



[2017] JMSC Civ. 9.

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2012HCV00646

BETWEEN	F	CLAIMANT
AND	D	DEFENDANT

IN CHAMBERS

Leonard Green and Sylvia Edwards instructed in by Chen Green & Co for the claimant

Janet Taylor and Yackeisha Scott instructed by Taylor Deacon and James for the defendant

May 30, June 9, July 25, 2016 and January 18, 2017

FAMILY LAW – CUSTODY – SECTIONS 3, 4, 7, 11, 12, 13, 14, 18 OF CHILDREN (GUARDIANSHIP AND CUSTODY) ACT – PARAMOUNTCY OF THE WELFARE OF THE CHILD – FACTORS TO BE TAKEN INTO ACCOUNT

SYKES J

[1] The father, D, and mother, F, were husband and wife. The marriage has ended. The mother is about to remarry. There are two children involved: a girl and a boy. The girl is the older, born in September 2005 and the boy was born in January

2009. The father has applied for sole custody children, care and control in respect of both children with access granted to the mother. There is an order of Pusey J in place which had ordered joint custody to both parents with care and control to the mother with access to the father. The father is of the view that the current state of affairs is not advancing the welfare of the children. His main concern he says is that the mother is not managing the health, psychological, emotional and physical, of the children properly. He is of the view that the children are better off with him. He says he has more time to see to the welfare of the children which the mother does not have because she works long hours. He also says that the maternal grandmother who supports the mother in the rearing of the children is unsuitable and she does not have a healthy relationship with the children.

- [2]** The mother, on the other hand, sees this application as part and parcel of the father's attack on her as person, a mother and professional. She believes that he has no regard for her and will stop at nothing to discredit her.
- [3]** The mother has accused the father of trying to convince the Supreme Court that they should be reconciled. She sees this application by him as a means of trying to force a reconciliation that is no longer possible. In her mind, he has not accepted the reality that the relationship is over and there is simply no prospect of the family unit getting back together. For his part, the father has spared no words in describing the mother as negligent, incompetent and a candidate for the loss of licence to practice her profession. He has gone on to say that had she, as a medical practitioner, treated her patient's health in the way she has treated the health of her children she would be sued and removed from the role of medical practitioners. Both parties have expressed the view that the other should be committed to prison for alleged breaches of Pusey J's order. The court has repeatedly said that it cannot supervise every aspect of child rearing and while the children are minors the parents ought to be able to communicate with each other sufficiently respectfully to advance the welfare of the children.

- [4] In the case of **Re C (Older Children: Relocation)** [2016] 2 FLR 1159; [2016] EWCA Civ 1298 Peter Jackson J made this observation at paragraph 1:

[1] This family appeal strongly demonstrates the damage that is caused when separated parents fail to take the opportunity to resolve their differences. Instead of finding its own solutions, this family, which has every other advantage, has engaged in 2 years of litigation that has caused great unhappiness, not least to two teenage children. ...Aside from the emotional cost and general waste of life, the financial cost has been staggering. ... The proceedings are yet another example of why the Family Court repeatedly attempts to divert parties into mediated solutions that allow them to keep control of their own affairs. The court is there to resolve disagreements that cannot be resolved in any other way but, as has been said before, it is not a third parent.

- [5] This present case is not an appeal but the sentiment expressed by his Lordship applies to this case. Much 'blood' has been spilt and treasure spent on this custody hearing. This court has encouraged the parties to resolve their dispute regarding the children. Both mother and father have dug in their heels. Each is confident of victory. The reality though is that custody is not about the parents. It is about the welfare of the children.

The law

- [6] Section 18 of the Children (Guardianship and Custody) Act of Jamaica reproduces, almost verbatim, section 1 of the Guardianship of Infants Act, 1925, UK, which reads:

Where in any proceeding before any court (whether or not a court within the meaning of the Guardianship of Infants Act, 1886) the custody or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant 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.

[7] With the exceptions of the words in brackets in the English statute and the use of the word 'child' in the Jamaican statute instead of 'infant', the Jamaican section 18 is the same as the English provision.

[8] It has been said that the provision did not enact any new law and was simply stating what the law was just prior to the passing of the English statute. It has also been said that the paramountcy of the welfare of the child is not the sole consideration. Support for the first conclusion is found in the judgment of Lord Hanworth MR in **In re Thain** [1926] Ch 676, 689:

The other statute referred to is the Guardianship of Infants Act, 1925, which by s. 1 provides that the Court, in deciding any such question as we have here, "shall regard the welfare of the infant as the first and paramount consideration." That is no new law, and the welfare referred to there must be taken in its large signification as meaning that the welfare of the child as a whole must be considered. It is not merely a question whether the child would be happier in one place than in another, but of her general well-being. The section merely enacts the rule which had up to that time been acted upon in the Chancery Division.

And Sargant LJ, 691:

It is not necessary for me to say much more than that s. 1 of the Guardianship of Infants Act, 1925, does not affect what was and is the law, that the first and paramount consideration is the welfare of the child.

And Lord Upjohn in **J v C** [1970] AC 668, 724:

My Lords, the Guardianship of Infants Act, 1925, enshrined the view of the Chancery Courts.

- [9] For the second conclusion support is found in Eve J's first instance judgment in **In re Thain** at page 684:

.. inasmuch as the rule laid down for my guidance in the exercise of this responsible jurisdiction does not state that the welfare of the infant is to be the sole consideration but the paramount consideration, it necessarily contemplates the existence of other conditions, and amongst these the wishes of an unimpeachable parent undoubtedly stand first ...

- [10] Something must be said about the expression unimpeachable parent but that will be done after reference to the Court of Appeal's decision in **In re Thain**.

- [11] In the Court of Appeal in the same case Warrington LJ also supports the conclusion when he held at pages 690 – 691:

The welfare of the child is no doubt the first and paramount consideration, but it is only one amongst several other considerations, the most important of which, it seems to me, is that the child should have an opportunity of winning the affection of its parent, and be brought for that purpose into intimate relation with the parent. The judge bore these matters in mind, and was therefore right in coming to the conclusion that the father was entitled to, and that it was for the welfare of the child that he should take over the duties and enjoy the actual privileges of a father.

- [12] Ormrod LJ in **S (BD) v S (DJ) (infants: care and control)** [1977] 1 All ER 656 emphasised the following at page 660:

The question is not what the essential justice of the case requires but what the best interest of the children requires.

...

It is clear from J v C that if the interests of the children require a decision in favour of one parent, the perfectly proper interests and wishes of the other parent, unimpeachable or impeachable, must yield to the interests of the children.

[13] Ormrod LJ warned against the use of the expression 'unimpeachable parent' which was used in earlier cases to suggest that if one parent was 'unimpeachable' then that factor gave that parent a head start in the decision making process regarding custody. His Lordship had this to say at pages 660 – 662:

The phrase 'unimpeachable parent' seems to exercise a certain fascination over judges and advocates from time to time. I think it is a most misleading phrase. It is hurtful to the other parent in whom it invariably creates an immediate resentment and a bitter sense of injustice, and, in my experience, it is a most potent stimulus for appeals to this court. I have never known and still do not know what it means. It cannot mean a parent who is above criticism because there is no such thing. It might mean a parent against whom no matrimonial offence has been proved. If so it adds nothing to the record which is before the court and in the event is now outmoded. I think in truth it is really an advocate's phrase. It is to be found in some of the reported cases but only, I think, in those where a parent was trying to recover custody of the child from a non-parent or stranger; and there the concept of unimpeachability may have some place. But if it is used in a case where the dispute is between one parent and the other it invariably acquires an antithetical flavour, so that one parent has to be labelled 'unimpeachable' and the other parent 'impeachable'. If not, if both are unimpeachable, then the word has added nothing to the argument whatsoever. The present case illustrates very aptly indeed how dangerous it is to make this kind of value judgment. Here the learned judge took the view that the father was the unimpeachable parent and, by necessary implication, and expressly, that the mother was the impeachable one because she had committed adultery with three men. Having come to that view, that the husband was unimpeachable and the wife impeachable, the learned judge's judgment followed to the conclusion which I have indicated. But it is quite impossible to decide whether a parent is unimpeachable or impeachable without an exhaustive investigation into the history of the married life. It also requires that the judge in question should not only find the facts relating to the ins and outs of the matrimonial life of the parents, if he feels it necessary to go into it--and it is not as a rule necessary to go into it--he has also to give some

indication as to what moral standards he is using. When we look at the facts of this case the mother's three adulteries are, of course, plain to be seen and are admitted. But when one turns to her side of the case as set out in her affidavit one gets an entirely different view of the situation. In her affidavit she gave, in a very short succinct form, not attempting to develop it in any way, the reason which led up to her leaving the father in 1971. No doubt she can be criticised for behaving irresponsibly on that occasion but she says that from the outset the marriage was fraught with difficulties. The father had never maintained her adequately--no doubt there was an issue as to that. But the most important point is that she says that from a very early stage in the marriage the father had had great sexual difficulties and had found sexual intercourse with her extremely difficult, leading, in 1966, to a minor nervous breakdown arising from fear of impotency on his part. He had had psychiatric treatment for this unfortunate condition and in the result it improved but was never satisfactory. He was attending a doctor at Whitchurch and a marriage guidance counsellor had also come into it. That was the background against which the adultery had taken place. That account was not substantially challenged by the father. So the assessment of the learned judge that the father was the unimpeachable parent is one which, in my judgment, carries with it a very large question mark indeed. So even if the learned judge had been right in his approach to the decision in this case, he would in my judgment have been wrong in the conclusion he came to on unimpeachability. It illustrates very well just how dangerous it is to try to make that particular finding in any particular case. It is often used, I think, as a way of expressing the difficulty that judges feel, and all of us have felt in dealing with these cases, where the interests of the children seem to indicate a course which is very hard on the father. I am not aware of any case in which this concept has been relied on by a mother against a father; it nearly always is the father who is said to be 'unimpeachable' and it is brought in because it is felt to be unjust in human terms to him for the mother to be able to take the children away from him or to retain them, simply because the interests of the children point to the mother as the proper parent to have their care. It is natural that courts should have sympathy with fathers who are in a particularly difficult position in these cases and seek to help them as best they can. But

the law is quite plain, the Act itself is perfectly clear, that it is the children's interests which must predominate.

[14] The court has cited this rather long passage to emphasise that the court is not making any value judgments concerning the marriage between D and F. The court is not concerned with who was at fault for the breakdown of the marriage. In coming to its decision the court is not saying that one parent is 'unimpeachable' and the other is 'impeachable.' The role of the court is to advance the present and future welfare of the children. It does not do this by identifying the worse of the two parents or by asking which parent is better. Rather it does this by taking a holistic view and makes the orders it feels will promote the welfare of both children. The focus is on the children. Having said this it must be pointed out that section 7 permits the court to take account of the conduct of the parents but that is only in relation to the question of the welfare of the children.

[15] The case of **Re K (minors) (wardship, care and control)** [1977] 1 All ER 647 drove home the idea that in these types of cases it is not about doing justice between the parents but looking at what the welfare of the child requires. In **Re K** Sir John Pennycuik stated at page 665:

A judge, when deciding what is best for the welfare of a child, must take into account all the particular circumstances relevant to that child.

[16] It is fair to say that the Jamaican legislature did not intend to depart from the English statutory position. On this premise the reasoning of the House of Lords in **J v C** applies to section 18 of the Jamaican Act.

[17] The all-important clause in section 18 is 'shall regard the welfare of the infant as the first and paramount consideration.' What does it mean? Lord McDermott in **J v C** gave his views at pages 710 – 711:

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 interests of the child’s welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed. It remains to see how this “first view,” as I may call it, stands in the light of authority.

[18] Lord McDermott still held his ‘first view’ after examining case law decided after the statute was enacted. His Lordship summarised his position at pages 714 – 715:

These may be enumerated as follows:

- 1. Section 1 of the Act of 1925 applies to disputes not only between parents, but between parents and strangers and strangers and strangers.*
- 2. In applying section 1, the rights and wishes of parents, whether unimpeachable or otherwise, must be assessed and weighed in their bearing on the welfare of the child in conjunction with all other factors relevant to that issue.*
- 3. While there is now no rule of law that the rights and wishes of unimpeachable parents must prevail over other considerations, such rights and wishes, recognised as they are by nature and society, can be capable of ministering to the total welfare of the child in a special way, and must therefore preponderate in many cases. The parental rights, however, remain qualified and not absolute for the purposes of the investigation, the broad nature of which is still as described in the fourth of the principles enunciated by FitzGibbon L.J. in *In re O’Hara* [1900] 2 I.R. 232 , 240.*

4. Some of the authorities convey the impression that the upset caused to a child by a change of custody is transient and a matter of small importance. For all I know that may have been true in the cases containing dicta to that effect. But I think a growing experience has shown that it is not always so and that serious harm even to young children may, on occasion, be caused by such a change. I do not suggest that the difficulties of this subject can be resolved by purely theoretical considerations, or that they need to be left entirely to expert opinion. But a child's future happiness and sense of security are always important factors and the effects of a change of custody will often be worthy of the close and anxious attention which they undoubtedly received in this case.

[19] This court adopts this summary subject to Ormrod LJ's caution on the use of the expression 'unimpeachable parent.'

[20] The Court of Appeal of Jamaica has said nothing to suggest that it disagreed with Lord McDermott. Harrison JA (later President of the Court of Appeal) in **Forsythe v Jones** SCCA No 49 of 1999 (unreported) (delivered April 6, 2001) states 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.

[21] It must be noted that Harrison JA was not saying that this list is complete.

The application

[22] In this application the father, seeks sole custody, care and control of both children. If granted the order asks that the mother has access from 2:00 pm Friday afternoons to 8:00am Monday mornings, ½ school holidays, alternate mid-term holidays and alternate Christmas days. The access shall include minimum of 2½ hours per week for ½ an hour by way of telephone and internet visual communication. D sought an order that the children receive counselling from a certified psychologist for such period as the psychologist thinks is necessary.

[23] The grounds of the father's application are:

- (a) circumstances of changed since Pusey J's order and those orders no longer serve the best interest of the children;
- (b) the mother violently attacked the father in presence of children;
- (c) the mother demonstrates poor judgment in matters concerning the children's health and well-being;
- (d) children display worrying behaviour since separation and the mother has refused to consent to the children receiving counselling;
- (e) daughter indicates that she wishes to reside with father;
- (f) the mother has habitually failed to comply with Pusey J's order;
- (g) the mother has made important decisions without consulting the father in breach of the court order.

The evidence and assessment

[24] The affidavit evidence comes only from the mother and father. There are police statements, photographs and two reports from the Child Development Agency ('CDA'). The court will refer to the factors relevant to this case.

(1) Physical surroundings

[25] The first report of the CDA indicates that the father's house was 'generally untidy but it had all the necessary amenities.' The house is a two storey construction. The lower floor has a kitchen, living room, a television room, bathroom and back patio. The upper floor has a bedroom for the children with own bathroom. The father has his own bedroom with bathroom with an attached balcony. The bedroom that would be for the children was untidy at the time of the visit. The complex where he lives has no green area. The daughter observed that 'the curtains are torn, termites have started to corrode the staircase handles, and some of the tiles are cracked.'

[26] The mother lives in a three bedroom concrete structure with two bathrooms, a living and dining area, kitchen, garage, back patio, veranda, car port and ample yard space. The house was described as 'clean and neat and the necessary amenities were present.'

[27] The first report of the CDA had this to say about the physical conditions of both parents' surroundings:

In terms of the physical home environment, the interviewer is in favour of mother's home which has ample green space and was generally kept better than the father's home. However, Dana mentioned that the neighbourhood is lonely so visits to the park and other places can give the children the opportunity for additional peer social interactions. Father can improve his home environment by making very small adjustments such as changing the curtains and organizing the furniture in a more aesthetically appealing manner.

[28] The second CDA report notes that '[p]hysically, the mother's home environment is cleaner, free of hazards and has ample green space, as mentioned in the first report. Father's home has some minor issues such as cracked tiles, termite infestation and there is no green area in his gated community.'

(2) Financial position of each parent

[29] According to the first CDA report the father earns approximately JAD\$375,000 (gross) out of which he pays JMD\$30,000.00 per month for both children, half medical and educational expenses, supports his parents with JMD\$30,000.00 per month, maintains his car, buys groceries, gym fee and a domestic assistant who comes in once per week. According to the father, 'he does not have any savings because his expenses consume all his income.' The father said he cannot afford to pay any more money towards maintenance of the children.

[30] The mother earns JMD\$400,000.00 net salary. She earns from another source about which there is no information. She states that the educational expenses of the children are not just school fees and books 'but there are other costs such as art supplies, field trips and other school-related activities.' The mother thinks that the JMD\$30,000.00/month contributed by the father is inadequate because 'it is just the cost of a trip [meaning groceries] to the supermarket.' The mother makes the point that the 'father wants full custody but said he found it difficult to pay the maintenance' for the children.

[31] The daughter said that her father is not able to send her to swimming and music because he cannot afford those things. Her mother is too tired when she comes home. She wants her mother to be more available to her. The nanny's cooking is not to her liking. She reported that with her father she 'played, watched movies, went to church, attended a barbecue and went to parties.'

[32] The second CDA report concludes that 'mother is better able to provide for the children's day to day needs as she has more sources of income and resources than father.'

(3) Emotional environment and availability to children

- [33] The father, in the first report of the CDA, 'stated that he wants care and control of the children while mother should have residential access. In his favour, he highlighted in an email that his job allows him the flexibility to work from home as he did while [overseas]. As such, he mentioned that he has the flexibility to spend time at home with the children if they are ill or are not in school.' The second report reported that 'the advantage with Mr. Donaldson is that he generally makes himself more available to the children physically than their mother, which is highly commendable.'
- [34] In the second CDA report the daughter said 'her mother is usually busy and is too tired to play with her and Allan. All her mother does is work and sleep and goes out on excursions on the weekends with [her fiancé] leaving them at home with grandma. She wants her mother to be more available to her.'
- [35] The apparent explanation for the mother's lack of availability is that her fellowship overseas was in some speciality that is rare in Jamaica and consequently she is in great demand and works long hours.
- [36] The son on the other hand (perhaps because of his age) does not seem to have the same concerns about time. He says that he enjoys playing with his mother.
- [37] The mother relies on her mother, the maternal grandmother, to assist with the children. The grandmother is a retired principal. According to the mother, the grandmother assists with homework and ensures that they have their dinner. Grandmother is said to be 'very strict.' The children do not see her as just strict. The son labelled her 'the horror' and 'described her as the worst person he ever met.'
- [38] From the son's standpoint the grandmother has been less than restrained in her use of language to describe the father. The grandmother is said to have called the father a 'liar from the pit of hell.' The son reported that grandmother threw

away the snacks his father bought him because she does not want them to eat snacks provided by the father.

[39] The daughter said that the grandmother has told her to 'shut up' in public and laughed at her. The daughter feels that both her mother and grandmother prefer the son. She even formed the view that both woman wanted to get rid of her.

[40] The daughter said that she has been called by a variety of unpleasant names: ' "stupid", "demon", "idiot", "wretched", "wimp" "next generation of evil people" and "worthless" ' No such conduct was reported in respect of the father.

[41] The first report of the CDA has the daughter saying that the relationship with her mother is fair but in the past her mother was mean to her. She was suspicious of the mother's behaviour.

[42] It is convenient to deal with the possibility of remarriage of the mother. It appears that such a possibility is imminent. She has a new person in her life and by all accounts the children have not been resistant to that possibility. The CDA does not report anything in this regard that would cause concern. There is not much information presented the mother's fiancé but should the marriage take place that fact points to an additional source of support for the mother.

(4) Discipline

[43] The daughter believes that the grandmother treats her unfairly. The daughter said that her father has never administered corporal punishment or shouted at her. The father reports that the daughter has made persistent reports of ill treatment by the mother.

(5) Health of the children

- [44] The father states that he fears 'for the emotional health, psychological and physical health of [his] children should [Pusey J's order] remain in effect.' He states that the mother 'has continued her trend of ignoring the children's health and refusing to follow prescribed treatment given to them by the doctors.'
- [45] The father stated that he noticed the boy began grinding his teeth and complaining of a toothache. He stated that since the mother had the children most of the time she should take him to the dentist which he claimed she refused to do. He stated that he took the child to the dentist who diagnosed gingivitis and cavity both of which were addressed.
- [46] In respect of the daughter, the father states that in November 2014 the daughter was diagnosed with chronic constipation which he says the daughter says that she told her mother. The father stated that after the daughter was complaining about this condition for some time he took her to the doctor who prescribed a course of treatment. The implication being that the mother knew about this condition and did nothing. He stated that he communicated the prescribed treatment to the mother. He believes that the treating physician also told the mother (there is no independent evidence of this). He says that he was told by the daughter that 'the mother did not give her the prescribed medication.' He asserts that the daughter 'received the treatment only on the scheduled visits when she was with [the father].'
- [47] The father informed the court that on March 22, 2015, the daughter awoke around 2:00am 'vomiting and complaining of stomach pain.' He took her to the hospital. Diagnosis was that she had a urinary tract infection. The daughter had complained of involuntary bowel movement (called encopresis) which at times left evidence of that event on her under garments. This, the father said, led to the urinary tract infection. The father said that the doctor told him that 'that [the mother's] failure/refusal to carry out the prescribed treatment for [the daughter's] chronic constipation could have resulted in [the daughter] developing encopresis.' The father stated that he was the parent who took the daughter to

the paediatric surgeon who relieved the daughter's chronic constipation and encopresis.

[48] He says that he is the parent who is always paying attention to the children's physical, emotional and psychological needs. He claims that they often come to him sick and he it is who takes care of them and have them see the doctor.

[49] The mother is a health care professional. The allegation made by the father is that the mother, a health care professional, either deliberately or recklessly, ignores the health of her children. The father states that the mother, refuses to or omits to have them seen by doctors when necessary and worse, when medication is prescribed either refuses to or omits to give the daughter in particular her medication. This is a grave allegation. There is no support from any other source. No medical report. No affidavit from any of the treating physicians. The CDA reports make no mention of having sight of any supporting records and documentation backing up these very serious allegations. In this court's view, it would require more than the father's say so for the court to accept this evidence.

[50] The court has to be mindful of the hostile relationship between the parties as recorded by the CDA. The court will refer to, perhaps, the most striking example of the tone of the communication between father and mother. It is an email coming from the father to mother. It was sent March 31, 2015 at 6:31am as part of a chain of emails to the mother about the health of the children. It reads in part:

[name of mother]

I find your reluctance to answer my simple queries about the welfare of our daughter considering the harrowing medical experience she has recently been through, most disturbing. It is as if you are trying to hide important information from me.

Is it that you do not wish me to find out that you have not been giving [the daughter] her prescribed antibiotics?

...

[refers to son's gingivitis]

If this had been a patient in your care at the hospital, your conduct would be deemed negligent and indicative of incompetence, disciplinary action would be taken against you. You'd be sued for malpractice, and you may even lose your ... practice licence.

Your judgment is being impaired by your emotions. Your priorities are not in the correct order. I suggest you get counselling. The current state of affairs is untenable. You are causing the children much pain and suffering. (Emphasis added)

[51] The father says in his affidavit, after referring to emails, that:

[The mother's] behaviour in ignoring my requests for information is typical of her handling of these matters since the separation.

[52] The court accepts that the father is entitled to information about the health of his children but to say that the mother's conduct was '**negligent and indicative of incompetence**' to such an extent that '**disciplinary action would be taken against you**' and that she would '**be sued for malpractice**' could hardly be described as an endorsement of the mother qua mother and professional. It is not hard to see why the mother is reluctant to engage him on any issue regarding the children.

[53] Any negative traits shown by the children, the father is clearly of the view that it is the mother's fault. In one of his affidavits the father says this:

That the children are also showing some disturbing behavioural traits which I believe require the attention by a child psychologist however [the mother] refuses to cooperate despite my repeated requests.

That I met with the children's teachers in February 2015 ... [the son's] teachers expressed a concern about the aggressive and controlling behaviour in which he speaks to the other students. His

teachers also indicated that [his] behaviour is increasingly similar to [his sister's] behaviour when she was class captain, aggressive and controlling.

That to the best of my knowledge information and belief, the children are displaying patterns stemming from their experiences with their mother, grandmother and aunt who all possess aggressive and imposing personalities.

[54] The father's view is that if the children are 'aggressive and controlling' it must be because of the mother, grandmother and aunt.

[55] And on another occasion he wrote:

...While the manifestation of strong leadership traits is essentially a good thing, we need to ensure that the way in which such qualities are developed and expressed have minimal negative implications. Our children need to understand that they are not responsible for controlling the behaviour of others, nor are they to seek to impose control on others as a matter of course.

I have asked that [the son's] teachers discuss their observations and concerns with you. Hopefully you can take the time to have that discussion. Since the children currently are primarily in your care, they take much of their behavioural cue from you and whomever it is you have them exposed to in your environment. It is therefore imperative that you ensure that the children are not exposed to behaviour which could negatively influence them. Based on the feedback from the teachers, and my own observations, I have strong concerns about things that the children have seen and heard while with you and the people you associate with. (Emphasis added)

[56] The court will now address the incident of December 2, 2015 in some detail. It is said that the mother physically abused the daughter. The court has to be cautious here. The matter is still before the Family Court of Clarendon and nothing is to be said that would pre-empt or undermine the processes of that court.

- [57] The father said that on the night of December 2, 2015, he received a distress email from his daughter alleging that she was beaten up by her mother and that she intended to run away from her mother's home. The father said that he called the police and reported the matter. He went to the police station at 9:30pm and where he was told that the police had gone to the home of the mother had not gained access to the property. The father 'urged the police to get whatever assistance they needed and return to the claimant's home to verify that ... children were safe.' He said that he was insistent because 'the tone of my daughter's email had me greatly worried for her safety and ... was distressed that the police were not able to confirm that she was unharmed.'
- [58] The father left the police station at 1:30 am the following morning without verifying the safety of his daughter. Later the same morning he went to the children's school where he said he saw 'visible signs to her upper right arm.' He said 'it was swollen, bruised and cut.' He promptly called the police. He said that the daughter told him that on December 2, 2015, she was punched and slapped repeatedly and was even struck in the mouth.
- [59] The mother stated that the police came to her home and she refused them entry after receiving legal advice.
- [60] There is a letter from the police addressed to the attorneys at law for the father. The police say that the father attended the Mona Police Post at approximately 10:00pm and reported that he had received emails from his daughter alleging that she was abused by her mother. The letter reported that the father called 119 to report the matter. The father also turned up at the police station and showed the police the chain of emails. The letter goes on to say that earlier that evening about 7:00pm a police patrol received a transmission from police control that a child was reportedly being abused at the mother's address. The patrol reported that on arrival, the mother told them that the child was in bed and they would need to get a search warrant to search the premises.

- [61] According to the police's letter the father insisted that his daughter was being abused by her mother and was adamant that he wanted to see his daughter. Another police patrol went by the home of the mother in the early hours of December 3, 2015 and they saw the house in darkness. The patrol reported that they made effort to alert the occupants but no one was seen.
- [62] The letter adds that it was never the intention of the police to search the premises. The first patrol visited because it got a call from police control. The second patrol visited because the father insisted that the police assist him to see his daughter 'as she was being abused.'
- [63] There is a police statement from the father who said that he received an email from his daughter at about 8:38 pm and on receipt of this email he called 119. He stated that he went to the daughter's school on December 3, 2015. At the school he saw his daughter who told him that she and the maternal grandmother had a confrontation which resulted in the mother punching her in the mouth causing her tooth to bleed. The mother also hit her on the arms causing swelling and bruising.
- [64] The daughter gave a police statement. The statement gives details about the incident with the grandmother. The incident started with grandmother on the computer listening to music. The music went away and the daughter was asked by the grandmother to assist since she was always called to assist with technology. It appears that in her effort to assist the grandmother formed the view that the daughter was trying to get into her email. The grandmother said going into the email was not necessary. Eventually the exchange ended, she said, with grandmother saying that she does not listen and she behaves like a miss know-it-all. It was at this point the mother intervened. She said that the mother asked her to extend her hand which she did. The mother held down her hand and struck her on her hand and then struck her in the mouth. The essence of this account was recorded in the second CDA report.

- [65] The daughter says that she was sent to her room. While there she packed her bags to go a police station because she said that her father told her that if something 'really bad' happened she is to go the police post and call him. It was after she went to her room that she contacted her father.
- [66] The following day she saw her father at the school. There was a meeting of sorts involving the guidance counsellor, her father and her. She was then taken to the police station.
- [67] There is a statement also from the police officer who took the report on December 3, 2015 from father and daughter. The police officer indicated that after taking the report the child was sent to seek medical attention. The police officer contacted the CDA. The police officer states that the daughter 'was handed over to her father in what appeared to be good physical condition.' The police officer also reported the matter to the Centre for the Investigation of Sexual Offences and Child Abuse ('CISOCA').
- [68] What is interesting so far is that the police statements of the father, the daughter and the police officer do not mention seeing any swelling, bruising and the like on the daughter's hand. There is nothing in the police statement to show that either the father or the daughter pointed out any specific injuries allegedly received at the hands of the mother. In referring to this matter in some detail this court wishes to make clear that it is not determining the guilt or innocence of the mother in relation to the criminal charge laid against her which is before the Family Court. This court is examining this allegation as part of the assessment of whether the welfare of the children is advanced by being with the mother.
- [69] The court has looked at the photographs of the injuries received during the December 2, 2015 incident alleged to have been taken by the father. The pictures are not clear. They are not date and time stamped. Such dates as appear on the photographs show September 14, 2015.

- [70] The other bit of evidence on this is a medical certificate that speaks to blunt trauma to mouth of the daughter and laceration to her arm. This medical evidence, if accurate, seems at variance with the observations made by the police officer when she said that the child appeared to be in good physical condition. The father did not mention seeing any injuries in his police statement.
- [71] The mother said that the incident between the daughter and grandmother took a turn for the worse she (the mother) heard the daughter making cheeky remarks to the grandmother and decided to intervene. She admitted to slapping the child on the back of her palm. She did not say whether she hit the child in the mouth or not.
- [72] The guidance counsellor at the school mentioned seeing a scratch on the shoulder of the child while the medical report says the injury to the arm was a laceration.
- [73] From all the evidence relating to the December 2, 2015 incident, the court concludes that an incident took place involving the daughter, the mother and grandmother. It seems fair to say that the mother administered corporal punishment to the daughter. The evidence on whether it resulted in the injuries allegedly seen on medical examination in light of the absence of any mention of such injuries by the police and the father when the daughter was first seen leaves some doubt. The court is mindful of the fact that this is not a trial of the criminal charge. The court also takes into account that it has not heard from the daughter directly. The police statements about the December 2, 2015 incident are not consistent with the father's assertion in his affidavit in this court he 'took photographs showing bruises to her arm and mouth caused by her mother on the night of December 2, 2015' (para 15 of affidavit dated February 12, 2016). That he was referring to photographs of that incident is made clear by the fact that in the same paragraphs he made reference to two sets of photographs. One set dealing with bruising to the daughter's knees and the other referring to the December 2, 2015 incident. Despite these photographs the father failed to

mention bruises to the daughter's arm and mouth in his police statement and there is nothing to say that he pointed out the bruises that he claimed that he saw to the police. This is not reliable evidence of abuse of the child by the mother.

[74] In relation to the son other than the case of gingivitis there is no evidence that the son was physically abused. The evidence of gingivitis does not show abuse and neither does it show neglect of health.

[75] The daughter is now eleven years old. The CDA has pointed out that puberty is not far away if it has not yet begun. The CDA expressed the view that the mother's input at this stage of a girl's development 'is vital and crucial.' It should be noted that this is a consideration but not a presumption that girls are better off with their mothers. There are instances where fathers have reared girls singlehandedly.

[76] According to the father his daughter catalogued a series of what he calls 'ill-treatment.' The father stated that he believes that his daughter was ill-treated by the maternal grandmother when she was at the grandmother's home. The daughter told the father about another incident of March 4, 2015. According to the father, the daughter told him that she was beaten by the mother for speaking to him on the phone. The daughter told the father of another incident on June 8, 2015 where the daughter alleges that she was beaten after her mother found out that the daughter had called the CDA because the daughter was upset that her mother had prevented her from going to school in order to prevent the daughter and the son from spending a scheduled weekend with the father. The daughter told him that she was hit so hard on the upper right arm that it was bruised and swollen. Another incident occurred in August 2015 when her grandmother and mother beat her and then forced to kneel in a corner because she spoke to her grandmother about her loud cheering during the 100m race of the World Athletic Championship. On that occasion her behaviour was classified as rude. The kneeling it was said caused bruising to her knees. The father claims that he took

photographs of his daughter's knees when he saw her and according to him, the knees showed scars and bruising.

- [77]** The second CDA report stated that the father made allegations of ill treatment against the mother and even showed pictures that the father claimed was evidence of the ill treatment. The CDA report observed that no scars could be identified but offered the possibility that 'the injuries were too small for [the interviewer's] vision.'
- [78]** There is not much support for the allegations of physical abuse at the instance of the mother.
- [79]** The court will mention one other incident because it can conveniently be dealt with here. There was the incident at the church in Clarendon. The mother took the children to Clarendon without informing the father. Apparently, the daughter was to be baptised. The father went to Clarendon and attempted to take the children from the mother. The father says that the mother assaulted him and tore his clothes. This is now the subject of a criminal charge against the mother. The church members present unleashed their fury on the father. He was set up on and roughed up by the brethren.
- [80]** The mother denies this and inferentially, from her affidavit, attributes any injuries and damage to property suffered by the father to the rather robust response of the brethren.
- [81]** This incident was being use by the father to suggest that mother has a propensity for violence.
- [82]** The father stated that he was told by his daughter that in November 2015 the mother took away her school badges. These badges indicated her role in the school ranging from sub-prefect to vice- captain. They also covered strong academic performances. The mother took away these badges and threatened to tell her teachers that she was a bad girl. This occurred after an incident in which

she was allegedly verbally abused by her maternal grandmother because the daughter refused to eat the meal provided at dinner.

[83] The father said he intervened by asking the mother to deliver the badges to him. The mother declined to respond to his communication. The father took it up on himself to write a note to the teacher explaining the absence of the badges.

[84] The alleged catalogue of abuse mentioned by the father seems exaggerated and there is nothing to suggest that the daughter is being systematically or even occasionally abused. By all accounts the mother was brought up in a strict environment and has low threshold for perceived inappropriate behaviour.

(6) Impact on the children

[85] The first CDA report noted that the children were performing well in school, had good social skills but punctuality and attendance needed improvement. This suggests that the breakdown of the marriage and the subsequent inability of the parents to resolve the issue of custody has not had an adverse impact on the academic performance of the children.

[86] The report emphasised the importance of both parents maintaining appropriate behaviour in public in the presence of the children.

[87] In the second report the daughter's class teacher stated that:

[the class teacher] stated that [the daughter's]s attendance is good and she is an excellent student academically who goes the extra mile and is consistently on the honour roll.

She is not a rude child; in fact, [the daughter] appears to set a high moral standard for herself and other students. [The daughter] often assumes a motherly role among her peers and tries to get them to conform to rules. As a result, [the daughter] has been subjected to immense teasing by her peers that she [the class teacher] has addressed by punishing the perpetrators and having talks about bullying.

- [88] According to the father he had the children see clinical psychologists (two to be precise) who 'assessed them and concluded that they are emotionally overwhelmed, experiencing great anxiety, repressed anger and great sadness.' The father said that he 'made formal arrangements with the school's guidance counsellor ... to periodically speak (sic) with the children and monitor their status to ensure that they were alright.'
- [89] It seems to this court that this anxiety and high emotion can be reduced if both parents heed the advice of the CDA and reduce their competitiveness and focus on the best interest of the children regardless of the parents' personal agenda.
- [90] The daughter mentioned her mother's new relationship but there is nothing to suggest that the daughter disapproves of the fiancé.
- [91] She believed that her mother and maternal grandmother want to get rid of her. She came to this conclusion because she overheard her mother talking with her lawyer and asking, 'What are we going to do about [daughter]?' The court thinks that this is the product of an overactive imagination on the part of the daughter.

(7) Hyper vigilance

- [92] The CDA itself came to the conclusion that the father's constant reporting of the mother to the CDA itself and any other state agency is excessive. This is what the second report says:

On December 22, 2015 [the father] sent social worker as well as member of the Centre for the Investigation of Sexual Offences and Child Abuse (CISOCA) an email thread with all the emails he had written to the Office of the Children's Registry making complaints of physical and emotional abuse. The frequency of the reports and constant demand for follow-up was excessive in nature. Moreover, [the father] had hoped to use the emails to help substantiate his attempts to hold on to the children but he was advised by the CDA social worker as well as the CISOCA personnel to comply with the Supreme Court's order. Furthermore, the CISOCA officer responded saying that [the son] was not in any danger and that [the

daughter] had no obvious signs of trauma or anxiety and he was implored to comply with the court's order. Nevertheless, he did not return [the daughter] until January 29, 2016 after the Supreme Court intervened.

- [93] In the second report, it is stated that the guidance counsellor thinks that the father's behaviour is excessive. This is what the report says:

[The guidance counsellor] believes that [the father's] behaviour is generally excessive: she articulated that he visits school every day "morning, noon & night" and he makes her (guidance counsellor) aware of everything.

- [94] This is consistent with the first report which stated :

*The interviewer is of the view though that Mr. Donaldson is being **hyper vigilant** because there is not enough communication between mother and father about the children and he honestly feels left out. (Emphasis added)*

- [95] The court has referred to these parts of the evidence because Mrs Taylor sought to say that the suggestion by the CDA that the father gave too much information to the daughter about the issues between the parents had no foundation. Mrs Taylor sought to say that the daughter could have had the information by virtue of her own snooping and eavesdropping. The extract from the report regarding the father's constant dialogue with the guidance counsellor suggests that the CDA's conclusion may have some foundation. If the father gives such volumes of information to the guidance counsellor is not wholly unreasonable to think he may do the same with the daughter.

- [96] It is better to acknowledge that the father probably does give too much information to the daughter and to address that issue rather than seek to discredit the CDA as Mrs Taylor sought to do.

(8) The CDA's overall assessment

- [97]** The court must give serious consideration to the reports and recommendations made by the CDA. The first CDA report indicates that both parents are competitive, divisive and disagreeable in respect of each other. The CDA is of the view that they spend too much time competing and trying to be successful in this litigation to such an extent that they do not realise the hurt and harm their behaviour is causing to the children.
- [98]** The first report noted that both parents need to be mindful of their conduct in public. The report also noted that there have been more than one incident of the parents tussling or engaging in confrontational behaviour in the presence of the children. These incidents, the report observed, are not only embarrassing to the children but threaten their sense of safety and security.
- [99]** Both CDA reports recommend that the mother is to keep care and control of the children with liberal access to the father. It was noted that the daughter expressed a desire to be with the father and the son to be with the mother. The CDA cautioned against separating the children.
- [100]** The second report indicates that the daughter is either in or about to enter puberty. This can be a challenging time for any young female. A mother's input can be of immeasurable value and all the more so in this case because the mother is a health care professional.
- [101]** The report noted that the father is hyper vigilant but his feeling of exclusion is genuine. This feeling the report said is likely to be exacerbated by the fact that the parent who does not have care and control feels more unsettled and in those circumstances it was incumbent on the parent with custody and control to be sensitive to this issue and accommodate the other parent.
- [102]** The report also recommended that both parents continue counselling and that the daughter continue counselling as it is evident that 'she is hurting and very much affected by the separation.'

- [103] The son expressed anxieties about the pending marriage of his mother to another male although he describes that other male as nice. He is happy with the living arrangement. He said that the maternal grandmother described his father as 'a liar from the pit of hell.' He is of the view that it is not true that his mother abuses his sister. He has never heard his mother call his sister hurtful names.
- [104] The court cannot help but note that in the second report the father expressed the view that 'the system is not fair' because criminal matter before the Family Court against the mother in respect of alleged abuse 'end in counselling.'
- [105] The second CDA report noted that the daughter was returned to the mother after two months of being with the father. The two months with him began after the December 2, 2015 incident. The report noted that 'it appears that they [mother and daughter] are mending fences.'
- [106] The daughter noted that when she returned to her mother's house she was 'pleasantly surprised to see that her mother had missed her a great deal.' She had expected a beating.

The court's assessment

- [107] As noted earlier both parents have not had many complimentary things to say about each other. From the totality of the evidence the father does have a tendency to overreact and given to exaggeration.
- [108] The court understands that the non-custodial parent may feel left out. The first CDA addressed this point:

It is understood that the parent who has residential access is usually the more unsettled and uncomfortable of the two parties because of their perceived lack of control over the children's affairs. As such the parent with care and control needs to be as accommodating and as facilitating as possible which involves using phone calls, emails, text messages or whichever medium is most conducive to civil communication to inform the other party of

important happenings in the children's lives. The interviewer is of the view though that Mr. Donaldson is being hyper vigilant because there is not enough communication between mother and father about the children and he honestly feels left out. The real problem is that violated expectations and past hurt (there is a mutual feeling that the other party has no regard or respect for the other) makes communication and trust very difficult. Therefore, despite having a previous term of counselling, it is recommended that the parents have counselling together (as parents trying to promote their children's best interest and nothing else). This is not about reconciliation or anything of the sort but this counselling is necessary to help the parties to at least repair enough trust to communicate more effectively regarding the children.

[109] The first sentence from this is quite likely incorrect and perhaps it should have read 'It is understood that the parent **who does not have** residential access'

[110] The mother should be more accommodating.

[111] The mother's house is better suited for the children. Economically, the mother, is the stronger of the two parents and is better able to meet the material needs of the children. It seems as well that she is better able to fund co-curricular activities. This advantage is not determinative but a factor to be considered.

[112] On the question of meeting the emotional needs of the children, the reports from the CDA shows that the mother appears to be meet the needs of the son better than the daughter. It may be that at his age he is not as demanding. The daughter appears to be strong-willed or more strong-willed that the mother and grandmother would like. That as well as the being a full time working mother has placed great stresses on the mother. It is fair to say that the mother has not handled the stress of her job and mothering as well as she could. The reports note that counselling has been provided by way of the Family Court system and there seems to be some improvement in the mother's ability to cope. The mother has admitted that she could have handled the December 2 situation better. To this court this is an important development because it shows the capacity of the

mother for critical self-examination and a willingness to admit fault. The daughter reported some improvement in the relationship with the mother. If this is correct it is a demonstration of the mother's ability to correct herself under the guidance of professional help. This would indicate an improvement in the environment in the mother's home.

[113] The grandmother's way of relating to the children needs to be addressed. The CDA notes that neither child had a good relationship with the grandmother. It appears that the grandmother, a retired principal, is very strict and does not take kindly to what we in Jamaica call 'back chat.' Grandmother needs to find more appropriate language with which to address the children. She needs to understand that she need not win every battle that arises. Every slight cannot be an occasion for swift strong condemnation followed by judgment.

[114] Parents are not perfect and the court is not looking for a home of perfection. The court is being asked to look into the future and make a decision about the advancement of the present and future welfare of the child. In a sense this is an impossible task because no one knows the future. The role of the court is therefore making a judgment call based on the available evidence bearing in mind that that judgment call may well turn out to be incorrect.

[115] The court notes that the father has stated that mother can be a violent person and in proof of that he told the CDA about two incidents in which he was attacked by her.

[116] It appears that the daughter has begun to accept that she may have a step father. In the second report she stated that she is aware that her mother received a proposal of marriage which was accepted and a marriage is imminent. Despite the fact that she likes her proposed step father she does not wish him or anyone to do the things her father does.

[117] Before announcing the final decision there is the need to distinguish between guardianship, custody and care and control. We, in Jamaica, have tended to use

the expression custody as a synonym for guardianship. Broadly speaking, guardianship refers to the group of rights or perhaps, the bundle of powers that vest in the parents of children, regardless of whether the parents are married. Guardianship includes the duty to maintain and care for the child. Guardianship enables the guardian to make important decisions regarding the child's education, religious instruction, health. The right of custody is usually included as an incident of guardianship. The guardian usually has physical custody of the child. The law's default position is that the parents are the guardians unless there is some reason for this not being the case.

[118] Custody, properly understood, means the right to physical care and control of the child. Care and control refers to who the child should live with. The person with care and control decides the day to day issues concerning the child. In Jamaica, we tend to use the expression custody as if it is an exact synonym of guardianship. In the vast majority of case the distinction will not matter.

[119] In this case, no issue of guardianship has arisen and therefore both parents are the guardians of the children. The court is being asked to decide who should have custody. In determining this issue the takes account of the fact that it is increasingly recognised that both parents, barring some exceptional circumstances, should have an input in the rearing and development of the child. Sole custody orders while made are not the norm in the Supreme Court. A sole custody order is usually made where the parent's relationship with each other has broken down to the extent that communication is impossible and the acrimony between the parents is such that it is having a significant detrimental effect on the child. Such an order ought not to be made unless counselling and mediation for the parents have been tried and have failed completely. In extreme cases, counselling and mediation may not be possible.

[120] The welfare of the children requires that both parents be involved in their rearing and development. The court is unable to see that it is in the best interest of the

children to grant sole custody to the father. The interest of the children is advanced by both parents having custody.

[121] In the present case, the order is one of joint of custody with care and control to the mother. The mother and father are expected to be quite sensible about their arrangements for the children. It is not about them or their egos, or their pride but about the children. As Barnett CJ said in the Bahamas Supreme Court in **Oldfield v Oldfield** 2013/FAM/DIV/00128 at paragraph 21:

All orders as to custody care and control of children are by definition interim orders. There is no such thing as a final order.

[122]