

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2000/E115

BETWEEN	DMH	APPLICANT
AND	DH	RESPONDENT

Debra McDonald for the Applicant

Andrew Irving for the Respondent

**Heard 14<sup>th</sup> March and 3<sup>rd</sup> April 2008**

**Campbell J.**

(1) On the 3<sup>rd</sup> April 2001, Mr. Justice Pitter, upon an application by DMH, made the following Orders:

1. That custody of the children of the marriage namely; C, born on the 27<sup>th</sup> day of January 1991 and M, born on the 14<sup>th</sup> day of October 1995 be granted to the applicant.
2. The applicant does have care and control of the said C and M.
3. Access to the respondent every other weekend or such times as might be mentally agreed upon between the parties.
4. The respondent do pay to the applicant the sum of \$17,500.00 per month towards the maintenance of each of the children to commence on the 7<sup>th</sup> day of April 2001, until the children have attained the age of (18) years.
5. Liberty to apply.

(2) On the 6<sup>th</sup> November 2007, the applicant applied to vary Justice Pitter's Orders along the following at paragraphs 3-5;

- (3) Access to the Respondent one half of all summer holidays and one half alternate Christmas holidays.
- (4) That the Respondent do pay to the Applicant the sum of \$30,000.00 per month towards the maintenance of the children until the children have attained the age of eighteen (18) years or complete their tertiary education.

- (5) That the applicant be permitted to remove the children from the jurisdiction to reside with her in Canada.

The ground on which the applicant is seeking the Order is as follows;

The applicant intends to migrate to Canada within the next year. As the custodian parent, the children will reside with her. It is therefore necessary to seek changes to the access arrangements.

- (3) On the 19<sup>th</sup> February 2008, the husband applied for a variation of Justice Pitter's Orders to read as follows;

- 1) That custody of the children of the marriage namely; C, born on the 27<sup>th</sup> January 1991 and M J born on the 14<sup>th</sup> day of October, 1995 be granted to the respondent. “

(4) DHM has deponed that from the time of the Order, the children have continued to live with her and have been in her sole custody and control. They have performed exceedingly well in their examinations, C, having obtained seven (7) distinctions and one (1) credit in her CXC Examinations; and M scored high in his G.S.A.T. examinations and was placed in the school of his first choice. Of her husband, she depones that since the Order has been made, he has rarely availed himself of the arrangements set out for access to the children.

- (5) The reason for the application for variation is expressed in paragraphs 8, 9 and 10 of her affidavit in support of her application;

- 8) That I will soon be the only member of my immediate family residing in Jamaica. My sisters reside in North America and my parents will be migrating shortly. I have actually been granted the status of a resident in Canada, but I have postponed migration until C completes the first year of sixth form.

- 9) That I expect that within the next year, I will relocate to Canada. My reasons for relocation are as follows:

- (1) To provide wider educational opportunities for the children.
- (2) To access better financial opportunities through career advancement for myself and as a result, the children.
- (3) To be nearer to my parents and siblings, and as a result a wider network of family support within which to raise my children.

10) That in Canada, a wide selection of tertiary institutions will be available to the children and also a wide range of options in terms of educational courses. A similar kind of education, if they were to access this as foreign students, would cost approximately three times as much as the cost for them as Canadian residents.

(6) DMH claims that the variation of access to DH will be beneficial both to father and the children, in that they will be spending a longer period together and experience a residential relationship. The variation will actually increase the time he will spend with the children each year.

(7) DMH contends in his affidavit in opposition to the application, that it is not in the “interest and welfare of the children” that they be removed from the jurisdiction, and disagrees that it is likely to have a positive effect on the children. He denies that he has not availed himself of the access provided by Justice Pitter’s Order and accuses DMH of frequently disreputing the visitation arrangements and seeking to alienate his children’s affection from him, as a result, the relationship is strained. He however states that the relationship with his son is cordial and confidential. He complains that he is not given sufficient notice when his participation is required due to the failure of their mother to perform some task in relation to the children that she had originally plan to do herself.

(8) He claims that his daughter’s bi-polar disorder is exacerbated by stress and confusion, that DMH seems incapable of controlling. M is overweight and he was instrumental in soliciting the necessary expertise to provide proper nutrition and a course of exercise.

Both parents give several incidents to illustrate the cause of their concern. DMH demonstrating that the children’s father had been lax on occasions when he would have been expected to have the children visit with him and when called upon spontaneously to assist in some particular area endeavour concerning the children.

(9) In an application to this Court, for custody by a parent under The Children (Guardian and Custody) Act, the welfare of the child is the chief concern of the Court. S18 of that Act provides as follows:

“Where in any proceedings before the Court, the custody or upbringing of a child or the administration of any property belonging to or held on trust for a

child, ... the Court in deciding that question, shall regard the welfare of the child as the first and paramount consideration.”

(10) Harrison, J.A. summarized the elements that the Court should have before it in an application of this nature. Welfare is clearly a wider concept than mere material considerations. At page 7 of the judgment, he adopts the principle by which the Court is guided, as enunciated by Lindley, LJ in **re McGrath** (1893) 1 ch. 143:

“the dominant matter for the consideration of the Court is the welfare of the child. But the welfare of the child is not measured by money only nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.”

(11) and at page 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.”

(12) There is nothing before me in relation to the conduct of the parents that separates them to the extent that this court would be able to rely on that consideration alone to come to a decision. Both are well-educated, in possession of post-graduate degrees. They are both career driven, nonetheless caring parents, who are desirous of achieving the best for their children. The mother appears more nurturing; the father’s relationship with his son is more stable than of that with his daughter.

(13) The father claims that the mother depends heavily on her parents and elder sister for guidance and direction, therefore, the fact that the mother’s parents were migrating to Canada has made her desperate, thus her reason for choosing to migrate to Canada. I recognize that the mother’s happiness and security, being the person who has had sole custody of the children since 2001, is of importance in determining the welfare of the children. It follows if the primary caregiver is unhappy and desperate, this will impact unfavourably on the children.

(14) There may be a sense in which the parents are competing against each other for their children's affection. In the case of M, the father notes with pride the late night calls that he shares with his son and does not conceal the fact that the subject of these conversations are confidential as between himself and his son. The mother minimizes this by saying that is what is expected of the father.

(15) There is no suggestion that there is likely to be any detriment to the child for either religious or moral reasons should the court decide one way or the other. Neither parent has raised any concern in this area.

(16) The physical amenities and the material attributes that each parent has to offer demonstrate no substantial difference between the parties. This is so even if the proposed relocation to Canada takes place.

(17) To my mind, the main considerations in the circumstances of this case are the likely psychological and emotional impact on the children, should relocation to Canada, be ordered. What is likely to be the impact on both children, if the court were to separate the children?

(18) **Relocation to Canada**

In **Poel vs Poel** (1970) 1 WLR 1469, the Court of Appeal had overturned a decision of the judge who had refused an application by the parent with custody for an order to relocate to New Zealand, the judge had not considered the effect of his refusal on the mother.

(19) It was held that regard had to be had to the welfare of the parent who had custody, since if he or she became unhappy, it might adversely affect the child, and therefore there should be no interference with any reasonable mode of life selected by the parent having custody unless it is essential. What then is the likely effect on the mother, should this Court refuse her application to vary the initial order to permit her to take her children to Canada.

(20) The evidence before the Court is that the mother has thoroughly researched her planned relocation. The majority of her close family members with whom both of her children are bonded, are residing in Canada. The children were in the habit of making frequent trips to

Canada, which should serve to make adjustment easier. Her preparation has ensured that she has adequate funds on which to rely in case of emergency. She has accumulated sufficient funds, CAN\$80,000.00 to support the children and herself in getting settled. She has secured employment in her chosen field within easy access of her home. She earns currently in Jamaica, the Canadian equivalent of CAN\$65,000.00, her expected salary at her new job in Canada is \$100,000 per annum. It is noteworthy that the father had cited differences in the engineering practice in Jamaica and Canada and the fact that the mother was not trained in the Canadian procedures would make it difficult to obtain employment in the area of her expertise. She has the support of her family members, who appear to be quite successful in their new country.

(21) The main area of concern of the father is to which school would the boy attend. The mother's first choice of school, according to the father was not equipped to handle exceptional students such as his son. Neither of the schools selected for the children compare favourably with the schools they are currently attending, is his view. The mother is hoping to have C matriculate at the University of Waterloo, where her aunt is a Professor of Accounting and Finance.

(22) The mother has had sole custody of the children since 2000. Has that custody been working well? Where the custody is in fact working well and the reason for relocation is reasonable and calculated to achieve what is best for the child, then the Court will not interfere with the way of life selected by the parent who has custody. Again, the reason for this keeps before the Court its objective, that of the welfare of the child. If the mother is unhappy because of the refusal, would her unhappiness affect her children? I have no doubt it would. The husband himself asserts that she would be desperate without her family support.

(23) Here the husband contends that the custody has not worked well and himself ask for custody of both children. The father had applied to vary the Order granting the mother custody. In **Richards v Richards** (1980), 17 J.L.R. 226, it was held that in order to secure a variation of an Order granting custody to the mother, it is necessary to show that the welfare of the child will best be secured by awarding custody to the father.

(24) C has been diagnosed bi-polar, a condition typified by mood swings, extreme highs and lows. The mother states that it is effectively treated with medication, which even out the moods.

She further states that, “this is a condition of which there was some early manifestation in 2006 in terms of moodiness and temper tantrums. She credits this undiagnosed condition to her daughter’s rudeness towards her father.

(25) The daughters special medical needs, brought on by her being bi-polar will not be adversely impacted because the evidence adduced before me is that the medical facilities and support group are better developed in Canada as compared to Jamaica. The Court takes notice that Canada is a first world country, with a highly developed system of social medicine. Health care in Canada is free whereas she pays presently \$5,000 per month for a visit to her psychiatrist and \$8,000.00 per visit for her bi weekly sessions for the psychologist. The mother contends that her daughter will be better served by an environment where there is not such a stigma attached to mental illness.

(26) Is C likely to adjust to Canada; is she likely to be psychologically negatively impacted as a result of her relocation? Would her welfare be better protected by granting her father custody of her? If her mother’s application is granted, she will be surrounded with familiar caring persons in locations that are not alien to her. The mother’s preparation has seen to that. Her present relationship with her dad is not the best; she has been rude to him on at least one occasion. She had been hospitalised for three days, on one occasion when she attempted to harm herself. During that period she had asked that her father not visit her. Neither is she comfortable visiting with members of her father’s family.

(27) In order to accommodate the children, the father would be obtaining the assistance of a domestic helper. This to my mind is not as desirable a situation as having their mother tend to them. Nothing that has been presented to me has caused me to believe that were C to be relocated to Canada, it would impact her negatively. In any event, she turns 18 years in October 2008 and would be off to University in September 2008. Her mother has secured for her the best treatment that is available locally; her performance in her examinations is an important signpost that her health concerns are being effectively managed.

(28) In granting custody to the mother, the Court would have considered the welfare of these children. In order for the father to succeed in this application, he would have to demonstrate that

the pendulum has swung so far that the children's welfare is best served by their being in his custody. The father has not discharged that burden.

(29) M on the other hand has bonded and has a viable relationship with his father, despite the separation. M takes his father in his confidence. It is important to note that a substantial number of these communications between father and son takes place on the telephone and at night. If the mother's application is granted, would that inhibit or restrict his ability to communicate with his dad? His mother asserts that the proposed arrangements for access will allow more "residential time" between father and his children. And that the actual time the father will have with his children will be expanded. The mother has demonstrated that the father failed at least once to seek timely medical intervention and returned M to her in a weakened and fevered state, without taking him to the doctor. The father has failed to demonstrate that the M welfare is best achieved with custody being granted to him.

(30) I therefore grant the following Orders;

The father's application for custody is dismissed;

**On the mother's application**

(31) The order of Mr. Justice Pitter of the 3<sup>rd</sup> April 2001 is varied to read;

- 1) That custody of the children of the marriage, C born on the 27<sup>th</sup> day of January 1991 and M born on the 14<sup>th</sup> October, 1995 be granted to the applicant.
- 2) That the applicant do have care and control of the said C and M
- 3) Access to the respondent one half of all summer holidays, and one half alternate Christmas holidays.
- 4) That the respondent do pay to the applicant the sum of \$30,000.00 per month towards the maintenance of the children until the children have attained the age of eighteen (18) years or complete their tertiary education.
- 5) That the applicant is permitted to remove the children from the jurisdiction to reside with her in Canada.
- 6) Until the children are 18 years, the applicant will provide the respondent with the telephone numbers, addresses and e-mail addresses (if any) of the children's
  - (i) Residence,



- (ii) Schools,
  - (iii) Church,
  - (iv) Medical practitioners,
  - (v) School reports of both children.
- 7) Any changes in the details provided at 1) above will be notified to the respondent.
  - 8) The respondent may have access to the children in Canada upon giving the applicant at least 2 weeks notice and subject to the children's activities and schedules.
  - 9) The applicant will pay the airfare of the children to travel to Jamaica and return to Canada for the summer and Christmas visits with the respondent.
  - 10) The applicant to place the sum of \$890,000 plus interest at 10% per annum in a trust account in name of both parties for the benefit of the children within two (2) months of date hereof.

Liberty to apply.