



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2010 HCV03441

BETWEEN	NICHOLA MARSHA DUNKLEY	CLAIMANT
AND	DAIVE ANTHONY DUNKLEY	DEFENDANT

Alexander Williams instructed by Usim Williams & Co. for the Claimant
Defendant is unrepresented

Heard: October 12, 2012 and November 1, 2013

Custody - Separable Concept - Welfare of the Child –
Parents Residing in Different Countries –
Disagreements over Issues Pertinent to Child's Welfare
(Application for Joint Custody)

Campbell QC, J

[1] The parties are husband and wife. The husband is a Lecturer at the University of the West Indies, who lives in St. Andrew, Jamaica. The wife is an attorney-at-law, whose principal place of residence is in Tortola, in the British Virgin Island (BVI). They were married on the 29th December 2001, and separated on the 5th October 2005. Proceedings for the dissolution of their marriage were filed by the husband on the 24th February 2010. A daughter, Summer Paige Dunkley, was born, to them on the 24th April 2005. The child resides with the wife in Tortola.

Wife's Application

[2] On the 16th July 2010, the wife applied for the following relief:

- i. That sole custody, access and control of the child Summer Paige Dunkley be granted to her.
- ii. That the husband be granted access to the child during the months of July and August in each year and at such other times as is agreed to between the parties, or on such terms as the court deems fit.
- iii. That the husband pays to the wife maintenance in the sum of US\$200.00 per month or such sums as the court deems fit.

[3] The wife in the affidavit in support of her application says:

- i. Since her birth, Summer has only lived with the Respondent (husband) for the first eight (8) months whilst the Petitioner (wife) and I lived together. She now lives with me, and I remain her primary caregiver.
- iv. In fact, the Respondent has shown scant regard for Summer's welfare and upbringing. Now the Respondent calls twice per month in order to speak to Summer, and I have not received any financial support for her proper maintenance, apart from two pairs of jeans, one dress and a sweater.
- v. Because the Respondent and I live distinctly separate lives in different jurisdictions, I verily believe that it would be very difficult for there to be joint custody of Summer. Already, there is a disagreement between the Respondent and I on Summer's travel, the issuance and renewal of her passport, and as to her future education. The wife proposed that she be granted sole custody, with access to the husband during the months of July and August each year.
- vi. She also prayed that, Summer's residence, educational institution and religious instructions continue.

[4] Husband's Opposition to Application for Sole Custody

In response, the husband filed an affidavit, in which he says that there was an agreement for him to complete his doctoral studies in England during which period he

visited twice per year for the first two years, and it was agreed, that he would not visit for the final year. However, he maintained contact with his daughter through video conference and spoke with her several times per week. By the time of his return from England, the parties had irreconcilable differences. He maintains that he speaks to his daughter once per week, except when he is out of town or overseas. He denies that he pays his daughter "scant regard." He states that he informed his wife of information, told to him, by his daughter that, 'a man who visits' the house has kissed her on her mouth and sneaks looks at her whilst she is in the bathroom. The mother said he could be accused of similar inappropriate behaviour. He said he has made repeated requests for joint custody arrangements.

[5] He has been solely responsible for the maintenance of a house and car, in Florida, which the parties jointly own, and has indicated to the wife that he will never requests any further contribution towards the mortgage or the car insurance. He admits that there are disagreements, about their daughter's travels, issuance and renewal of passport and education. In respect to the daughter's travels, the disagreement springs from his need to have her visit with him more frequently in Jamaica. The disagreement in respect of the child's education, he doesn't see as a "bad thing." He claims fifteen years experience, in education and is of the view that, "using my experience to my child's benefit is to be expected. If I fail to do so, then I would truly be a neglectful father."

[6] The husband opposes the wife's application for sole custody and seeks instead joint custody, with access to his daughter for the summer, Christmas and New Year holidays and for a week in April, to incorporate her birthday. He would wish his daughter to attend the Anglican Church in Tortola, where he and his wife attended, and for this to be split with the church the wife attends. He is unable to pay the \$600.00 per month the wife has requested, his salary amounts to US\$1,300.00 per month. He says of the BVI, "The petitioner has chosen to live in an expensive jurisdiction, a decision which, incidentally he does not agree with as it causes the daughter to be classified as a "non-belonger" which he considers offensive." He is prepared to undertake maintenance of

\$400.00 per month, "when he can afford to do so," and assume part of her travel expenses when she comes to see him.

[7] The wife in a further affidavit has indicated that, the husband has sworn never to return to the BVI, and that he claims to have been classified "*persona non grata*," by the immigration authorities, although she has been unable to confirm any such classification. On his return to Jamaica, from England, his calls were infrequent, and at best, once per week. He advised that whenever he travels his calls would be erratic. He has never contributed to the expenses for his daughter to see him. The wife says of the complaint of inappropriate conduct on the part of a male who visits frequently, that she was present and it was an innocent game of "peek-a-boo." The husband has confirmed his approval of the child's academic prowess. The wife is surprised at his wanting to direct the child's religious instructions, because of his declared non-belief in God, further neither are members of the Anglican Church. The husband has intimated that, care and control could remain in the wife.

Discussion

[8] Legal custody includes the power to control the child's education, choice of religion, and the administration of the child's property, which includes the entitlement to veto the issue of a passport and to withhold consent to marriage. See **Hewer v Hewer** [1969] 3 All ER 578, at 585. Actual custody that is care and control is the actual possession of the person of the child. The separable nature of custody is considered in P.M. Bromley, **Family Law (Sixth Edition)**, at page 283:

"As custody is a separable concept, the rights inherent in it may be split. Clearly if a child's parents are living apart only one of them can have actual custody. If say the court gives this to the mother but all the other parental rights to both of them jointly, the father will have an equal right to decide on the child's education."

The learned author at page 293, in examining the "split orders," where a parent deprived of actual custody retains some of the other parental rights. The learned author notes:

"That the difficulties facing a parent who had possession of a child but none of the attributes of legal custody were equally real. However and consequently it became increasingly common to leave the remaining parental rights with both parents whenever there was a reasonable prospect that they would co-operate In practice, however, the difficulties of leaving any rights in a parent who does not have actual custody usually appear to be too great, and at least in divorce proceedings joint orders are rare."

[9] In an application to the court for custody and the right of access, by either parent, the first and paramount consideration is the welfare of the child. The conduct and wishes of the parents are also factors to be considered. The Court is entitled to make such order as it may think fit. Neither mother nor father is presumed in law to have a superior claim. See Section 7(1) and 18, **Children (Guardianship and Custody) Act**.

[10] The authorities indicate that "welfare is a much wider concept than merely material comforts." In **Dennis Forsythe v Idealin Jones** SCCA No. 409 of 1999 delivered on the 6th April 2001, Harrison, J.A., particularized some of the factors that are included under rubric of "welfare" 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."

[11] Welfare of the child is not the equal of any other consideration. It is the chief consideration. To the welfare of the child, all other considerations should be subordinated. The learned authors of, **The Law Relating to Children**, Professor H K Bevan, speaking of the relative importance factors other than those relevant to the welfare of the child says:

"The extent to which they are must, as Megarry J, has made clear, (Re F (an infant), [1969] 2 Ch. 238, at 241), depend on judicial discretion and cannot be determined according to any formula. Problems invariably arise with regard to the weight to be attached to the claims and the conduct of the parties."

[12] The child had has lived apart from the husband, for all but eight months of her life. She attends one of the best educational institutions in the BVI. Both parents are of the view that she has performed well academically. She also attends ballet and tap dance classes. She enjoys membership in a dance and cooking club. She attends church with her mother, and has the support of a community of individuals, of her mother's choosing. The husband's complaint, of inappropriate conduct on the part of a frequent male visitor to the child's household, has been satisfactorily explained by the wife. I find that the environment provided by the wife, is secure, clean, peaceful and nurturing. There is no allegation that the wife, who is the primary caregiver, is an unfit mother.

[13] It is clear that both parents, love their daughter, and naturally want the best for her, and for her to achieve her full potential. I recognize that any ruling that this court makes is likely to have an emotional impact on one or the other of the parents. The husband appears to travel with some frequency, and during his trips, the communication becomes "erratic." No reason is given why this should be so. The father has not provided any arrangements that would be put in place, to ensure the child's well-being during these trips overseas. The wife has concerns that his mother is incapable of tending the child, in the absence of the father.

[14] The husband has sworn not to return to the British Virgin Island, and leaves unanswered the doubts expressed by the wife about his reason for that decision. He has expressed the view that he did not agree with the wife living in Tortola, because aliens are addressed as, "non-belongers," a term he finds offensive. He has disagreed with the wife's choice of church, although he bears no apparent allegiance to the alternative denomination that he has proposed. He has not challenged the wife's

contention that he espouses a disbelief in God. He offers no reason for his application that the child should attend the Anglican Church. The husband is of the view that, "disagreement is not a bad thing," in relation to questions of education. Disagreement can, however, stultify and hinder the making of decisions that are necessary for the child's welfare. The husband has said he was prepared to withhold consent in the issuance of the child's passport in order to ensure that he gains access to her.

[15] There can never be a majority in a committee of two. Joint custody can only work if the parties are able to agree on the fundamental issues concerning the child's welfare. The husband appears not averse to using his custodian rights as a bargaining chip in negotiating his own entitlements, such as withholding his consent to the issuance of a passport to the child in order to improve his right of access to his child. The difficulties noted by P.M. Bromley, in **Family Law** (see paragraph 8) are aggravated by the fact that the parties are living in different countries, and have disagreements over issues that are vital to the child's development. The difficulties involved in leaving rights such as consenting to change of her passport and her educational and religious instructions, in the hands of the husband appear to be too great, in light of the disagreements the parties have over fundamental issues. I find it is likely to impact negatively the child's welfare. I would refuse the husband's application for sole custody.

Maintenance

[16] The question of the maintenance to be paid by the husband is not contentious, the wife in her application, originally requested \$600.00 per month, and exhibited expenses of, for the upkeep of the child. The husband who had not been fully compliant with the interim payment of \$200.00 per month ordered by the court; complained that the mother choose to live in the expensive island, a choice with which he disagreed. He offered \$400.00 per month when he could afford it. The mother doesn't challenge his income as being the equivalent of US\$1,384.00 per month. The mother earns \$6,400.00 per month. The husband maintains a condominium and car in Florida to the extent of \$600.00 per month.

[17] It is hereby ordered:

- i That sole custody, with care and control of the child, Summer Paige Dunkley, born on the 24th April 2005, be granted to the Applicant.
- ii Access to the child, is granted to the Respondent, one-half of each summer holiday. The child will spend alternate Christmas and New Year's holidays and birthdays, with the Respondent. The first such events after this Order will be spent with the Respondent.
- iii The parties will share equally the cost of the child's travel.
- iv The Respondent is to pay the sum of \$350.00 per month towards the upkeep of the child, and to pay one-half of all her educational, (including her dancing lessons), medical and optical expenses, with effect from the first term of the calendar year 2014.
- v. The Applicant is to present copies of such bills, and receipts to the Respondent, who will make the necessary payments within thirty days of the receipt of such bills.
- vi Costs to the Applicant to be agreed or taxed.