

In the Supreme Court of Judicature of Jamaica

In Equity

Suit No. E. 121 of 1975

Re: L. S. S. (an infant) -

Buddoo v. Gubler & anor -

Writ of Habeas Corpus

T. N. Willoughby, Uriel Campbell and C. W. Walker for applicant

Hugh Small, Dr. L. G. Barnett and R. Fairclough for respondents

1976: April 29, 30; August 9, 10; September 23

Parnell, J. :

This is an application by the mother of an illegitimate female child praying for the custody of her daughter. She has moved the Court by way of a writ of habeas corpus directed against the respondents under whose care and custody the child has been for over five years. A motion seeking an injunction to restrain the mother of the child or her father from interfering with the said child was heard along with the application.

A child is born

The infant child L.S.S. (hereinafter called by her pet name "Annie") was born on July 14, 1968. Her natural mother, the applicant herein is 29 years old. The father of the child is O.S. who is a senior Police Officer. The applicant is the mother of two boys aged eleven and ten. O.S. is not the father of these children. The applicant is an attractive young woman, single and a beautician by profession. She has been living with O.S., a married man who is separated from his wife, since July, 1971. They have been friendly since 1967.

The respondents are husband and wife who operate a business at Negril, Westmoreland under the name "Negril Sands Club." The marriage has produced no issue.

Marital difficulties of O.S.

The wife of O.S. did not know that he was friendly with the applicant until long after the birth of Annie. But this is not surprising. A married man living with his wife and who is keeping a mistress outside, does not generally go around and publish for the benefit of his wife that

he is an active Romeo in his leisure hours. It will take some time for a leak to gain strength that a child has been born to the mistress. And, as in this case, when the lawful wife seeks better particulars of the husband about the "rumor" of the birth, there is generally a strong denial. Eventually, under persistent and serious questioning, the husband may own up. This is what happened in the case of O.S. The wife's discovery of the birth of Annie was made within three months of her birth. Thereafter, according to him, the wife issued threats to do bodily harm to the child. Persistent inquiries would have given a clue to where the child could have been found. A solution must be found to deal with the situation and O.S., without consulting the applicant, worked out a plan.

Child is delivered to the respondents

In December, 1970, when Annie was nearly two and a half years old, O.S. delivered the child to the respondents. The applicant was then studying the art of the beautician at the expense of O.S. And she was living at premises which O.S. visited regularly.

It appears that at the time, no proper arrangements were made for the care of the child during the days when the applicant was a student of beauty-culture. A household helper who used to look after the child left the employment. The mother of the applicant tried to help. But in due course, she <sup>also</sup> left in order to look after her own business. A 14 year old brother of the applicant gave what assistance he could while attending school. As a result, it is easy to follow the evidence of the wife-respondent at paragraph 6 of her affidavit dated December 8, 1975:

" That the said child was at the time she was delivered into the custody of my husband and myself less than 2½ years old, was malnourished and was in need of medical care and attention and was emotionally under-developed. "

The evidence of the husband-respondent on this point is to the same effect. Another witness, Frederick Hamaty, an attorney-at-law, who saw Annie shortly after she was taken to Negril was succinct in his observation of her. Said he at paras. 5 and 6 of his affidavit.

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" That in December 1970, I observed an infant female child called Annie residing with the Gublers at Negril aforesaid. That at the time aforesaid the child Annie appeared ill and in need of medical care and attention. "

In contrast, the evidence of O.S. is interesting. Under cross-examination of Mr. Small on the second day, he was asked these questions:

Q: " In 1970 when you took the child from her mother, what was her physical condition? "

A: " In excellent health, she was well developed. She spoke at an early age and I considered her the sharpest of my children or on par with the sharpest. "

Q: " Did you feel you were acting in the interest of the child when you handed her over to the respondents? "

A: " Yes. At that time I knew Miss B (the applicant) dearly loved her only daughter. I did not consult her. "

On this aspect of the case, I find that the physical condition of the child when she was delivered to the respondents is as described by them. Lack of adequate day-care for a very young child contributed to the condition described.

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What was/dominant purpose of O.S. in delivering  
the child to respondents?

Under cross-examination, O.S. gave his reason for delivering this "sharp child" of his to the respondents. He did not remember where the first discussion took place but he remembered what was said.

Q: " Do you remember what you said to Mrs. G. (wife-respondent) in that discussion? "

A: " I told her that my wife discovered that I had an illegitimate child. She (the wife) was furious and threatened to do bodily harm to the child. And at the time, the child's mother would not always be at home as she was studying. I asked her to keep the child and she agreed. "

O.S. said that the child was handed over to the respondent without any qualification whatever. There were no conditions attached. On the other hand, the wife-respondent maintains that O.S. was told that she would not agree to take the child unless "there was a legal adoption." In paragraph 5 of her affidavit of December 8, 1975, she depones as follows:

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" That the said O.S. told my husband and myself at that time that he wished that my husband and myself would legally adopt the said child and promised to have the necessary papers signed by the mother of the child. "

The evidence is clear that O.S. discussed the question of adoption of the child by the respondents with Mrs. Holmes of the Adoption Board. He told Mrs. Holmes that he would consent to the adoption of Annie by the respondents. This was before he went to live with the applicant in July, 1971. But he said that the offer of his consent was to appease the wife-respondent. He told the Court that he knew he had no power to give any consent because the child being illegitimate, permission to give consent was vested in the mother (the applicant). His understanding of the law is not patently erroneous. The Children (Adoption of) Act, provides as follows:

" Subject to the provision of section 11, an adoption order shall not be made -

- (a) in any case, except with the consent of every person who is a parent or guardian of the child or who is liable by virtue of any order or agreement to contribute to the maintenance of the child;
- (b) on the application of one of two spouses, except with the consent of the other spouse. " See sec. 10 (4)

Section 11 of the Act deals with the power of the Court to dispense with any consent required by the section above mentioned. Did O.S. have the permission of the applicant to give her consent for the promised adoption made to the respondents? If the answer is yes, is it permissible for the consent previously given to be withdrawn? This leads to an examination of the evidence of the applicant as to her knowledge of any discussion leading to the delivery of Annie to the respondents.

Did the applicant know of the arrangement  
to deliver Annie to the respondents?

The applicant has said that O.S. took the child away without discussing the matter with her. She returned from her work one day to find that Annie was missing. O.S. told her that the child had gone to spend time with friends. After about six weeks when the child did not return, she started to make inquiries and as a result of information received, she went to

Negril where she saw the child.

The applicant said that she went to Negril twice in 1971 to see the child and once in 1972. Questioned as to her delay in not taking action before to re-possess the child, she said under cross-examination:

" I did not take the matter to court before because everything was on Mr. O.S.; he did not want me to take proceedings. "

For over five years, the applicant and O.S. have been living as man and wife at 3, Beech Avenue, Kingston. The house is owned by O.S. It has six bedrooms, six bathrooms and adequate space for playing. Two of the children of O.S. by his lawful wife live there. The two sons of the applicant also live at the premises. It is the intention of O.S. to marry the applicant as soon as a pending divorce petition with his wife as petitioner, has been heard.

In answer to the court the applicant said:

" If the divorce goes through this year, the wedding will be next year. "

At no time did O.S. tell the applicant that he was going to give the child to the respondents. He knew that she would have opposed any such move. I find, however, that O.S. thought that it was in the child's interest at the time he did, to give the child Annie to the respondents whom he regarded as his friends. His own words speak for themselves:

" I thought Mrs. Gubler was an appropriate person to take Annie in 1970. "

Annie is brought up until the "legal battle" started

The evidence is overwhelming that the respondents cared Annie very well. They showered her with love and affection. Adequate arrangements were made and executed for her schooling and religious upbringing in Westmoreland. Annie sleeps in a bedroom in a two bedroom cottage near to a club which the respondents operate. Both O.S. and the applicant are not too happy with the immediate surroundings and atmosphere in which Annie has to live and sleep. The applicant has stated that she saw her daughter in the bar with musical strains on the background.

The evidence of O.S. is put thus:

" The child sleeps in a very small wooden bedroom, the building is made of wood and thatch. She is exposed to a bar and all the inequities that are attached concerning a child of that age and the environment is such that I do not consider that for any lengthy time she should be exposed to it. "

At the invitation of the parties, the court visited the premises of the applicant and the respondents. The applicant and O.S. live in a well-appointed, spacious, neat and attractive house. The area is quiet; the house is near the sea where swimming exercises and other games may be engaged in. The respondents operate a club on the Negril Beach coast. The premises attract tourists, visitors and other persons who wish to enjoy some of the amenities which a beach club and its environs have to offer. The respondents live in a two bedroom cottage near to the club. From what I observed, I am not prepared to say that the concern of O.S. in relation to the atmosphere that Annie is being brought up when she is not at school, is groundless. Perhaps, it may be a case where as far as living conditions are concerned, one takes the respondents as he finds them.

Annie is interviewed

During the hearing, Annie was privately interviewed twice, i.e. on April 30 and August 9. She is very intelligent. Questions were answered with lucidity, frankness and with a touch of humour where possible. On the first occasion, she criticised the "fight" being waged over her. But on the second occasion still demonstrating intelligence and humour, she showed no signs of fear or anxiety in the proceedings in which she is the central figure.

Father and mother did not lose interest  
in Annie

O.S. visited Negril on several occasions to see his daughter. He visited her at the school she attended. And throughout the proceedings he seems to have played a dominant role in support of the applicant's move to get back her child.

Law on the subject

As I have already pointed out, what is before me is an application for a writ of habeas corpus directed to the respondents to show cause why the applicant should not secure custody of Annie. There is also a notice of motion praying for an injunction to restrain O.S. or the applicant from interfering with Annie. The notice is based on an allegation that in February 1976, O.S. went to Unity Primary School in Westmoreland twice and there induced Annie to accompany him to Kingston. It is alleged that Annie became upset as a result and she became the object of chaff at the instance of her school-mates.

Section 12 of the Children (Guardianship and Custody) Act, states as follows:

" Where the parent of a child applies to the Court for a writ of order for the production of the child and the Court is of opinion that the parent has abandoned or deserted the child, or that he has otherwise so conducted himself that the Court should refuse to enforce his right to custody of the child, the Court may, in its discretion, decline to issue the writ or make the order. "

And section 14 states:

" Where the parent has -

- (a) abandoned or deserted his child; or
- (b) allowed his child to be brought up by another person at that person's expense for such length of time and under such circumstances as to satisfy the court that the parent was unmindful of his parental duties, the Court shall not make an order for the delivery of the child to the parent unless the parent has satisfied the Court that, having regard to the welfare of the child, he or she is a fit person to have the custody of the child. "

The welfare of the child is what guides the court in an application of this nature. And "welfare" covers the moral and physical with reference to all the circumstances of a particular case. The respondents are well aware of this factor. The wife-respondent in the prayer to paragraph 20 of her affidavit of December 8, 1975 asks for:

" an order granting my husband and myself custody of the said L.S.S. and such order as to access by her natural parents as the Court shall deem fit. "

But in paragraph 17, she states as follows:

" that I believe the welfare of the said child will be best served by her remaining in the care and custody of my husband and myself. "

I can find no evidence that the applicant abandoned or deserted Annie. I find that Annie was delivered to the respondents with the understanding that she would be adopted. But that the applicant knew nothing of the arrangement inasmuch that she was misled by O.S. as to the real reason for the child's disappearance.

Certain common sense principles  
to guide the court

1. Other things being equal, it is in the best interests of a child to be with its natural parents. And where the natural parents have a comfortable home to bring up their child, and the environment is appropriate, there can hardly be a case where the court could possibly sanction the deprivation of the **rights** of the parents for the benefit of another.
2. A decision that a mother is to be parted from her only daughter - or from her child for that matter - is one of the gravest that a judge may ever take. The shock, pain and anguish which this may cause both mother and child may be irreversible. But if such a decision is to be made, it should be grounded on a compelling case where the probabilities show a balancing in favour of that move.
3. The obligations of a parent include the natural and moral duty to show affection, care and interest towards his or her child, and also the common law or statutory duty to maintain.
4. The Children (Guardianship and Custody) Act was enacted on certain bases. Three of them may be outlined:
  - (a) Where, as in a case of this nature, a respondent is required to show cause why a writ of habeas corpus should not issue, it is not enough to say merely that the natural father of the child delivered it to him for the purpose of being adopted. The father is not the agent for the purpose of giving the mother's consent unless he is duly authorised, and ignorance of the law cannot be relied on by the respondent.

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- (b) Where one parent has delivered a child to a person to be brought up by another at that person's expense so as to indicate that he was unmindful of his parental duties, the parent may be ordered to pay the reasonable expenses incurred in bringing up the child up to the time the application for a writ is being considered.
- (c) The welfare of a child is not to be measured mainly by examining material factors and grandiose plans for its future. Natural ties of blood, family relationship and attachment to brothers and sisters living in the same home are factors which should also be considered.

Closing address of Counsel

Dr. Barnett in his final address, while conceding that the general welfare of Annie is the paramount consideration, argued that the circumstances in which the child was handed to the respondents should be carefully examined by the Court. He referred to this as a "significant area of dispute." Another "significant area," <sup>according to him,</sup> is whether a removal of Annie from the care and custody of the respondents would endanger her personality. He mentioned the fact - and it is a fact - that since the age of two and a half, Annie has spent most of her life with the respondents and therefore, no effective parental control has been exercised over her by the applicant or by O.S. himself. With respect, I detect some weakness in this argument.

If the "personality" of Annie covers her habitual pattern and quality of behaviour as expressed by her physical and mental activities and attitudes, it is to be remembered that she is still of tender age and not yet fully developed in the physical, mental and moral sense. At the age of two and a half years, she was unable to appreciate the significance of family relationship, tie of blood and the biblical injunction to children that if they want their days to be long they should honour their father and their mother. As she grows older - and at her present age these things will appeal to her - there may be a strong force in her to identify herself with the natural family. Legal adoption at an earlier age, if this had been possible, would have counter-balanced some of the pull and trauma which the present situation may engender.

Mr. Campbell in a spirited reply to the arguments of Dr. Barnett submitted that there is no evidence to show that the applicant consented to the delivery of Annie to the respondents for the purpose of being adopted nor is there any evidence that the applicant was aware at any time that the disappearance of her daughter was for any other purpose than for spending time with friends. He argued in effect that nothing has been shown that it is for the general welfare of the child that the respondents should have custody over the natural claim of the applicant in the particular situation she now finds herself.

General Comments

I am satisfied that the respondents have become greatly attached to Annie and she in turn has reciprocated. But it is not the welfare of the respondents that is paramount. It is the general welfare of the child on the background of the peculiar circumstances surrounding her being given to the respondents in December 1970.

It is open in law for a parent to indicate that he will give his consent for adoption of his child to be granted to a particular person and later withdraw the consent. Whatever may have been the state of mind of O.S. in 1970 it seems to me that his attitude now is to withdraw any consent he may have indicated towards adoption. He has placed the applicant in his home as a wife and treats her as his lawful wife de futuro. Two of his other children live in the house. He is 50 years old, holding a senior position in the officer rank of the Police Force. Even if he cannot match dollar for dollar against what the respondents may have, it has not been suggested that from a material or financial standpoint Annie will suffer by returning to her natural parents.

Conclusion

It is ordered that Annie be returned to her natural parents. In view of the special circumstances and in order to avoid any traumatic effect, I direct as follows:

- (1) That Annie be returned to her parents forthwith but subject to a date to be fixed for the ceremony of actual delivery which the parties may decide. In the absence of any agreement I order a return within two weeks from date hereof.

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The Court hopes that until Annie is sixteen years old, the respondents be permitted to enjoy reasonable access to her during school or public holidays as may be arranged between the parties. But the Court cannot compel this arrangement.

- (2) The motion for an injunction is dismissed.
- (3) There will be no order as to costs.

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