C.A. R.M. Court — Application for custody — two female children living with mother by order of agreement between parties — one with mother and one with father — 20 years — welfare of child necessitated her being removed from her father — "mother factor" — Principles reviewed — Appeal against order of Resident Magistrate refusing to remove child from father's custody dismissed.

JAMAICA

Cases referred to p 10 (end)

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IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT MISCELLANEOUS APPEAL NO. 1/90

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

Civil Proceed

BETWEEN	MADGE HORTENSE EDWARDS	APPELLANT
AND	JEFFREY ADOLPHUS EDWARDS	RESPONDENT

(Family Law)

Jack Hines for Appellant

Keith Smith for Respondent

July 30, October 4, 1990

ROWE P.:

The wife appellant is a 43 year old Teacher and the husband respondent a 45 year old Optometrist and farmer. Both live in the town of Mandeville and both are of the Seventh Day Adventist religious pursuasion. Their marriage which was celebrated in Canada in December 1975 was dissolved in Florida in 1986. At the hearing of the application for custody out of which this appeal arises, counsel for the wife mildly probed the basis of jurisdiction of the Florida Court to grant a decree of divorce but left the matter very much up in the air. Two children came of the union: Melanie born October 16, 1976 and Averil-Mae born May 10, 1981.

In January 1985 the respondent left the matrimonial home at Nevon Place, Mandeville where he had lived with his wife and daughters. Then in June 1985 he took the younger child "Averil-Mae" then 4 years old to live with him, in circumstances described by the appellant's counsel as amounting to kidnapping. There was nothing on the Records to substantiate

this complaint. An agreement was signed between husband and wife on July 1, 1985 in respect of custody of both children and also related to "other matters" not disclosed in evidence. Under that agreement custody of Averil-Mae was given to the respondent. The appellant has repudiated that agreement on the ground that although she had independent legal representation, she was induced to make the agreement under threats from her husband that he would cease paying rent for the Nevon Place home. At that time she had no source of income other than maintenance provided by her husband. Significantly, the wife said she did not disclose to her attorney-at-law the fact of the threats or their effect upon her although the agreement was signed at a lawyer's office in the presence of her attorney. In cross-examination the wife maintained that it was her intention in July 1985 to pursue legal action for custody notwithstanding the written agreement. Formal application for custody was made in September 1987.

In that application the appellant alleged that:

(a) the child Averil-Mae was separated from her sister to whom she was closely attached;

(b) the father spent little time with the child;

(c) the child was being deprived of emotional support and proper maternal care.

An affidavit in support gave some details. When the father was away from home, which was said to be from early morning until late in the evening, Averil-Mae was left in the custody of a paid domestic helper. Further, it was alleged that the father's female companion would visit the home to the child's knowledge and would sometimes sleep in the same bed with father and daughter. There was an allegation that the

separation of the two girls caused "loneliness and depression" but it was unclear from the affidavit, which child suffered the loneliness and depression. From what appears in subsequent responses of the mother it can be inferred that Melanie, in respect of whom there are no legal proceedings, is the child more affected by the separation. However, the learned Resident Magistrate proceeded on the basis that the child Averil-Mae was emotionally disturbed.

Only the two principal parties gave evidence. The husband said that he had re-married, that his new wife was at home in the days while he was away at work, that he provided adequate accommodation for Averil-Mae who attended Church and was doing well at School and that there was a satisfactory arrangement for access. Melanie would stop at his home on her way from School on Wednesdays where the sisters could be together and on Sundays he took Averil-Mae to her mother's home where she remained from 11.00 a.m. to 6.00 p.m. On none of these facts was there disagreement but the mother said that Averil-Mae's hair was unkept and had fallen off considerably and on one occasion she had to request the respondent to apply a mild deodorant to the child's personal hygiene.

Two Social Enquiry Reports prepared by the Department of Corrections were made available to the learned Resident Magistrate. In the first one dated April 2, 1987, under "General Observation", the Senior Probation Aftercare Officer for Manchester wrote:

> "Both parents enjoy a similar standard of living. Averil-Mae is taken to spend each weekend at her mother's home and she is also taken to spend time, whenever her father has to be out of town or off the island.

"Assessment

The foregoing information indicates that the environments under scrutiny are physically similar in nature, and are both conducive to the proper upbringing of the child. Arrangements have also been made so that the child is exposed to both situations. Thus, should custody be granted to Mrs. Edwards, only the social and emotional aspects will be altered."

At best this Report was non-committal. On January 7, 1988 the Probation Aftercare Officer presented a second Report. The respondent had re-married and had a stable family situation. The appellant, however, complained that the respondent had reduced Averil-Mae's visits to her thus alienating the child from her and that as Melanie had gone to a Secondary School entailing longer hours at School and more home-work she saw less of her sister. Two significant additional complaints were that:

(i) the elder child was becoming emotionally disturbed over the "tug-of-war" and felt unloved as she was not being fought for; and

(ii) the elder child continued to express her anxiety at wanting her sister to live with her.

The Officer merely noted that the respondent said his family was a closely-knit one and that both his wife and daughter shared a very close relationship.

When the matter came before this Court eighteen months had passed since the last Social Enquiry Report. In response to the Court's request for a recent evaluation of the family situation, the Probation Aftercare Officer produced a final Report dated July 19, 1980. At that time Averil-Mae and her sister Melanie were in Canada spending the summer holidays with their father's relatives.

The Report showed that in the interview with Mrs. Edwards all the earlier complaints were repeated and in addition Mrs. Edwards was dissatisfied with the access provisions which she described as haphazzard. The appellant complained too that the child's personal hygiene was below standard which indicated neglect on the part of the step-mother. Mr. Edwards, on the other hand, dismissed all the complaints as unsupportable and opined that the appellant's real purpose in securing the custody of Averil-Mae was to obtain added financial benefit.

"Eulalee" the domestic helper of the respondent and his wife, gave a revealing picture of life at the home of the respondent. She is reported as saying that when she started working at the Edwards' home two years before, she did not realise that Averil-Mae was not the present Mrs. Edwards' daughter. This said Eulalee was due to the amicable relationship which existed between Averil-Mae and her step-mother. That relationship had remained wholesome.

I set out the July 1990 "Conclusion" of the Senior Probation Aftercare Officer for Manchester. He said:

> "The information received has indicated that nine year old Averil-Mae Edwards is comfortable at her father's home. It also appears that her moral, religious and educational development is proceeding at a very acceptable rate. Whether moving her to live with her mother will improve her general situation, is an unknown quantity. Thus, the possible implications of changing the status quo will have to be considered carefully, before the learned Court makes a decision with its collective wisdom."

The Investigating Officer did not wish to seem to be usurping the functions of the Court but the fair inference to be drawn from the above "Conclusion" is that the welfare of the child Averil-Mae is being adequately satisfied in her present

home. The appellant, a Teacher, was confident that under her personal supervision the School Grades of Averil-Mae could be improved in line with that of Melanie who had then placed first in her Form. On inspection of Averil-Mae's School Reports for 1988-89 and 1989-90, it became clear that she is an "A" student who has also placed first in her Form and in addition excels in music above her older sister. Notwithstanding that the girls live in separate homes, Mr. Edwards' opinion of their relationship is that they were "inseparable."

It was a difficult decision which faced the learned Resident Magistrate. Prima facie, both parents were devoted to both children and behaved as ideal parents in every respect. There was no appreciable difference in the standard of living of either parent, or of the socialization of the children in the separate homes. The family unit had broken down irretrievably and in the early days of the disruption the husband and wife had entered into a written agreement for the custody of the children. There was no insistence then on the part of the appellant that the younger female child should live with and be cared for by her. Then she had her own independent legal representation and yet she did not seek her attorney's assistance to counteract the alleged threats made by her husband.

It would seem to be self-evident that a young female child should be reared by her mother if that can be accomplished without harm to the child. And of course if all the siblings could live under the same roof and share the same degree of discipline as well as care this would enure to a healthy and cohesive family. Romilly M.R. spoke of the preferred role of mothers in Austin v. Austin (1865) 55 E.R. 634 at 637:

> "No thing, and no person, and no combination of them can in my opinion, with regard to a child of tender years, supply the place of a mother, and the welfare of a child is so intimately connected with its being under the care of the mother, that no extent of kindness on the part of any other person can supply that place."

The preferred role of the mother enunciated by Romilly M.R. is not a rule of law but rather a rule of common-sense. This was exemplified in the case of Re K. (Minors) [1977] 1 All E.R. 647. There the mother of a boy aged 4 years and a girl aged 1 year began to commit adultery to the great distress of her husband an Anglican Clergyman who refused on religious grounds to divorce her. The adulterous wife remained in the matrimonial home for the sake of the children but the extremely ugly scenes between husband and wife began to affect the son. The wife who wished to desert the matrimonial home to live with her lover, sought a custody order from the Court. The husband countered by causing the children to be made wards of court and applied to the Court for an order that the care and control of the children be committed to him. The trial judge while ordering that the children remain wards of court during their minorities, granted care and custody of the children to the mother on the ground that she was the natural guardian and protector of very young children. On the justice of the case the judge was inclined towards the father but having regard to the ages of the children gave a preference to the mother. His decision was upheld on appeal. In the course of his concurring judgment Sir John Pennycuick said at page 647:

> "Having taken this and all other relevant factors into account the judge, in his most careful and thoughtful judgment, reached the conclusion that the welfare of these children requires that they should be in the charge of their mother who, not as a matter of law but in the ordinary course of nature, is the right person to have charge of young children."

The Australian Courts are not quite as tender towards mothers of very young children. In Raby v. Raby [1976] 12 A.L.R. 669 the Court held that the suggested preferred role of the mother was not a principle, a presumption, a preference or even a norm, but it is a factor to be taken into account where relevant. As the Australian Court said in Gronow v. Gronow 29 A.L.R. 129 per Mason and Wilson JJ.:

> "In discharging this responsibility the Family Court will give weight to the mother factor with other features of the particular case. The precise weight to be given to that factor will necessarily depend on the particular circumstances. The structure of the family, the respective roles of the parties within the family relationship, the personality of the parents and of the child."

In the instant case, the mother had surrendered the custody of the young girl Averil-Mae to the father as evidenced by the written agreement of July 1987. The mother factor would shrink in importance during the intervening two years and this passage of time would impact upon the trial judge.

Leighton Jackson in his Book "The Law Relating to Children in Jamaica" [1984] at page 70 refers to the effect of change of environment upon the welfare of the child. He says:

> "This forms an extremely important consideration in the deliberations of the Courts today, and in competition with an unimpeachable parent, this consideration usually sways the balance in favour of the person who already has custody of the child."

The probable effect of a change of environment upon the child was a consideration very much in the minds of the Probation Aftercare Officer and of the Court below and it would appear was indeed a determining factor.

The relationship between an appellate tribunal and a trial judge who has a power to exercise a discretion in custody matters was considered by the House of Lords in G. v. G. [1985] 2 All E.R. 225 at 227. Lord Fraser of Tullybelton summarised the appellant's argument and gave his opinion thereon in the following passage:

> "[Her contentions] fall into two parts.
>
> The first is that when an appellate court is exercising its jurisdiction in cases concerned with children, in which the welfare of the children has been declared by Parliament to be the first and paramount consideration ... . special rules apply. Second, it was said that in such cases the only proper way in which an appellate court can assess whether the judge of first instance has exercised his jurisdiction correctly is to carry out the same balancing exercise between the various factors in favour of and against each party as the judge at first instance had done, and if it reaches a different conclusion from him as to what is in the best interest of the child it must allow the appeal. The argument which I have thus crudely summarised was of course expanded and elaborated, and was very persuasively presented, but I am of opinion that it is unsound. I entirely reject the contention that appeals in custody cases, or in other cases concerning the welfare of children, are subject to special rules of their own. The jurisdiction in such cases is one of great difficulty, as every judge who has to exercise it must be aware. The main reason is that in most of these cases there is no right answer. All practicable answers are to some extent unsatisfactory and therefore to some extent wrong, and the best that can be done is to find an answer that is reasonably satisfactory. It is

> "comparatively seldom that the Court of Appeal, even if it would itself have preferred a different answer, can say that the judge's decision was wrong, and unless it can say so it will leave his decision undisturbed."

His Hon. Mr. Sang recognized that the crucial point for his determination was whether the welfare of the child Averil-Mae necessitated her being removed from her father. He understood, against the weight of the evidence, that Averil-Mae was emotionally disturbed, but did not attribute this to the separation from her mother and sister and her being resident with her father, step-mother and step-sisters. He clearly did not accept the appellant's evidence on this issue. The learned Resident Magistrate obviously considered the weight to be given to the "mother factor" but he balanced this against the environmental dislocation and concluded that the welfare of the child did not require him to "pluck" her from the settled home of her father. In my view this was one of the practicable solutions to which the Resident Magistrate could legitimately arrive on the evidence and applying the principle in G. v. G. (supra), it would be wrong for this Court which neither saw nor heard the parties to come to an opposite conclusion.

For these reasons I was of the opinion that the appeal should be dismissed. However, the appellant is entitled to very generous rights of access. As there was no agreement between the parties as to the terms of access in the light of the order of the Court for custody in the father, the Court declined to make a detailed access order. To enable the Court to retain supervision over access, liberty to apply was granted.

GORDON J.A. (AG.)

I have read the judgment of Rowe P and I agree with the reasons given and conclusion arrived at. One factor that cannot be overlooked is that Averil-Mae has developed emotional attachment to her two sisters born of her father and step-mother. These children, both girls, are under three years old and were born in the home while Averil-Mae lived there. The trauma of a separation from this attachment cannot be estimated and undoubtedly the learned Resident Magistrate considered that the welfare of Averil-Mae is best served by maintaining the status quo.

Cases referred to

1. Austin v Austin (1865) 55 E.R. 634
2. Re K (Minors) [1977] 1 All ER 647
3. Raby v Raby [1976] 12 A.L.R 669
4. Graham v Graham 29 A.L.R 129
5. G v G [1985] 2 All ER 225