JLR 637, 646 where Smith J.A. stated that:

“A child’s physical comfort is however, an important consideration when deciding what is in the child’s best interest. A child can be more comfortable in a poor home though he may be more comfortable in a rich home. But if he is in a comfortable rich home from which is sought to remove him, care has to be taken to see that his general welfare is not prejudiced by such a removal”.

[17] Counsel for the Respondent submitted that the Applicant, having made the application before this court for custody and access, had no reason to fail to prepare a room to accommodate the female children, unless the application is not genuine, that is to say, it is not for the children’s welfare but for him to get to their mother as the Respondent has asserted. This, she submitted, is supported by his admission that he had one of the children’s birth certificate but doesn’t even know where it is now. Further, that from the evidence there is no physical comfort at the Applicant’s house for residential access as no bedroom has been set up to accommodate the four girls who range from ages seven to fourteen. She argued further, that the room which he has for them is currently his work room and that he has financial challenges which have to be resolved before he can furnish the room. Further, that it is clear that the Respondent has always had care and control of the children. Counsel also argued that the Applicant has failed to provide the Court with evidence as to how he proposes to take care of

the children's daily needs on the weekend or holidays or how he intends to feed them and who is going to physically care for the younger girls.

- [18] She also submitted that there is also the concern that if the Orders sought are granted the children's psychological and physical well-being would be in jeopardy as the Applicant is unstable emotionally and this may impact the children. Accordingly, it was submitted that it is in the best interest of the children that sole custody be granted to the Respondent as she is the only parent who makes decisions regarding their development and care. Further, that an Order for joint custody would prevent the Respondent from making prudent decisions regarding the children in a timely manner. It was also submitted that day access ought to be granted to the Applicant on weekends and during the school holidays.

Submissions on behalf of the Applicant

- [19] No submissions were advanced on behalf of the Applicant.

The Law

- [20] The Children (Guardianship and Custody) Act makes provisions for the custody of children. Sections 7(1) and (2) provide as follows:

(1) 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, and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this Act; and in every case may make such order respecting costs as it may think just.

(2) The power of the Court under subsection (1) to make an order as to the custody of a child and the right of access thereto may be exercised notwithstanding that the mother of the child is then residing with the father of the child.

Section 18 also provides as follows:

"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”.

Issues

1. Whether the Application is genuine?
2. Whether the Applicant should be granted joint custody with the Respondent?
3. Whether the Applicant should be granted residential access?

Analysis

Whether the Application is genuine

- [21] It has been suggested that the Applicant has only made this Application as a guise to get access to his estranged wife. Before proceeding to determine the substantive issues I have to resolve this issue because if this suggestion is true it may mean that the Application is not being made for the welfare of the children.
- [22] Pursuant to section 18 of the Children (Guardianship and Custody) Act the first and paramount consideration is the welfare of the children. In determining this issue I find guidance in the decision of Mangatal J. in **F v B Cl. No. 201 0 HCV-2702** (unreported), a case in which, among the issues she had to determine was one as to whether or not the Application was made simply out of spite. In dismissing this suggestion and finding that the Application was genuine and realistic she had this to say:

“F desires to continue her care and control of L by relocating to the Bahamas. I am of the view that F’s application is genuine, realistic and understandable. It has been well-researched and investigated. F’s plans are reasonable. Whilst B’s opposition to the application is genuine, and motivated by real concern for L’s welfare, his cross-application for care and control of L does not have any pre-existing foundation”.

Although the Applicant’s actions in this case have not reached the standard of actions of the Applicant described in the case cited, it does appear that this

application is premised on his desire to play a part in the lives of his children and for them to realise that both parents have a role to play. When the Applicant was questioned regarding his motives for making this Application, he was at pains to explain that for most of the children's lives the Respondent has had the say but that it is important that they realise that they have both a mother and a father. I bear in mind that it is important for young girls to have the influence of their father in their lives especially when he desires to play a part. The Respondent's motive for objecting seems to be based on what she alleged the Applicant has said to the children about her and appears to be motivated by concern for herself as opposed to what is in the best interest of the children.

[23] It was also submitted that the Applicant could have made this application in the Resident Magistrate's Court as he had the wherewith all to do so. However, I bear in mind that the Application at this point seems to be in response to the Application for Dissolution of Marriage with the supporting Affidavit Accompanying Petition filed November 21, 2104, which states that he has full and free access, a fact which he is contesting. Although the Respondent indicates, in the Affidavit Accompanying Petition that he has full and free access to the children and is free to visit them whenever he wishes to, she speaks differently in her Affidavit in Response to this Application. In that Affidavit she speaks to him having day access. Accordingly I accept that the Affidavit Accompanying Petition does not reflect an accurate state of affairs and that this was reason enough to spur the Applicant into making this Application bearing in mind that upon the dissolution of the marriage those arrangements are likely to be confirmed. In light of that I find that his Application is a genuine one.

Whether the Applicant should be granted joint custody with the Respondent

[24] The Applicant is seeking joint custody primarily because he wants to have a say in the lives of his daughters. The children have been in the de facto custody of their mother since the parties separated. I accept the evidence that for most of the children's lives the Respondent has taken charge of making decisions in respect of them. I also accept that this was not by choice of the Applicant's but rather by the fact that the Respondent has always taken charge of the children's affairs. This is reflected in the fact that she took them away from the matrimonial home to live with her mother and she now has sole de facto custody of them. It is obvious that the girls have had a closer relationship with their mother and that for the last few years they have been deprived of the chance of fostering a relationship with their father.

[25] Based on the provisions of section 7 a mother and a father have equal rights to custody of a child. Although the Respondent has always made the decisions for the children, in the normal course of things, decision making should be done by both parents. However, the fact that the parties are separated has made this difficult. There is clearly some tension between the parties and I am concerned that this may affect their ability to make the best decisions for the girls. The Applicant has said that he wants to play a greater role in the lives of his daughters and this is his right. However I have to determine this issue based on what is in the best interest of the girls taking into consideration the applicable legal principles.

[26] In the case **Jussa v Jussa [1972] 2 All ER 600** Wrangham J., expressed at page 603:

"...I recognise that a joint order for custody with care and control to one parent only is an order which should only be made where there is a reasonable prospect that the parties will co-operate. Where you have a case such as this the present case, in which the father and the mother are both well qualified to give affection and wise guidance to the children for whom they are responsible, and where they appear to be of such calibre that they are likely to co-operate sensibly over the children for whom both of them feel such affection, where you have that kind of situation, it seems to me that there can be no real objection to an order for joint custody".

- [27] From the discussions that follow this pronouncement by Wrangham J., it is clear that such an order is usually viewed as exceptional. If the parties are not on good terms and are not able to agree on important matters concerning the children, this may hinder good decision making.
- [28] Similarly, in the case of **Michelle Angella Johnson v Lawrence Michael Passley** [2015] JMSC Civ.135, Laing J. said this:

“It does not appear that the parties will be able to put aside their personal differences and reasonably work together for Raaef’s best interest if they are required to jointly make decisions that will impact him. The governing principle is accurately reflected in the unreported decision of Fish v Kennedy Claim No. HCV 373 of 2003, where Marsh J. stated the following: “As rule, joint custody orders do not serve the best interest of a child, and the full promotion of his welfare “unless his parents have demonstrated that degree of maturity and such an ability to communicate and cooperate with each other as to give a Court some confidence that the order of joint custody will be workable...” On the particular facts of that case the learned Judge concluded 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 the child is hard to achieve.” In this case, the Court is of the firm view that it is inappropriate to make an award of joint custody and after considering all the relevant factors in the round and for the aforementioned reasons concludes that the best interests of Raaef are served by awarding custody care and control to his mother the Claimant, in whose custody care and control he has been for effectively, his entire life. The familiarity and stability of those systems and surroundings should enure to his benefit and with the Defendant continuing to play and important part in his life he ought to continue to develop as a well balanced child”.

- [29] In the **Jussa** case Wrangham J. made an Order for joint custody where he found both parents to be unimpeachable and to be of such a calibre that they are likely to co-operate sensibly. Allegations have been made in this case by each party against the other as it relates to the conduct of each of them. According to the Respondent the Applicant had threatened to commit suicide. Although the Applicant denies this, he did admit to making some comment in Court. I have formed the view and find as a fact that the Applicant must have said something in the presence of the Judge that caused the Judge to harbour some concern in

relation to him so as to make a recommendation for counselling. I therefore accept the Respondent's account that the Applicant admitted that he told the Court that he had threatened to commit suicide. According to the Respondent she is concerned for the safety of the children because of the Applicant's desire to commit suicide.

- [30] The fact that conduct is a relevant consideration was also reflected in **Dennis Forsythe v Idealin Jones** (supra) where at page 8 Harrison J.A., as he then was, sets out the considerations for a court considering custody of a child. He listed what he viewed as primary considerations which he suggested must be considered along with the conduct of the parents, as influencing factors in the life of the child, and the welfare, with the welfare being the top item.
- [31] Allegations have been made about the Applicant being abusive to the Respondent. These allegations were denied for the most part and so there is no uncontested proof of bad conduct on the part of the Applicant but I find that there is some indication of instability on his part, based on his expression to the Resident Magistrate. This is somewhat of a concern for this Court. The fact that he acted on the recommendation of the Resident Magistrate and sought counselling is however a redeeming factor.
- [32] Additionally, there is a concern in relation to the Applicant making provisions for the girls if he were to be granted joint custody with the mother. They are young girls ranging from age eight to fifteen. They have been in the care of their mother and grandmother since the separation of the parents. There is also the suggestion that the oldest child does not want to see the Applicant. This suggestion was not refuted so I accept that there is some reluctance on the part of this child to spend time with the Applicant. Although this is suggestive of something amiss, it should not be dispositive of the issue for various reasons. Firstly, this indication came from the mother and not from the child herself and the Court has not heard directly from the child. Secondly, this is the alleged view of just one of the four girls. Thirdly, she is the oldest with just about three years

left before adulthood and so she would then be able to make her own decisions with respect to her father.

[33] Another area of concern that was raised was the fact that the Applicant has left the girls by themselves, bearing in mind that the youngest was then merely seven years old. He admitted that he did so but only on one occasion. It is common knowledge that it does not take long for an unfortunate event to take place when children are left alone. Fortunately for the children no such event took place on that occasion. In light of all the foregoing I am unable to say that the Applicant is an unimpeachable parent.

[34] The mother had always made all decisions in respect of the children, even when they all lived together. There have been allegations made by the Applicant about the mother leaving the children with her mother who he suggests is the main care giver and that the mother has delegated her responsibilities to the grandmother. There is however no indication that the grandmother is a less than suitable care giver, nor is there any indication that this was for any long period of time. Although the Applicant makes these allegations, there is no proof that the mother has ever done anything adverse to the interest of the children or that they have come to any harm whilst in her care. I find his allegations to be spurious and lacking in foundation.

[35] In the case of **Robert Fish v Fenella Victoria Kennedy** 2003 HCV0373, March J. at page 13 indicated the following:

“As a rule, joint custody orders do not serve the best interest of a child, and the full promotion of his welfare “unless his parents have demonstrated that degree of maturity and such an ability to communicate and cooperate with each other as to give a Court some confidence that the order of joint custody would be workable...” 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”.

[36] In the case of **Kaye Elliot Fenton v Mark Anthony Fenton F2003/D1797**, (unreported) Brooks J. in considering the question of custody, stated that one of the aspects to be assessed in considering the best interest of the child is whether the existing state of affairs should be maintained and he then went on to award sole custody to the mother based also on the inability or unwillingness of the parties to work harmoniously for the child's benefit, despite their personal differences.

[37] In all the circumstances, based on the less than impeachable conduct on the part of the Applicant, based on the fact that the relationship between the parties is not a harmonious one and also based on the fact that the current state of affairs is one of de facto custody of the mother, I am of the considered view that an order for joint custody would not be appropriate.

Whether the Applicant should be granted residential access

[38] In determining whether or not the Applicant should be granted residential access, again the primary consideration is what is in the best interest of the children. The interest of children usually dictates that a father should be able to preserve his natural links with his child. (Principles of Family Law, S.M. Crete 4th Edition page 400). In the English decision of **M v M [1973] 2 All ER, 82** at page 88 Latey J. sets out what in his view is meant by access:

“where the parents have separated and one has the care of the child, access by the other often results in some upset in the child. Those upsets are usually minor and superficial. They are heavily outweighed by the long term advantages to the child of keeping in touch with the parent so concerned so that they do not become strangers...”

Latey J. went on to say that save in exceptional circumstances to deprive a parent of access is to deprive a child of an important contribution to his emotional and material growing up in the long term.

[39] The Respondent has not resisted access but rather resists residential access. This issue is not so much access but rather the type of access. The

Respondent's major concerns as indicated in her affidavit are that the Applicant was abusive towards her, that the oldest child has expressed fear of him, that she fears for her safety and that of the children due to his previous abuse of her and the threats he made to kill himself and also that he has not made adequate provisions to accommodate them. I therefore have to consider whether or not these are valid concerns at this point in time.

[40] I will deal firstly with the concern raised by the Respondent about the inadequacy of the arrangements he has made to accommodate the children. I bear in mind that the girls are young. The arrangements the Applicant has outlined are less than ideal. However I have to place in the balance all relevant factors with the welfare of the children being paramount. When asked how he would accommodate them if they were to stay over, he said the girls could sleep in his bed. This shows that he is willing to make the necessary adjustments to accommodate the children. In any event the necessity to foster a relationship between father and daughters outweighs the inconvenience of not having their own bed when visiting their father. Although ideally the girls should be together on their visits, there is nothing to say he must accommodate them all at once. He could for example keep the twins one weekend and the two older girls another weekend, of course giving due consideration to their wishes and their comfort level in this regard. In the case of **In re McGrath (Infants)** [1893] 1 Ch. 143 Lindley L.J. pointed out that;

"...the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense."

[41] Although the Respondent resists residential access, she does not insist that access should be supervised. If her fear for the safety of the children and of abuse were genuine, what difference would it make if he has the children in the day or in the night? An abuse can take place equally in the night as in the day. It has been agreed that the children have spent time with him since the separation and there is no indication of any abuse of the children or that they have suffered

any psychological harm whilst in his care. In light of that I am of the view that the concerns of the Respondent about abuse and safety of the children are not genuine.

[42] The Respondent has also complained that the Applicant has left the children alone and has had a male friend visit whilst they were there. He accepted the former complaint but not the latter. The fact of him leaving the children alone is a concern for this Court and that weighed heavily in the determination of the custody issue. It is hoped that the Applicant has recognised the danger inherent in that and will ensure that this never occurs again.

[43] There remains the issue of the Applicant's admission regarding his comments about suicide. This a live concern for this Court, however I bear in mind that he says he received counselling and I suggest that this should continue. In addition he says he now attends church regularly and I trust that these influences will cause an improvement in his conduct. I also bear in mind that prior to the separation of the parents the Applicant lived with the children and so would have spent not only day times with them but also night times. If the relationship between the Applicant and the children is to be developed to a sufficient level it may be necessary for the Applicant to spend quality time with them which may be difficult to achieve with only access in the day time. In the circumstances, I am of the view that residential access is appropriate and my Orders are as follows:

1. The Application for joint custody is denied.
2. I hereby order that sole custody, care and control of the Children G.L.C.W., A.U.W., K.O.W. and C. A. W. is granted to the Respondent with liberal access to the Applicant.
3. The Applicant is allowed residential access on alternate weekends, from Friday evenings to Sunday evenings, plus half of all major school holidays.
4. Liberty to apply.
4. Each party to bear his/her own cost.