IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

FAMILY DIVISION

SUIT NO. F2003/D1797

IN CHAMBERS

BETWEEN KAYE ELLIOT FENTON PETITIONER/APPLICANT

AND MARK ANTHONY FENTON RESPONDENT

Mr. Gordon Steer instructed by Chambers Bunny and Steer for Petitioner/Applicant

Miss Carol Sewell for Respondent

APPLICATION FOR CUSTODY AND MAINTENANCE

Heard: January 11 & 23, 2006

BROOKS, J.

Mr. and Mrs. Fenton's marriage has broken down. He has migrated to the United States of America while she has remained in this country. The two children of their union, Graham John (John) and Joseph live with her. She has been granted a *Decree Nisi* on a divorce petition which she filed in this court. She now seeks orders granting her sole custody, care and control of the children, requiring Mr. Fenton to contribute to the financial cost of maintaining them and that his visits with them be supervised.

Mr. Fenton, for his part, contends that he ought to be granted joint custody of and liberal access to, the younger child Joseph. The fact is that the older child John is above the age of eighteen years and therefore cannot properly be made the subject of an order for custody. Mr. Fenton also prays, by an amendment to his application, for an order that Joseph be permitted to reside with him for a period of two years when the child attains the age of fourteen years.

An interim order in respect of access and maintenance was made by Mangatal, J. in June, 2005. The matter now comes for final determination.

The issues for determination may be categorized thus:

1. to whom should custody of Joseph be granted;
2. whether Mr. Fenton's access to Joseph should be supervised
3. whether Joseph should be allowed to reside with Mr. Fenton in the United States of America
4. what level of maintenance should Mr. Fenton be ordered to pay?

I shall address each in turn.

TO WHOM SHOULD CUSTODY OF JOSEPH BE GRANTED?

In considering this question the prime concern is the best interest of the child (see section 18 of the Children (Guardianship and Custody) Act). One of the aspects to be assessed in considering the best

interest of the child is whether the existing state of affairs should be maintained.

Apart from the residential situation described above, the existing circumstances here are that:

a. Joseph goes to high school in Kingston where he is performing reasonably well academically, while John attends a tertiary institution of learning;

b. The relationship between Mr. and Mrs. Fenton has so deteriorated that they do not speak to each other, at least not on any regular basis, about the welfare of the children. In cross-examination Mr. Fenton said that since June of 2005 he and Mrs. Fenton have spoken once. The discussion concerned the disconnection of the phone service which John had. He said that between late 1998, when he left Jamaica and June 2005, he had spoken to her on "a couple of occasions but the conversations became ruinate after...five minutes".

c. There was one occasion where John, who had gone to the United States to visit Mr. Fenton for vacation, ended up staying with him for about two years. Mr. Fenton's report of the incident, in the context of communication between himself and Mrs. Fenton, was

that "(p) rior to taking the decision to keep Graham (John) with me I told her our plan. Of course she disagreed and I thought it was best at the time to hold on to John". This incident speaks to the absence of a co-operative approach between these parties.

d. Joseph has suffered two major dislocations in his young life. The first was the break-up of his parents' marriage and the emigration of his father, to whom he was, by all accounts, strongly attached. The second was the separation from his brother for two years, arising from the decision which was mentioned at paragraph d. above. Based on a report provided to the court, by a Dr. Pauline E. Milbourn, a psychiatrist, the dislocations had a severe effect on him and as a result counselling was secured for him.

The factual situation described above is more in favour of Joseph remaining in the home with his mother and older brother and in familiar surroundings with respect to school, church and the general environment. This decides the issue of care and control.

Parties who have joint custody of a child should be able to discuss together the welfare of the child in a manner which is best conducive to that welfare. In that scenario, given the inability or unwillingness of Mr. and Mrs. Fenton to work harmoniously for the child's benefit despite their

personal differences, I find that it is in the best interest of the child that sole custody, be granted to Mrs. Fenton.

I have also borne in mind the fact that Mr. Fenton in his bid to have Joseph come to the United States to live with him has not made any proposals concerning the environment that will be provided for him. It is ironic that against that background his counsel referred me to the case of *Noelia Seow v. Harold Morrison* E 428 of 2000 (delivered July 20, 2001). This reference was to the first instance judgment of K. Harrison, J. (as he then was). I note however that when the Court of Appeal considered and affirmed that judgment, (*Harold Morrison v. Noelia Seow* SCCA 107 of 2001, delivered March 13, 2003) P. Harrison J.A. (as he then was), commented on Mr. Morrison's failed attempt to secure custody, in this way:

> "He failed to disclose any arrangements made in relation to the residence for the child in Jamaica, his religious upbringing, recreational activities or day-to-day care...His concern should also be for the welfare of his child, namely his "maintenance care and upbringing"."

A similar comment may be made about Mr. Fenton's proposal.

WHETHER MR. FENTON'S ACCESS TO JOSEPH SHOULD BE SUPERVISED

The general principle is that it is usually in the best interest of the child "that his natural father should be able to preserve his links with the child" (Principles of Family Law, S. M. Cretney 4th Ed. – p. 400). The

courts recognize, however, that at times, access to the child should be supervised, to ensure that the child does not come under, or be exposed to, improper influences.

Mrs. Fenton initially wished to prevent Mr. Fenton having access to the children. Within a short time however, that stance softened and she conceded to him having access, but wished for it to be supervised access within the island. This unusual stance has it genesis in the occasion on which John was kept in the United States by Mr. Fenton against Mrs. Fenton's wishes, the subsequent falling off of John's academic performance and an incident involving the authorities of the justice system of the city of Sacramento. Mrs. Fenton also accuses Mr. Fenton of exposing John to alcohol, cigarettes and ganja. The allegations are however based on hearsay and Mrs. Fenton has never herself witnessed any such event. Mr. Fenton denies the allegations, but it seems to be common ground that John commenced using these substances during the time that he spent in the United States with Mr. Fenton.

I am of the view that I need not attempt to resolve this aspect of the conflict between the parties. Supervised access will do no harm to the child or to his relationship with Mr. Fenton. If, as was ordered in the interim order made by Mangatal J., both children go together when Mr. Fenton

exercises the privilege of access, it may well improve the bond between the three. It certainly will make Mrs. Fenton, the caregiver, more comfortable and that would be in the best interest of the child.

I do have a concern, bearing in mind John's past involvement with the substances mentioned above, but the fact is that Joseph is in close contact with John on a daily basis in any event. I also have considered that Dr. Milbourn in her report has indicated that Joseph has eschewed the idea of using such substances bearing in mind John's experience.

I therefore find that it is in Joseph's best interest that Mr. Fenton is granted supervised access to Joseph while Mr. Fenton is visiting Jamaica. The access shall be during the daytime on weekends during those visits, except if the visits are in excess of three weeks in duration, in which case the access would be on alternate weekends. This will allow "family time" with Mrs. Fenton during the more relaxed weekend period.

WHETHER JOSEPH SHOULD BE ALLOWED TO RESIDE WITH MR. FENTON IN THE UNITED STATES OF AMERICA

It would have been clear from my findings in analyzing the previous two issues that, in the present circumstances I find that it would not be in Joseph's best interest to travel to the United States to stay with his father for

two years. I need not make any further clarification in this regard and therefore Mr. Fenton's application to that end would be refused.

WHAT LEVEL OF MAINTENANCE SHOULD MR. FENTON BE ORDERED TO PAY?

In her application Mrs. Fenton has claimed the sum of $30,000.00 per month for the maintenance of the children. In addition she has claimed an order that Mr. Fenton pays all medical and educational costs reasonably incurred on behalf of the children. It should be pointed out that even though John is now nineteen years old and is legally an adult, the court may yet order that he be maintained by his parents until he attains the age of twenty-one years. This is so long as he is engaged in a course of education or training (see section 25 (2) of the Matrimonial Causes Act).

The application for maintenance has come about because Mr. Fenton has failed to provide reasonable regular maintenance for the children for the past several years. His explanation for his failure is that he has been ill and also unemployed, for the most part, since he has been in the United States of America. He has provided income tax returns to show the income he earned for the years 2002 and 2003, and these figures have not been contested.

Mrs. Fenton has detailed some of her expenses for the children and has deposed to a monthly total of $122,300.00. Though these figures have

not been contested by Mr. Fenton, it seems to the court that some are not exclusively for the benefit of the children. I cite for example "Groceries $40,000.00", "Household helper $16,000.00", "Maintenance (yard) and Miscellaneous (minor repairs etc.) $10,000.00". There is precedence for requiring an apportionment of such expenses in the unreported case of *Butler v. Butler* D1982/B099, which was decided in this court (June 28, 1991). It also should be noted that there are some things which have not been included by Mrs. Fenton, such as clothing and footwear and, more significantly, educational and medical expenses. Some adjustment should be done to achieve balance for the expenses.

Mr. Fenton's initial reaction to the claim for maintenance was essentially that he could not afford the level of maintenance which was being claimed. Happily, his situation has significantly improved from that which previously obtained, to one where he has now secured employment at a salary of US$60,000.00 per annum.

Despite the increase, Mr. Fenton was reluctant, in answer to the court, to volunteer a figure which he would now be willing to pay toward the maintenance of the children. I find that he should comfortably be able to afford the $30,000.00 per month claimed by Mrs. Fenton. With the present rate of exchange being in the vicinity of J$64.70: US$1.00 the sum claimed

amounts to slightly over US$460.00 per month or less than ten percent of his salary. I shall restrict the award to that sum to allow the balancing referred to earlier.

CONCLUSION

The matter of custody is to be resolved in a manner which is in the best interest of the child. In this case I find that it is in Joseph's best interest that he remains in his present surroundings living with his mother and brother. I find that Mr. and Mrs. Fenton do not now have a relationship which allows for the level of co-operation required to justify an order for joint custody.

Supervised access is recognized as being necessary in some circumstances. The circumstances of this case warrant an order for supervised access, in order to provide a level of comfort to the mother that the child's welfare is protected.

On the question of maintenance I find that the level of expenditure claimed by Mrs. Fenton is not unreasonable and that Mr. Fenton should comfortably be able to afford the maintenance contribution claimed. In so far as he earns United States currency and to allow some certainty from his point of view, the payments should be made in that currency.

The order of the Court is as follows:

1. Custody care and control of relevant child Joseph Eugene Fenton born on the 31st July, 1992 be and is hereby granted to the Petitioner.
2. Supervised access to the said Joseph Eugene Fenton is hereby granted to the Respondent in Jamaica between 10:00 a.m. and 6:00 p.m. every Saturday and Sunday in the event that the Respondent's stay in Jamaica does not exceed three weeks. In the event that his stay does exceed three weeks then such access shall be on alternate weekends. Supervision may be provided by the other relevant child of the marriage Graham John Fenton.
3. The Respondent shall pay to the Petitioner the sum of US$230.00 for each of the aforesaid relevant children until they shall have respectively attained the age of 21 years or until further order of the court. Payments shall be made on or before the 1st day of each month commencing on the 1st day of February 2006.
4. The Respondent's application dated 25th February 2005 (as amended) is refused.