[2020] JMCA Civ 18

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT APPEAL NOS 28/2018 & COA2019PCCV00002

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

BETWEEN	**SHERIKA DARE**	**APPELLANT**
AND	**ISRAEL CARMET-CACHADINA**	**RESPONDENT**

Mrs Denise Senior-Smith instructed by Oswest Senior-Smith & Co for the appellant

Gordon Steer and Mrs Judith Cooper-Batchelor instructed by Chambers Bunny & Steer for the respondent

6, 7 June 2019 and 19 May 2020

MORRISON P

[1] I have read in draft the judgment of my sister Foster-Pusey JA. I entirely agree with her reasoning and conclusions.

SINCLAIR-HAYNES JA

[2] I too have read the draft judgment of my sister Foster-Pusey JA and agree with her reasoning and conclusion.

FOSTER-PUSEY JA

[3] At the time of these appeals, the parties were involved in proceedings before Her Honour Mrs Dionne Gallimore-Rose, Parish Court Judge ("the Parish Court Judge") for the Family Court in the parishes of Saint James, Hanover and Westmoreland ("the Family Court"). The proceedings, which were part heard, were to determine who would be granted, among other things, custody of their child, IC, who was born in Jamaica on 25 June 2010. The respondent, although born in Spain, lives and works in Jamaica. The appellant, a Jamaican citizen, migrated to Australia in October 2014.

[4] On 15 August 2018, the Parish Court Judge refused an application made by the appellant for the variation or discharge of an order dated 7 April 2016. By this order, the Parish Court Judge, among other things, had granted the respondent interim custody of IC. On 29 August 2018 the appellant filed a notice of appeal in this court (PCCA No 28/2018) challenging the order.

[5] On 28 November 2018, the Parish Court Judge granted an application which had been made by the respondent, for the revocation of an order made by the court on 9 May 2017. At that time the court had granted the appellant permission to give evidence from Australia via live link. On 13 December 2018 the appellant filed notice of appeal (appeal no COA2019PCCV00002) challenging this decision. We considered that it was necessary to determine the live link appeal quickly so that the custody hearing, which was on hold pending the outcome of the appeal, could proceed.

[6] On 6 and 7 June 2019, we heard the appeals and gave our decisions as follows:

On Appeal No 28/2018

"(1) Appeal dismissed.

(2) The judgment and order of the learned parish court judge, Her Honour Mrs Dionne Gallimore-Rose made on 7 April 2016, in respect of the order for the variation of the custody order, is affirmed.

(3) Costs of $50,000.00 to the respondent."

On Appeal No COA 2019 PCCV 00002 -

"(1) Extension of time granted for filing notice of appeal filed on 13 December 2018. Notice of appeal to stand as being filed in time.

(2) Appeal allowed.

(3) The order and judgment of the learned parish court judge, Her Honour Mrs Dionne Gallimore-Rose, made on 28 November 2018 revoking the order dated 9 May 2017 is set aside.

(4) The appellant is permitted to give evidence by way of live link with the assistance of the Court Management Service.

(5) No order as to costs."

[7] On handing down our decisions, we urged the parties to immediately act upon these orders, in light of the fact that the trial was on hold awaiting the outcome of the appeal relating to the live link evidence. We indicated that written reasons would be provided for our decision, and now fulfil that promise.

Background

[8] In order to understand the issues raised in these appeals, it is necessary to outline some of the history of the proceedings between the parties.

[9] The respondent, in August 2012, applied to the Family Court, for an order awarding him custody of IC. On 26 October 2012, the Family Court made an interim order for joint custody of IC, with care and control to the appellant and liberal access to the respondent.

[10] On 13 November 2013, arising out of mediation sessions between the parties, they signed a settlement agreement at the Family Court in the presence of the Parish Court Judge. Among other things, they agreed to joint custody of IC with care and control to the appellant and access to the respondent on alternate weekends along with one half of the major school holidays. However, on 21 October 2014, the appellant migrated to Australia with IC without the consent of the respondent. This was in breach of the terms of the settlement agreement, which provided that: "each party must inform the other of overseas travel plans involving [IC], providing the other party with adequate details of such plans including contact information".

[11] As a result, the respondent made an ex parte application to the Family Court for an interim order. On 2 March 2015 the Family Court ordered:

> "Custody to father
>
> Liberal access to mother within the jurisdiction of Jamaica upon her immediate return of the child [IC] to the said jurisdiction…"

[12] The appellant applied to set aside this order. On 11 May 2015, the Family Court, although refusing the application, varied the 2 March 2015 order to reflect the following:

> "Interim custody to father.

> Access to mother within the jurisdiction of Jamaica every other weekend and half holidays until further ordered.
>
> Father is permitted to travel with [IC] to Jamaica.
>
> …."

[13] While in Australia, on 15 May 2015, the appellant commenced legal proceedings pursuant to the Family Court Act of Western Australia, in the Magistrates Court there. In these proceedings she sought orders for the parties to have equal shared parental responsibility for IC and that IC be permitted to live in Australia with her and her husband, an Australian citizen. Unsurprisingly, the respondent, having received notice of those proceedings, raised the issue of forum conveniens in the proceedings in the Western Australian court.

[14] On 18 May 2015 the appellant filed a notice of appeal, challenging the Family Court order made on 11 May 2015. She applied to this court for a stay of the proceedings in the Family Court, and an order to this effect was made on 10 June 2015.

[15] On 11 March 2016, a magistrate in the Western Australia court ruled that Jamaica was the appropriate jurisdiction to address issues relating to the custody of IC, and therefore ordered that the respondent return to Jamaica with her. It was also a provision of the court's lengthy order that the appellant was to hand IC's passport to the respondent. The appellant appealed the order. This order was stayed until 29 March 2016 when the court in Australia dismissed the appellant's application for a further stay of execution.

[16] The respondent and IC returned to Jamaica on 3 April 2016. On 6 April 2016, he filed an application in the Family Court to vacate and discharge the ex parte order which had been made on 2 March 2015 and varied on 11 May 2015. On 7 April 2016, the court ordered:

> "Interim order made on 2nd day of March 2015 varied on the 11th day of May 2015 are hereby discharged as prayed:
>
> Interim custody, care and control of [IC] to the [respondent]
>
> Access to [appellant] in Jamaica every other weekend and on half major school holidays i.e. Easter, Summer and Christmas holidays.
>
> The child's Jamaican passport is to be returned to the [respondent] and the child is not to leave the jurisdiction of Jamaica without the written consent of [respondent] such consent to be filed with the court."

[17] Following an application made by the respondent on 3 May 2016 for the court to make an order that the appellant be granted telephone/video chat access with IC, on 12 May 2016 the Family Court made the following order:

> "[Appellant] is granted telephone/video chat access to [IC] on Tuesdays between 6:00 pm to 6:30 pm and on Thursdays between 6:00 pm to 6:30 pm and on Saturdays between 9:00am to 9:30 am."

[18] On 17 May 2016, the appellant suspended the appeal that she had filed in the Western Australia Court of Appeal "until further order". On 30 May 2016, this court granted an order allowing the judgment of the Family Court of Western Australia – Dare v Carmet-Cachadina [2016] FCWAM to be adduced as fresh evidence in the custody trial.

In addition, on 31 May 2016, this court dismissed the appellant's appeal against the Family Court order made 11 May 2015.

[19] On 3 August 2016, the custody trial began in the Family Court with the respondent giving evidence. He continued giving evidence on 9 November 2016, 2 March 2017 and 2, 3 and 4 August 2017. The appellant filed an application on 24 March 2017 to have the matter transferred to the Supreme Court, or, in the alternative, for her to be allowed to give evidence by a special measure. On 9 May 2017, the court ordered that the appellant give evidence via live link including Skype, with the use of a fax machine for documents where relevant. The Family Court refused the application for transfer of the matter to the Supreme Court.

Appeal No 28/2018

A. Application to vary and/or discharge order dated 7 April 2016

[20] As indicated earlier, on 15 August 2018, the Parish Court Judge refused an application made by the appellant for the variation and or discharge of the order dated 7 April 2016, which had granted interim custody of IC to the respondent.

[21] In the affidavits in support of that application, the appellant stated that she had been struggling to communicate with IC pursuant to the order of the court, as the respondent had unilaterally excluded Skype as a means of contact with IC, although this was a viable and effective means of contact. She deposed that she wished for IC to spend half of all major holidays with her in Australia until the custody matter was determined, but the respondent refused to agree to this. The appellant asked that the Family Court

vary the interim custody order to award joint custody of IC to both parties instead, with liberal access to her, and half of all major holidays being shared equally between both parents in Australia or in Jamaica until the custody matter is determined.

[22] The respondent opposed the application. He denied impeding the appellant's access to IC. He stated that the appellant and IC had, for a time, communicated using Skype. He, however, felt uncomfortable with allowing IC to communicate with others by Skype because anyone could call her without his knowledge. He believed that this was not safe. He also suspected that the appellant was, among other things, teaching IC signs for secret messages, in an attempt to coach IC as to what to say in sessions with the psychologist. As a result, he established a Facetime account for IC to receive calls. Facetime allowed both he and IC to receive parallel calls and messages, so that he could supervise what happened on any calls IC received. When he informed the appellant that she could use Facetime to call IC, she did not object, and communicated with IC through that medium for over a year. After a time, however, the appellant began to make Skype calls to his account, at times immediately before she called IC on Facetime. The appellant then produced a record of unanswered Skype calls in support of her claim that she was having difficulty communicating with IC. The respondent stated that the record of unanswered calls even included a time when the appellant was in Jamaica with residential access to IC.

[23] The respondent indicated that he did not agree that IC be allowed to travel to Australia. In his view, since the appellant had a pending appeal of the order made by the

court there for IC to be returned to Jamaica, she was likely to feel that the strength of her appeal against the order would be enhanced with IC in Australia.

The Parish Court Judge's ruling

[24] The Parish Court Judge dismissed the application. As the reasons provided are short, I reproduce them below in full:

> "The Court finds that the [appellant] … has failed to provide sufficiently compelling reasons to have the Court at this time vary the interim Court order, which gives [the respondent] interim custody, care and control of [IC] and grants her access to [IC] here in Jamaica.
>
> There have been points made by Counsel for [the respondent] which I agree, should cause and indeed does cause this Court to question the credibility of the [appellant] in regards for instance, to her putting forward her son's illness as the reason for her inability to have made plans to travel to Jamaica. Noted too is mother's reference to unanswered calls to [IC] during August 2017 when she clearly had residential access to [IC].
>
> The Court further takes the point that in the context of the variation to the interim Court order being sought at this time for access to [IC] in Australia, that it needs to be mindful of the history of non-compliance with its orders by [the appellant].
>
> It is noted that the suggestion of the [appellant] that she is denied video-chat access to their daughter in breach of the Court's order, is not supported by the contentions of [the respondent] who depones in his Affidavit to enabling regular video-chat access to their daughter via Facetime and many times in excess of an hour.
>
> The nature of the variation being sought, including that of interim joint custody, the Court views, is most appropriately for determination at the end of the trial, which is still at this time, ongoing.

Furthermore, the point is taken that the [appellant] has not sought to discontinue the Appeal she had filed regarding the decision of the Australian Court and this is raised as being of particular concern."

[25] The appellant relied on the following amended grounds of appeal:

"(1) That the Learned Parish Judge erred in law and/or in fact and/or misdirected herself when she decided that the Respondent decision to unilaterally exclude skype access to the mother was not in breach of the existing Court Order;

(2) That the Learned Parish Judge erred in law and/or in fact and/or misdirected herself when she concluded that the Respondent's decision to only allow Facetime Access is sufficient for the Appellant irrespective of when it is allowed.

(3) That the Learned Parish Judge erred in law and/or in fact and/or misdirected herself when she elevated irrelevant considerations above the best interest of the child in arriving at her decision that an interim joint custody order and access on half major holidays in Australia in favour of the Appellant until the matter is determined should be refused.

(4) The Learned Parish Judge erred in fact and in law when she failed to take into account the best interest of the child in arriving at her decision to refuse to vary the Order.

(5) That the Learned Parish Judge erred in law and/or in fact and/or misdirected herself when she concluded that liberal access to the minor child in relation to communication and access is refused.

(6) The Learned Parish Judge erred in fact and in law when she found that it was the suggestion of the Applicant that she is denied video chat access to their daughter in breach of the court order.

(7) That the Learned Parish Judge erred in law when she refused the Appellant the right to rely on the affidavit

> of Olivia Derrett, Attorney-at-Law." (Underlining as in the original)

[26] She sought the following reliefs:

> " 1. That the decision of the learned judge be set aside and liberal access be allowed by the Appellant to her minor child via skype as well.
>
> 2. That the appellant be permitted to have the minor child for the half of the major holidays in Australia until the trial is concluded.
>
> 3. That the Appellant be permitted to have liberal access so that the minor child can spend time with Appellant, mother.
>
> 4. No order as to costs.
>
> 5. Such further and other relief as may be just."

Submissions

Appellant's submissions

[27] Counsel for the appellant submitted that the order of 7 April 2016 did not address the mode of communication by which the appellant and IC could communicate. Counsel noted that the appellant had originally been able to communicate with IC using Skype, but she later found out that the respondent had denied Skype access because he thought that such access was harmful. There was, however, no evidence that IC would experience any harm by the appellant's use of Skype to communicate with her.

[28] Counsel argued that the appellant did not, at any time, deny that she had video chat access with IC. The appellant wished to communicate with IC by Skype as she found it to be a more viable and effective communication tool including allowing her, for

example, to tape their conversations and replay them later. More effective communication would be in the best interest of IC. Counsel further contended that one parent cannot unilaterally determine the mode of access of the other to the child. There was nothing in the evidence to justify the judge refusing the application. In fact, she misinterpreted the evidence, and failed to take into account considerations which would promote the best interest of the child. She relied on **Mrs S v Mr S** [2016] JMSC Civ 224.

[29] Counsel argued that the Parish Court Judge erred when she took into account irrelevant factors and other matters such as:

> (1) The appellant's credibility, in light of the fact that she relied on her son's illness as the reason why she was unable to have made plans to travel to Jamaica, and the appellant's reliance on unanswered Skype calls to IC during August 2017, at a time when she had residential access to IC;
>
> (2) The appellant's history of non-compliance;
>
> (3) The appellant's alleged complaint that she had been denied video chat access to their daughter in breach of the court's order, which was contradicted by the respondent's evidence; and

(4) The view that in light of the nature of the interim orders which the appellant had sought, such issues would best await determination by the custody trial.

Counsel argued that while the illness of the appellant's son was not the reason for the application, it was an additional reason why the application was appropriate. Counsel also submitted that the court was not limited in the orders that it could make at that stage of the proceedings because, where matters relating to children are concerned, there are no final orders.

[30] Counsel urged that no parent is perfect. Therefore, if a parent is impeached, that is not a sufficient basis on which to deny her access to her child. She referred to **F v D** [2017] JMSC Civ 9 (see paragraphs [12] and [13] of the judgment and **LM v CS** [2013] JMCA Civ 12, in which reference was made to **Re K (Minors)** [1977] 1 All ER 647). In addition, non-compliance with a court order should only be relevant if it impacted the welfare of the child. The appellant's failure to hand over IC's passport when ordered to do so by the court did not impact the child's welfare and was therefore irrelevant.

[31] In closing her submissions, counsel argued that in light of any concerns that the minor child will not be returned to Jamaica, were she to be allowed to go to Australia, certain restrictions pursuant to the Hague Convention on the Civil Aspects of International Child Abduction 1980 could be put in place to ensure compliance.

Respondent's submissions

[32] In response, counsel for the respondent submitted that the appellant had made the application to vary the order for custody and access during the hearing of the substantive custody application. The case for the respondent had closed and the appellant was being cross-examined The appellant's application for the variation of the interim order had to be viewed against that backdrop.

[33] The compelling reasons given by the appellant as necessitating the application were that she could not contact IC via skype, and that she had learnt from her mistakes in relation to disobeying court orders. Counsel submitted that the appellant, however, did not have a good track record for obeying Jamaican court orders. The appellant took IC to Australia and remained there with her, which was in breach of the court order. Consequently, there were orders made on 7 April 2016 and 9 November 2016, for the appellant to return IC's Jamaican passport. The appellant disobeyed these orders as well as cost orders which the Family Court had made.

[34] Counsel for the respondent further submitted that the appellant could afford the cost of travelling to Jamaica in order to spend time with IC, as was provided for in the interim order. Counsel submitted that the appellant was not credible, as she had given the impression that she had not had access to IC by use of video chat. The appellant had said that she was "struggling to communicate with IC" pursuant to the order of the court. The appellant's credibility was also questionable, as the appellant was in Jamaica in July and August 2017 and had residential access to IC between 3 August 2017 and 18 August

2017; however, in the call logs which she placed before the court she claimed that during this time she was being denied access via Skype.

[35] In light of these circumstances, counsel argued that the Parish Court Judge did not err in her decision. Counsel submitted that an appellate court can only interfere with the Parish Court Judge's decision, if it finds that her decision was plainly wrong (see **LM v CS** [2013] JMCA Civ 12, paragraphs [38]- [40]), and there was no such evidence in the instant case.

The law

[36] It is trite law that a court, in determining an application concerning a child, must regard the welfare of the child as its paramount consideration. Section 18 of the Children (Guardianship and Custody) Act provides:

> "**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**, 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." (Emphasis added)

[37] What does this concept mean? Lord MacDermott in the House of Lords decision of **J v C** [I970] AC 668 at page 710, stated:

> "The second question of construction is as to the scope and meaning of the words '… shall regard the welfare of the infant as the first and paramount consideration.' Reading these words in their ordinary significance, and relating them to the

> various classes of proceedings which the section has already mentioned, it seems to me that they must mean **more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interest of the child's welfare as that term has now to be understood**." (Emphasis added)

[38] The basis on which this court will set aside the exercise of discretion by a judge is not in dispute. The relevant principles were succinctly outlined by Morrison JA (as he then was) in **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1. Morrison JA stated at paragraph [20]:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference-that particular facts existed or did not exist-which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[39] In **LM v CS** at paragraph [38] McIntosh JA accepted the principle in **Re K (Minors)** [1977] 1 All ER 647 as a correct statement in our jurisdiction. She stated:

> "… …I would emphasize that where a judge has seen the parties concerned, has had the assistance of a good welfare officer's report and has correctly applied the law, **an appellate court ought not to disturb his decision unless it appears that he has failed to take into account something which he ought to have taken into account, or has taken into account something which**

> **he ought not to have taken into account, or the appellate court is satisfied that his decision was wrong;...**"(Emphasis added)

Discussion and analysis

[40] The submissions of both counsel integrated the various grounds of appeal and I too will adopt the same approach in giving the reasons. I thank counsel for their industry in the cases provided although I will not refer to all of them.

[41] As the lengthy background provided earlier in this judgment shows, the parties had been appearing before the Parish Court Judge for over three years, in the context of numerous applications. By the time of the application in April 2016, she clearly had a thorough knowledge of the matter as well as an in-depth understanding of the issues which arose for consideration.

[42] The Parish Court Judge, after listening to the evidence and submissions of the parties, ruled in favour of the respondent. The court found that the appellant failed to provide sufficient and compelling reasons to vary and/or discharge the interim court order. In arriving at her decision, the Parish Court Judge considered the credibility of the appellant. For instance, she found it questionable that the appellant was relying on her son's illness as the basis on which she could not travel to Jamaica. While counsel for the appellant argued that the son's illness was not the basis for the application, but instead an additional reason why the application was appropriate, it was still open to the Parish Court Judge to assess whether that matter ought to have been put forward in support of the application. The Parish Court Judge clearly felt that reliance on that matter was insincere.

[43] It is necessary to understand the context in which the Parish Court Judge arrived at this assessment of the appellant's credibility. The first affidavit filed by the appellant in support of her application for variation was sworn on 27 June 2018. Subsequently, in a supplemental affidavit sworn on 6 August 2018, the appellant stated that her son had fallen ill in July 2018 and she was unable to make any plans to visit Jamaica, not knowing how long his recuperation would take. At the hearing before the Parish Court Judge, counsel for the respondent had submitted that the appellant was not being truthful as, among other things, there would be nothing to prevent her husband from staying with their sick son. Counsel for the respondent had also submitted that the alleged illness of the appellant's son, which occurred subsequent to the filing of her June 2018 affidavit, was "sudden" and unsubstantiated by a medical report. It was in the above context that the Parish Court Judge assessed the credibility of the appellant. The conclusion to which she arrived was clearly open to her in all the circumstances.

[44] The appellant's counsel argued that the Parish Court Judge erred in law and in fact when she acted on the basis that the appellant's complaint was that she was being denied the opportunity to video chat with IC. I agree with the appellant that this was not correct. What the appellant complained of was that she was struggling to, and was not able to effectively, communicate with IC. This gave the impression, however, that the appellant had a difficulty communicating with IC and that communication with the child was infrequent. In the circumstances, the misstatement made by the Parish Court Judge, though overstating the appellant's position, was not a significant error such as to undermine the integrity of her decision and her assessment of the appellant's credibility.

[45] The appellant, in seeking to substantiate her struggle to communicate with IC, exhibited a log of unanswered Skype calls. It turned out, however, that she had made some of these calls during August 2017, a period when she had had residential access with IC. The Parish Court Judge was clearly entitled to take these facts into account in assessing the credibility of the appellant. I do not believe that the Parish Court Judge erred in this regard.

[46] She rejected the appellant's complaint that she was not getting effective access to IC. Instead, the Parish Court Judge accepted the respondent's evidence that he allowed IC to regularly speak with the appellant via FaceTime; oftentimes in excess of an hour. When one examines the appellant's complaints in this regard, it is clear that her argument is that, because she was not happy with access via FaceTime, and preferred Skype as being more viable and effective, this would in turn mean that communication other than by Skype was not in the best interest of the child. Clearly, this cannot be accepted as a valid argument. As Lord MacDermott highlighted in **J v C**, the claims and wishes of parents are taken into account in determining what course is "most in the interest of the child's welfare". The appellant's or the respondent's wishes do not, inexorably, translate into what is in the best interest of IC. In the instant case, the evidence showed that the appellant had ample opportunity, which she utilized, to spend time with IC, through video chat on Facetime. While the appellant clearly preferred communicating with IC by Skype, there was nothing in the evidence which showed that communication by Facetime was inadequate or was deleterious to IC's welfare. The Parish Court Judge was correct in this regard.

[47] In considering the appellant's application for permission to also have IC travel to Australia and spend time with her there, the Parish Court Judge took into account the appellant's history of non-compliance with various orders of the court. The appellant had previously taken IC to Australia in breach of the settlement agreement between the parties, which was signed in the presence of the Parish Court Judge, and the child had only been returned to Jamaica after contentious court proceedings in both Australia and Jamaica. The appellant's tardiness in complying with the court's order to return the child's passport suggests that she has not, at least in the past, seen it as important to comply with orders of the court. As the history of the matter has shown, it was entirely appropriate for the Parish Court Judge to take these circumstances into account. I do not agree with the argument made by the appellant's counsel that any concern as to whether the child would be returned to Jamaica, if allowed to travel to Australia, could be addressed through restrictions put in place pursuant to the Hague Convention on the Civil Aspects of International Child Abduction 1980. There was no need for such arrangements to be considered and undertaken at that point in the proceedings.

[48] The learned Parish Court Judge also ruled that a variation of the interim order was most appropriate for determination at the end of the trial, as at the time when the application was made, the trial was still ongoing. This made eminent good sense. Why make a substantial change to the interim order at that time when no urgency or special circumstances had been demonstrated? This was clearly an appropriate position for the Parish Court Judge to take.

[49] Lastly, the Parish Court Judge bore in mind that there was an appeal regarding the decision of the Australian court, which had not been discontinued. It is noteworthy that it was only during the hearing of the appeal in June 2019, that the appellant's counsel was able to indicate that she had received recent instructions that the appeal in Australia had been discontinued. The appellant had, therefore, still had in train in Australia, while participating in the custody trial in Jamaica, an appeal against that court's decision in which it had been determined that it was best that the custody matter be determined in Jamaica, among other things. In our view it was quite appropriate for the Parish Court Judge to have taken this state of affairs into account.

[50] The arguments in relation to ground of appeal number seven were not argued with any force by either counsel.

[51] The appellant's counsel had argued that a number of the matters to which the parish court judge had referred in her decision were irrelevant. I disagree and believe they were highly relevant. Having thoroughly reviewed the reasons of the Parish Court Judge, there is no basis on which I could conclude that she was plainly wrong or arrived at an aberrant decision.

[52] There are no merits in these grounds of appeal and as such they all fail.

Appeal No COA2019PCCV00002

B. Appeal concerning revocation of the permission which had been granted to the appellant to give evidence by live-link

Preliminary application – Extension of time to file notice of appeal

[53] Counsel for the appellant made a preliminary application, supported by affidavit evidence, seeking an extension of time to file the notice of appeal, which had been filed two days late. She relied on **Ralford Gordon v Angene Russell** [2012] JMCA App 6. Counsel for the respondent did not challenge this application.

[54] After carefully listening to counsel's submissions and taking into account the applicable principles in **Leymon Strachan v Gleaner Company Ltd and Dudley Stokes** (unreported) Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered 6 December 1999, this court granted the application.

The application at first instance

[55] On 9 May 2017, due to medical challenges faced by the appellant, she applied to the Family Court pursuant to section 3(1)(b) of the Evidence (Special Measures) Act, 2012 ("the Act"), for permission to give evidence via live link in the custody trial. The Family Court granted the application and outlined in detail the various arrangements which had to be put in place. Some of these arrangements were to have been put in place, in Australia, by the appellant.

[56] On 15 August 2018, the respondent filed an application in the Family Court requesting the revocation of the order. At that time, the custody trial was part-heard, with the respondent having completed his evidence and the appellant was in the course of being cross-examined.

[57] In his affidavit in support of the application, the respondent deposed that the taking of evidence by live-link had proved to be very time-consuming, as the hearings were beset with numerous technological difficulties. At times, there were challenges with the video connection and sound between Jamaica and Australia, this caused the appellant to have a difficulty hearing questions posed to her in cross-examination. It was also very awkward to cross-examine the appellant when she was being shown various documents. Documentary evidence was to continue to be an important feature in the cross-examination of the appellant. The respondent stated that it would be best that the appellant come to Jamaica for the completion of the trial, and in recent affidavit evidence, she had stated that she could afford to do so. There were also challenges securing the use of the court room, as at times it was being used for criminal and circuit court matters, so that the Family Court was not able to use it for the hearing.

[58] The appellant deposed that the technological difficulties being experienced had nothing to do with the venue from which she was giving evidence in Australia. When these difficulties arose, there were always officers from the court to address them. The respondent had complained that, in breach of the arrangements that she was to establish in Australia, she had not provided a clerk in Australia to assist during the hearing. The appellant said that the hearings had proceeded without a clerk, but she had eventually secured an individual to act as clerk. Due to surgery which she had to undergo, she would not be able to travel for the following 18 months. She attached various letters and medical reports from her doctors in this regard. In addition, it would be financially burdensome for her to travel to Jamaica for the hearing. She stated that the court had made the order

allowing her to give her evidence by live link in the interests of justice, and no material change of circumstances had been shown so as to justify the revocation of the order.

The decision and reasons of the Parish Court Judge

[59] The Parish Court Judge, on 28 November 2018, granted the respondent's application and revoked the order allowing the appellant to give evidence by live link. These were her reasons:

> "… a Court going through a trial is undergoing a grave undertaking indeed. The [appellant] being seen and heard and herself hearing and seeing is clearly of integral importance. The Evidence (Special Measures) Act itself so emphasizes. It defines "live link" as being a "technological arrangement whereby a witness is able to see and hear and to be seen and heard…"
>
> The [appellant] has experienced much difficulty hearing the questions being put to her by Counsel for the [respondent]. The Court has found itself rising on countless occasions in a bid to have the technical person treat with the various issues including feedback being faced by the [appellant], blurred or frozen imaging on the screen and delayed transmission of responses being received. The continuous complaints have slowed down the gathering of the evidence. The pace is slowed and compromised even more when treating with documentation being put to the [appellant] for her measured perusal (during which time she could not be seen). Finding persons to provide her with the technological "know-how" (as the Court had expected) at that time of night/early morning in Australia has no doubt proved to be challenging. Her getting someone deemed appropriate by the Court to act as Clerk has been hampered as well by her circumstances. The point has been made by the [respondent] that the maintenance of the child in question is being fully undertaken by him without any contribution whatsoever from the mother. To have her travel to Jamaica to complete her evidence in this trial is not asking too much of her under the circumstances.

After all the child was born in Jamaica to a father in Jamaica. In terms of co-parenting with father; of necessity the issue of travel between Jamaica and Australia must have been arisen in mother's contemplation when she decided to move to Australia to live. In her affidavit, furthermore she does not deny having the financial ability to take at least one trip to Jamaica. In terms of her medical situation the Respondent presented information in her Affidavits alongside correspondence from Dr Ravi Rao, Dr Hanikeri and Dr Davidson. The information when compared one with another, were at best inconsistent. Indeed, the conclusion of Dr. Davidson that the Respondent would be unable to travel for the next eighteen (18) months seemed to downright contradict what had been stated previously.

It has been noted that the [appellant] indicates in her first affidavit an initial recovery period from her surgery of three months, that is, by January 8, 2019. She is due to attend intermittent doctor's appointment thereafter. She could schedule coming to Jamaica for a week or more between appointments (which according to Dr. Rao would be on a three-month basis). As a relatively long-standing part heard matter this case would be given every possible accommodation by the Court.

Having considered everything put before this Court, the Application is accordingly granted."

Grounds of appeal

[60] The grounds of appeal were:

"(1) That the Learned Parish Judge erred in law and/or in fact and/or misdirected herself when she failed to give due regard to the medical correspondence and report provided by the Appellant;

(2) That the Learned Parish Judge erred in law and/or in fact and/or misdirected herself when she concluded that the Clerk has to be a Justice of the Peace or Notary Public in a live-link set up for evidence taking at a trial;

(3) That the Learned Parish Judge erred in law and/or in fact and/or misdirected herself when she failed to have

regard to other means of live link to facilitate the completion of the trial; and

(4) That the learned parish judge erred and/or in fact and/or misdirected herself when she took into account irrelevant and prejudicial considerations when making her decision to revoke the Order."

[61] The details of the order being appealed were:

"1. That the Order made on the 9th day of May 2017 giving permission to Sherika Dare to give her evidence through the live link is revoked.

2. Trial is scheduled for the week of the 6th April, 2019."

[62] The appellant therefore sought the following orders from this court:

"1. That the decision of the Learned Judge to revoke the Order be set aside;

2. That the appellant be permitted to give her evidence by way of live-link with the assistance of the Court Management System;

3. No Order as to costs;

4. Such further and other relief as may be just."

Submissions

Appellant's submissions

[63] Counsel for the appellant highlighted the fact that it was during the trial, in fact, at the stage of cross-examination, when the appellant was being shown documents, that the respondent made an application to revoke the order. The Parish Court Judge revoked the order on the basis, among others, that there were contradictions in the medical correspondence as it related to the appellant's anticipated recovery period from surgery.

Counsel submitted that this was an erroneous finding by the Parish Court Judge as she failed to give due regard to the medical reports that indicated that the appellant was limited significantly in her travel capabilities over the 18 months which followed the hearing of the application.

[64] In any event, counsel argued, there was no evidence of a material or sufficient change in circumstances so as to justify revocation of the order, as required by section 6(3) of the Act.

[65] In relation to the second ground of appeal, counsel noted that this is a new area of law and as such there is a dearth of case law. She contended that the Parish Court Judge had not stipulated in her order that only a particular person should be a clerk. As a result, the Parish Court Judge did not have any or any sufficient basis on which she could have concluded that the clerk had to be a Justice of the Peace or Notary Public. Counsel posited that a clerk could be any person who was able to understand court procedures.

[66] In support of the third ground of appeal, counsel argued that, upon a review of the legislation, the court is not limited to the use of one special measure. Section 3(1) of the Act states that the court may issue a direction that a special measure, or a combination of special measures be utilized. This approach, counsel suggested, could have been adopted until a practice direction is issued. Counsel relied on **John Morris v Radio Jamaica Limited and Latoya Johnson** [2016] JMSC Civ 197 in which the court conducted a balancing exercise in determining whether or not special measures were

appropriate for the defendants' witness who resided in Reden, Georgia in the United States of America (see paragraphs [30] - [32] of the judgment). Counsel also relied on the cases of **Wallace and Another v Ramsay & Another** (1999) 59 WIR 345 at 357, per Walker JA, **R v Christopher Thomas** [2017] JMSC Crim 2 and **Polanski v Conde Nast Publications Ltd** [2005] UKHL 10.

[67] In respect of the fourth ground of appeal, counsel contended that the Parish Court Judge considered irrelevant factors, such as who was maintaining the child. Counsel submitted that, instead of revoking the order, the Parish Court Judge could have made any necessary orders for the better use of technology. In addition, the respondent had not suffered any prejudice as a result of taking the evidence of the appellant via live link.

[68] Counsel further submitted that, to date, the courts have been improving their technology to address this mode of giving evidence. To bolster this point, counsel referred to the case of **DPP v Uchence Wilson and others** [2018] JMSC Crim 5, where the court had due regard to the availability of technology to accommodate special measures (see paragraphs [8] – [10] of the judgment).

Respondent's submissions

[69] Counsel for the respondent argued that the appellant had ignored the conditions which she ought to have satisfied upon the grant of the order. For example, except for the last date on which the matter was being heard, the appellant had not arranged to have technological support present at the site from which she was giving evidence. In

addition, the appellant had not secured the services of a clerk for the hearing and she did not have a fax machine there.

[70] Counsel submitted that the live link process was not working well and it did not save time and costs, because at times the screen would be frozen, or there would be a delay in transmission of sound. Counsel noted that the appellant herself had complained of a "feedback" and/or noise in the background, and had indicated that the problems were not emanating from her site. Counsel argued that such assertions were inconclusive, however, as the appellant did not have the required expertise to assist when technological problems arose.

[71] Counsel emphasised that the Parish Court Judge was the person in the best position to decide whether the live link process was working effectively. As stipulated by section 6 of the Act, the Parish Court Judge had the discretion to revoke the live link order having assessed the relevant circumstances. As a result, counsel argued that there was no basis to interfere with the Parish Court Judge's findings. She relied on **Gonzales (Miguel) and anor v Edwards (Leroy)** [2017] JMCA Civ 5, at paragraphs [15] - [16], which outlines the scope of review of this court.

[72] The basis for this appeal, counsel submitted, was the appellant's inability to travel to Jamaica, due to medical challenges. Counsel criticized the various medical reports on which the appellant relied in proof of her inability to travel to Jamaica for the trial. Among other things, counsel highlighted a third medical submission from Dr Liz Davidson, in which the doctor stated that the appellant would not be able to travel for 18 months with

effect from November 2018. Counsel urged this court to reject this report as Dr Davidson had not indicated how she arrived at the 18-month period.

The law

[73] The Act was passed to facilitate the admission of evidence in civil and criminal proceedings by the use of special measures. A number of terms are defined in section 2 of the Act including:

> '"civil proceedings' means any proceedings, other than criminal proceedings, before-
>
> (a) …
>
> (b) A [parish court judge];
>
> (c) A Family Court or a Children's Court;
>
> (d) ….
>
> (e) ….
>
> 'live link' means a technological arrangement whereby a witness, without being physically present in the place where proceedings are held, is able to see and hear and be seen and heard by the following persons present in such place-
>
> (a) the judge, parish court judge or Coroner,
>
> (b) the parties to the proceedings;
>
> (c) an attorney-at-law acting for a party to the proceedings;
>
> (d) ….
>
> 'special measure' means the giving of evidence by a witness in proceedings, by means of a live link or video recording, in the manner and circumstances provided for pursuant to the provisions of this Act…

> 'witness' means in relation to any proceedings, a person who has given, has agreed to give or has been summoned or subpoenaed by the court to give evidence."

[74] It is important to look at the basis on which the court may issue a direction for a witness to give evidence using a special measure or a combination of special measures. Section 3 of the Act provides:

> "(1) Subject to the provisions of this section, in any proceedings, on application by a party to the proceedings or on its own motion, the court may issue a direction that a special measure, or a combination of special measures, shall be used for the giving of evidence by a witness if-
>
> (a) …
>
> (b) in the case of a witness in civil proceedings … the court is satisfied that the special measure is appropriate in the interests of the administration of justice.
>
> (2) The court shall not issue a direction under subsection (1) unless arrangements to implement the special measure are available to the court.
>
> …
>
> …
>
> (5) Subject to subsection (6), in determining whether a special measure is appropriate in the interests of the administration of justice under subsection (1), the court shall consider-
>
> (a) any views expressed by or submissions made on behalf of the witness;
>
> (b) the nature and importance of the evidence to be given by the witness;

(c) whether the special measure would be likely to facilitate the availability or improve the quality of that evidence;

(d) whether the special measure may inhibit the evidence given by the witness from being effectively tested by a party to the proceedings; and

(e) any other matter that the court considers relevant.

…"

[75] The final section to which I will refer is section 6 of the Act. It states:

"(1) A direction issued under Part II may provide for a witness to give evidence by means of a live link.

(2) Where a direction under subsection (1) provides for a witness to give evidence by means of a live link, the witness may not give evidence in any other way in the proceedings unless the court revokes or varies the direction.

(3) **The court may**, on an application by a party to the proceedings or on its own motion, **revoke** or vary **a direction that provides for a witness to give evidence by means of a live link, if the court is satisfied that-**

(a) there has been a material change in the circumstances since the direction under subsection (1) was issued; or

(b) it is otherwise appropriate in the interests of the administration of justice." (Emphasis added)

[76] Counsel for the appellant relied on a number of first instance cases in which the court ruled on applications, in both civil and criminal matters, for witnesses to give evidence through the use of special measures such as a live link. See **DPP v Uchence Wilson**, **John Morris v Radio Jamaica Limited and Latoya Johnson**, and **R v Christopher Thomas**). Counsel also referred to the House of Lords decision of **Polanski v Conde Nast Publications Ltd** as well as a judgment of this court, **Wallace and Another v Ramsay & Another**.

[77] **Wallace and Another v Ramsay & Another** was decided by this court in 1999, many years before the passage of the Evidence (Special Measures) Act in 2012 and before the Civil Procedure Rules, 2002 came about. In that matter the appellants sought to prove a will. The sole surviving witness of the will was a very old lady who was living in Florida, who claimed to be unable to travel to Jamaica to give evidence, as her husband required her full time attention. The trial judge ruled that the court did not have the jurisdiction to admit such evidence. On appeal, this court ruled that a provision of the Judicature (Civil Procedure Code) Law, read together with certain sections of the Evidence Act, conferred the court with the jurisdiction to allow an application for the admission of evidence by way of video conference or video link.

[78] None of the cases to which counsel referred addressed the specific issue as to when it is appropriate for the court to revoke permission which had been granted for the giving of evidence through the use of a special measure. The cases, when read together, however, indicate that the courts are expected to, where this is allowed by the statutory

framework, utilize and facilitate the use of technology to promote and advance the interests of the administration of justice. Technological advancements can assist in mitigating challenges such as the timing and convenience of the giving of evidence as well as the distance and cost of travel to physically attend a trial. See for example paragraphs [29] and [31] in **John Morris v Radio Jamaica Limited and Latoya Johnson**.

[79] Earlier in this judgment, I referred to this court's approach to the review of the exercise of discretion of a judge in a lower court. This was also highlighted in **Gonzales (Miguel) and anor v Edwards (Leroy)** at paragraphs [15] - [16]. I will therefore consider whether the Parish Court Judge misunderstood the law or the evidence before her, made an inference that is demonstrably wrong that particular facts existed or did not exist or her decision is so aberrant that no judge regardful of her duty to act judicially could have reached it.

Discussion and analysis

[80] For convenience, I considered grounds of appeal one and four together.

[81] Section 6(3) (a) and (b) of the Act clearly outline the circumstances in which the court may vary or revoke a direction that provides for a witness to give evidence by means of live link. The two criteria are: where there has been a material change in circumstances since the direction was issued, or, where it is required in the interests of the administration of justice to do so. The Parish Court Judge did not expressly refer to

either of these criteria in her reasons. In addition, upon a careful review of her reasons, it did not appear as if she felt it necessary to consider either of them.

[82] I will nevertheless consider whether there was any material before the Parish Court Judge which could have satisfied either of the two criteria.

[83] There was clearly, in my respectful view, no material before her which reflected a material change in circumstances.

[84] The question therefore remains whether a revocation of the order was required in the interests of the administration of justice. The Act does not list the nature of the matters which should be taken into account in determining whether it is in the interests of the administration of justice to revoke the order. It is, however, arguable that the matters which a court considers in determining whether to grant an order in the first place, may also be relevant in considering whether to revoke the order (see section 3(5) of the Act).

[85] In such a case it could be relevant for the court to consider the availability or quality of the evidence which had been, and was likely to be received, and whether the special measure would inhibit the effective testing of the witness' evidence. These appeared to be matters which the Parish Court Judge took into account. The parish court judge referred to the appellant having challenges hearing questions being put to her by counsel for the respondent, blurred/frozen imaging and the delayed transmission of the appellant's responses to questions.

[86] On the other hand, this was a case in which the appellant was living in Australia - a significant distance away, usually requiring more than a day of air travel. She had indicated in her evidence that it would have been financially challenging for her to travel to Jamaica. This was understandable. The airfare from Australia to Jamaica is known to be substantial. While there was a dispute as to whether the appellant's surgery was elective, and whether the period for her recovery from surgery was exaggerated, there was no dispute that she was undergoing and was expected to undergo further medical treatment in the months following the order. I agree with the appellant's submissions that the Parish Court Judge did not give sufficient regard to the medical evidence. The parish court judge was, no doubt, anxious to have the long outstanding and highly contentious custody trial proceed to a conclusion. However, in light of the medical evidence, and in all the circumstances, in my respectful view, it was not reasonable for her to have ruled that the appellant could travel to Jamaica to complete the hearing after her surgery and between her various follow-up medical appointments.

[87] While the appellant had not initially complied with the order to have a clerk as well as technical support present at the site in Australia, she indicated by affidavit that she had secured someone to serve as a clerk. The live link hearings had previously proceeded without a clerk being present. These were matters which could have been addressed and would not have had to, inevitably, lead to a revocation of the order.

[88] A number of the challenges experienced with the live link process were not attributable to the appellant, and are likely to be experienced from time to time when

reliance has to be placed on the internet and other technological procedures. In so far as there was a challenge when documents were being shown to the appellant in the course of cross-examination, this could have been addressed by, for example, providing her or the clerk with a bundle of the documents in question.

[89] I also agree with counsel for the appellant that, in arriving at a decision to revoke the order, the Parish Court Judge considered irrelevant factors such as:

a. The fact that it was the respondent who was fully undertaking the child's maintenance with no contribution from the mother. This led the parish court judge to opine that it was not too much to ask the appellant to travel to Jamaica to complete her evidence;
b. The fact that IC was born in Jamaica, with a father residing in Jamaica, and so, the appellant must have contemplated travel to Jamaica when she migrated to Australia, and
c. The appellant did not deny having the financial ability to make at least one trip to Jamaica.

All of the above circumstances would have been obvious at the time when the order was made for the appellant's evidence to be taken by live link, and when the Parish Court Judge clearly decided that it was in the interests of the administration of justice to make

that order. The same circumstances could not then be used as a reason to revoke the order.

[90] In all the circumstances it is my respectful view that the Parish Court Judge erred in law as she did not consider the criteria outlined in the legislation which would justify the revocation of the order. There was no proof of a material change in circumstances since the making of the order. In addition, the Parish Court Judge took into account irrelevant considerations in arriving at her decision. Furthermore, in my respectful view, no reasonable judge, in light of all the circumstances, would have concluded that it was in the interests of the administration of justice to revoke the order. It would have been more reasonable, and in the interests of the administration of justice, for further attempts to have been made by the court to, as best as possible, address the various challenges being experienced in the live link process so that the appellant could have continued to give her evidence while in Australia.

[91] In ground of appeal two the appellant challenged the conclusion of the Parish Court Judge that the clerk assisting the appellant in Australia had to be a Justice of the Peace or a Notary Public. Upon a review of the reasons given by the Parish Court Judge I have not seen such a conclusion. In any event, I do not believe that a determination of that issue was necessary for us to dispose of the appeal.

[92] In respect of ground of appeal three, the appellant had argued that it was open to the Parish Court Judge to have ordered the use of a combination of special measures or other means of live-link to facilitate the conclusion of the custody trial. There is nothing

before us on the record indicating that this was an option that was raised with the Parish Court Judge, and which she refused to explore. In addition, we were not told what other options the Parish Court Judge ought to have explored. I am therefore not in a position to express a view on this ground of appeal, which, again, was not necessary for a determination of this appeal.

[93] It was for all of the above reasons that I agreed with the orders outlined at paragraph [6] herein.