#3

CP 1

FAMILY

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT OF CIVIL APPEAL NO. 49 OF 1999

BEFORE: THE HON. MR. JUSTICE FORTE, PRESIDENT
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

BETWEEN	**DENNIS FORSYTHE**	**APPELLANT**
AND	**IDEALIN JONES**	**RESPONDENT**

Dennis Forsythe for the appellant

Gordon Steer for the respondent

MARCH 20 21, 22, 2000 qnd April 6, 2001

FORTE, P.

I have read in draft the judgment of Harrison, J.A., and agree with his reasoning and conclusion. I have therefore nothing further to add.

HARRISON, J.A:

This is an appeal from the order of Pitter, J., on 6th April, 1999, granting custody, care and control of child Brian Forsythe, born on 24th March 1995, to the respondent mother Idealin Jones, and awarding costs to the respondent to be agreed or taxed.

The facts based on the evidence led before Pitter, J., disclosed that the child Brian was born as a result of a relationship between the appellant father

Dennis Forsythe and the respondent mother Idealin Jones. The relationship ended some months before Brian was born. The appellant, 50 years old in 1997, is a sociologist with a Ph.D. (McGill) and an attorney-at-law. The respondent now 33 years old, is a sales representative employed to a company, and now occupies a two-bedroom house with her fiance, a chemical engineer. She also has two other daughters. The child Brian has lived with its mother, the respondent, since birth.

The appellant occupies a modern spacious house with sufficient outdoor area for a child to play. He remarried and his current wife, experienced in looking after children of her own, now grown up, expressed a willingness to assist in the upbringing of Brian. The appellant sought custody of the child, contending that the living conditions of the respondent at Claremont Heights, Old Harbour, St. Catherine, being " ... devoid of bare communal facilities" is not conducive to the proper upbringing of the child. In addition, the medical condition of the child, alleged to be suffering from asthma allergies and "serious infections of the nose, ears, throat and stomach," indicates that the child is not getting the proper care that he needs.

Consequently, the appellant sought custody of the child, Brian. On 14th June, 1996, on an application by the appellant to the Family Court for custody of the child by information No. 240/96, an interim order was made that the child reside with his mother until final determination of the matter. On 12th September, 1996, the interim access order was varied. On 26th November, 1996, on the said "information No. 240/96," a further custody

order in favour of the mother, with access to the father was made "by consent." On 25th February, 1997, on information No. 937/96 in the said Family Court, by consent, the "interim order made for custody order made on the 26th November, 1996" was varied, as to access.

There were two further orders varying the access order by the said Court on the said "information 937/96" on a date suspending access until 9th June, 1997. "Mother to return to jurisdiction along with Brian by the 5th June, 1997," and also on 9th June 1997. On 2nd July, 1997, the appellant made application in the Supreme Court, by originating summons, Suit No. E. 230/97 seeking custody of the child. By exparte summons on 7th August, 1997, the appellant was granted custody of the child, but on 27th August, 1997, the order was set aside on the ground of non-disclosure of the fact of the interim order made in the Family Court. On 26th January, 1998, the originating summons was adjourned sine die to enable the parties to obtain counselling over a period of six months. The said summons was heard by Pitter, J., who concluded on the evidence before him, that it was in the best interest and welfare of the child that his custody and care remain on his mother, and he dismissed the summons on 6th April, 1999, pronouncing "Leave to Appeal is refused." This appeal arose as a consequence.

The grounds of appeal were:

> "(1) That the finding of the Learned Trial Judge that the child is happy and well adjusted is not supported by the evidence.
>
> (2) That the Learned Trial Judge whilst knowing the law did not apply it to the facts of the case.

(3) The Learned Judge erred when he substituted his own bias for the facts.

(4) The Learned Trial Judge erred in giving pre-eminence to what the arrangement was convenient to the mother of the child rather than what was in the best interest of the child.

(5) That the Learned Trial Judge did not appraise the evidence regarding the condition of the child correctly and objectively.

(6) That the Learned Trial Judge admitted inadmissible evidence whilst rejecting admissible evidence.

(7) That the decision of the Learned Trial Judge is so aberrant that no reasonable Judge regardful of his duty to act judicially, could have reached it.

(8) That the decision of the Learned Trial Judge was not "fair" and "impartial" as guaranteed by S. 20 (2) of the Jamaican Constitution."

The Children (Guardianship and Custody) Act, which came into force on 1st July 1957, empowers the Court to make custody orders on the application of either parent, and determines the proper approach of the court. Section 7(1) reads:

> "**7.** – (1) The Court may, upon the application of the father or mother of a child, make such order as it may think fit regarding the custody of such child and the right of access thereto of either parent, having regard to the welfare of the child, and to the conduct of the parents, and to the wishes as well of the mother as of the father, ..." (Emphasis added)

Such an application may be made in either the Supreme Court, the Family Court or the Resident Magistrates Court, thereby recognizing an existing concurrent jurisdiction (Section 2). The "welfare of the child" to

which the Court is required to pay heed, and to be guided in making its decision is re-enforced in Section 18 of the Act. Section 18 reads:

> "**18.** Where in any proceeding before any Court the custody or upbringing of a child or the administration of any property belonging to or held on trust for a child, or the application of the income thereof, is in question, the Court in deciding that question, shall regard the welfare of the child as the first and paramount consideration and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father." (Emphasis added)

At common law the father of the child enjoyed a virtual sacrosanct right to custody of the child, unless he was guilty of moral misconduct or proved to be otherwise unfit (see **Re Agar Ellis** (1883) 24 Ch. Div 317). The emphasis on that sacred right of the father was later changed, and replaced by the welfare of the child as the paramount consideration, both at common law and by statutory provisions. Of course, these principles concerned children of legitimate birth. A child not born in wedlock was not in contemplation.

This application for custody of the child Brian, a child not born in wedlock, is made under the provisions of the Children (Guardianship and Custody) Act, by the appellant father. At common law, the authorities have established that the mother of an illegitimate child has a prima facie right to its custody: (***Barnado*** v ***McHugh*** [1891] A.C. 388). This "right" arose as a consequence of her obligation to maintain her child. In Jamaica the

obligation to maintain her child is placed on a mother by the wide provisions of the Maintenance Act. Section 3 reads:

> **"3.** Every widow and unmarried woman is hereby required to maintain her own children ..."

In ***Finlayson v Mathews*** (1971) 17 WIR 69, this Court decided that, whereas the mother of an illegitimate child could apply for and be granted custody under the provisions of the Guardianship and Custody of Children Law, Law 69 of 1956, the father of such child could not. That latter Law was repealed and replaced by the current Children (Guardianship and Custody) Act, which contained no provisions to include the father of the illegitimate child. However, the Status of Children Act, which came into force on 1st November, 1976, provided, in section 2, that,

" 'child' includes a child born out of wedlock" and stated comprehensively in section 3 that:

> **"3. – (1)** ... for all the purposes of the law of Jamaica the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other, and all other relationships shall be determined accordingly."

The rationale therefore, is that the father of the illegitimate child, previously not contemplated as competent to apply for custody under the Act provisions of the Children (Guardianship and Custody) Act, may now do so. The relationship of all children to their parents, particularly an illegitimate child to its father who has accepted paternity is now the same, whether or not the parents "are or have been married to each other."

However, because of this equal right to apply, the statutory provision of section 18 of the latter Act, has specifically stated the principle that the Court

> "... 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 ... is superior to that of the mother or the claim of the mother is superior to that of the father."

Despite the wishes and desires of the parents, the welfare of the child is "the first and paramount consideration."

This emphasis on the welfare of the child should therefore be the primary focus of a court considering a custody application. However, the court is required to take into consideration, in determining that primary question, the conduct of the parties in all the circumstances of the case. In the case of **In re McGrath (Infants)** [1893] 1 Ch. 143, in dismissing a summons to appoint new guardians for four young children, the Court of Appeal, per Lindley, L.J., commenting on the principle by which the court is guided said, at page 148:

> "The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded."

In **R.** v **Gyngall** [1893] 2 Q.B. 232, the mother of a child at about 15 years old, sought by habeas corpus, the custody of her child who had been living with the defendant at a convalescent home for several years, because her mother was unable to keep her. The court refused to grant her custody.

Lord Esher, M.R. after quoting the above words of Lindley, L.J., in **In re McGrath** (supra) said, at page 243:

> "The Court has to consider, therefore, the whole of the circumstances of the case, the position of the parent, the position of the child, the age of the child, the religion of the child, so far is it can be said to have any religion, and the happiness of the child ... Again it cannot be merely because the parent is poor and the person who seeks to have the possession of the child as against the parent is rich, that, without regard to any other consideration, to the natural rights and feelings of the parent, or the feelings and views that have been introduced into the heart and mind of the child, the child ought to be taken away from its parent merely because its pecuniary position will be thereby bettered."

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. In ***J.*** v ***C.*** [1969] 1 All ER 788, Lord McDermott in placing in perspective, all these factors to be considered in the welfare of the child said:

> "It seems to me that ... the child's welfare is to be treated as the top item in a list of items relevant to the matter in question..." (Emphasis added)

An appellate court examining the decision of the learned trial judge in the exercise of his discretion may not disturb it, on the basis that it would have found otherwise. Any reversal or variation by the appellate court must

be based on a wrong exercise of the discretion due to the misapplication or the non-application of the proper principles by the trial judge. Lord Wright, in ***Evans*** v ***Bartlam*** [1937] 1 A.C. 473, said at page 486:

> "It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the court is clearly satisfied that he was wrong. But the court is not entitled simply to say that if a judge had jurisdiction and had all the facts before him, the Court of Appeal cannot review his order unless he is shown to have applied a wrong principle. The court must if necessary examine anew the relevant facts and circumstances in order to exercise a discretion by way of review which may reverse or vary the order."

In the instant case the appellant argued that the learned trial judge substituted his own bias for the facts by finding that the custody order was based on the order of the Family Court dated 26th November, 1996, when only an interim order was then in place and also by holding that the appellant was a drug addict. The learned trial judge commented, in his judgment at page 119:

> " ... this application would have been dismissed from the outset, had the point been taken in limine, that there was a subsisting Custody Order made in the Family Court on the 26th November 1996, in favour of the Respondent. There is no evidence that this Order was appealed from and I regard the subsequent filing of the Originating Summons in the Supreme Court to be an abuse of the process of the Court."

The concurrent jurisdiction bestowed by section 2 of the Children (Guardianship and Custody) Act, permits a party to apply for custody in the Supreme Court on the one hand, or either the Family Court or the Resident Magistrates Court, on the other hand. There is no statutory basis to permit

an application in both courts simultaneously, nor to "transfer" the application from the Family Court to the Supreme Court, as the appellant, claims that he did. The subsequent information before the Family Court, No. 937/96, should not have been allowed to proceed, because the appellant already had information No. 240/96 before the Family Court, on which only an "interim" order was shown.

However, because the said information No. 937/96, specifically refers to information 240/96, by the recital "the interim order made ... on 26th November, 1996," which latter order was made on information 240/96, by analogy, the Family Court could be construed as having both informations under consideration. Information 937/96 in the Family Court, "was discontinued by the appellant." See paragraph 16 of the affidavit of the respondent dated 20th August, 1997, at page 70 of the record. This discontinuance of the said information was confirmed by the appellant in paragraph 14 of affidavit dated 25th August, 1997, on page 77 of the record. The learned trial judge was not entirely at fault in his criticism in the circumstances.

The learned trial judge in his reasons further said, at page 118:

> "Of paramount importance is the fact too that the applicant is a drug addict. He admits to the continuous use of ganja for health and spiritual reasons. What moral authority would he have to tell Brian that it is wrong to use ganja when he himself is a constant user of it. It is very likely that if the child should live with him, he too might succumb to its use which would not be in his best interest or welfare."

The respondent, had herself described the appellant as a drug addict in her affidavit. The appellant admitted that he is,

> " ... a Rastaman and ... associated with herbs before she hopped into my wagon ... my book on the subject was written since 1983, even before I began my 2nd career in law. I have never hidden such knowledge from the public. The police never invaded my privacy to discover "Herbs" until the respondent willfully and spitefully brought Inspector Ayres there to 'bust' me."

The appellant is an attorney-at-law, and is specifically aware that the possession of ganja is an offence under the Dangerous Drugs Act. Not only is he openly contravening the particular statute, but he is also in open defiance of the principle that all laws are enacted for the good order of society. He maintains, erroneously that ganja is a sacrament essential to the worship of Jah Rastafari in the Rastafarian religion and to restrict its use is a breach of his constitutional rights. He admits however, that he would be

> "... horrified at the thought of Brian my child using ganja."

Furthermore, the fact that the appellant could be openly engaged in unlawful acts in the presence of his son five years old, by the use of ganja, he would also be conveying to his son that one does not need to obey the laws of the land. The child is in his formative years, and therefore quite impressionable. It would be the wrong message for a father to be conveying to such a child. The appellant's approach would only seek to add to an already developed culture of disobedience to law and seek to justify lawlessness in the society. More importantly, where a child is subject to the influence of a father who infringes the law and is later made aware that the

law in fact regards the use of ganja as illegal, and the wider society also frowns on its use, this may well create an ambivalence in the mind of such a child. This ambivalence may well lead to confusion in the mind of a child and if unresolved, cannot be helpful nor in the best welfare of a child. It is my view that this is a major issue detrimental to the welfare of the child Brian. I find no basis for the appellant's complaint that the learned trial judge substituted his own bias for the facts.

In order to support his "superior" claim for custody, the appellant repeatedly sought to highlight the unsuitability of the respondent mother, in particular, her inability to care for and ensure the good health of the child. He said at paragraph 18, page 23 of the record:

> " ... the Respondent's treatment of Brian shows that she is not a suitable or fit mother, and her way of life would not augur well for the boy's moral growth, nor for his physical, educational or psychological development."

He referred also to the child's many illnesses, such as asthma, ear, nose and throat infections allergies and others, all of which he attributes to the respondent's fault. The medical evidence does not support the appellant's claims.

Dr. Eve P. Palomino-Lue, who has been attending regularly to the child Brian since he was 10 days old, saw him on the 18th August, 1996, when he was brought by the respondent to the Andrews Memorial Hospital. On examination his "penis was slightly swollen ... and sore." Dr. Palomino-Lue said that the lesions "were unlikely to be self-inflicted." The child was treated with antibiotics and skin ointment and the legions healed by 28th

August, 1996, on the follow-up visit. The child, the doctor said, appeared healthy. Dr Ray A. Johnson, who treated the child Brian, since June 1996, when he was fourteen months old, found on an examination in March 1997, that he had "an upper respiratory tract infection, but no history of bronchial asthma." Dr. Palomino-Lue, certified, in a letter dated 13th August 1997, at page 35 of the record:

> "August 13, 1997
>
> TO WHOM IT MAY CONCERN
>
> RE BRIAN FORSYTHE
>
> This child has been my patient since 6/4/95 when he attended at 10 days of age for neonatal evaluation of mild jaundice.
>
> He has attended regularly since then for well baby visits and incidental sick visits. The child is fully immunized for age and his psychomotor development is normal for his age.
>
> He has a history of recurrent ear infections, allergic rhinitis and enlarged adenoids in the first year of life. This has resolved satisfactorily as the child grew and is no longer a problem.
>
> At each visit the child is given a full medical evaluation of his growth, nutritional status, emotional health and physical health. At no time have I had reason to believe that this child has been improperly cared for.
>
> His dietary history is satisfactory. His growth and development is normal. I have never found any evidence of physical or emotional abuse at any visit. The child appears to be healthy and very attached to his mother.
>
> There is no clinical evidence of malnutrition or other dietary deficiency."

Dr. B. Maragh examined the child on 18th January, 1997, at the request of the appellant. He described the child "ill looking very lethargic and withdrawn." He had multiple healing abrasions to the left side of his face, "a mild upper respiratory tract infection with a purulent nasal discharge and an hyperaemic throat" and with a protuberant abdomen. He later examined the child on 17th March, 1997, with a listing of cough, cold, fever and nasal stuffiness. Again the child was found to be ill-looking and febrile. On both occasions he was treated with antibiotics, antihistamines and vitamins and sent home.

The appellant argued that the learned trial judge did not apply the law to the facts and did not approve the evidence properly as it concerned the medical evidence and the condition of the child.

The learned trial judge recognized the complaint of the appellant, when he said at page 110:

> "The main thrust of the Applicant's evidence in support of his application is that the Respondent has failed miserably in the care and control of the child and as a consequence the child suffered throughout and continues to suffer. That the child now suffers from acute or morbid depression, which is most evident when he is to return to the Respondent after his fortnightly visit with the Applicant.

He traced the medical history of the child, detailing the examinations and treatment by Drs. Palomino-Lue, Maragh, Johnson and Scott, culminating with an examination by Dr Paul Robertson "who gave him a clear (sic) bill of health, with an assessment of 'good state of mental and physical health,' " on 3rd October, 1998. The learned trial judge then found at page 112:

> "All these medical reports indicate that Brian began receiving medical care from an early age and the illnesses from which he suffered were not associated with physical abuse or lack of parental care, but rather in the natural process of growth. He has made steady progression from his first medical treatment up to the 13th August, 1997, when he was given a clear bill of health. A subsequent evaluation in October 1998, confirms him to be a healthy child, both physically and emotionally."

There was ample evidence led from which the learned trial judge could properly conclude that there was no physical abuse nor lack of care of the child by the respondent, nor was there any neglect nor exposure to any environmental hazards to cause any danger to the child's health. Rather, there was a continuing course of visits to doctors from the age of 10 days, and the usual immunization and treatment, to cause Dr. Palomino-Lue to conclude in 1997, that the child Brian had a normal growth and development with a satisfactory dietary history, devoid of any physical or emotional abuse. He was healthy and showing no signs of malnutrition nor any other dietary deficiency.

There is no virtue in the complaint of the applicant of the finding of the learned trial judge in regard to the proper care of the child by the respondent.

The learned trial judge applied the proper balance in the case, when he made the following finding in respect of the child, at page 118 of the record:

> "He is settled well in a proper school and his school report attest to this. I find that although the Applicant is financially better off than the

> Respondent, and owns a large home, Brian is comfortable living with his mother and has the love and care of the Respondent as well as that of her fiance'. It would be difficult, if not impossible to justify any order moving him from his current home where he has the company of his two sisters to the home of the Applicant, rich though he may be."

The learned trial judge found that the child lived with the respondent in a two-bedroom house with all the usual amenities. He attends a kindergarten school where he is exposed to music, swimming, computer and other academic pursuits, and that arrangements were made to transfer him further to either the St. Jago or Hydell Preparatory School. The appellant himself admitted that his schooling then was satisfactory. The appellant did not convey to the court any alternative arrangement he proposed for the educational development of the child. The learned trial judge found that both parents "love Brian and wish to have his custody." He contrasted the "modern spacious house" of the appellant with the "modest (house) ... of two bedrooms," of the respondent, found that the child Brian was a happy child with the respondent who "... has seen to his proper schooling and upbringing, though she has not got the financial resources as those of the applicant."

In ***Clarke*** v ***Carey*** (1971) 18 WIR 70, the Court of Appeal of Jamaica, allowed the father of two illegitimate children, to retain de facto custody (because of the limiting restrictions of the then Guardianship and Custody of Children Law (No. 69 of 1956), allowed the children to remain in his "suitable, comfortable and stable home in which their material and spiritual needs" were adequately provided for, rather than into the home of the

mother where there was no adequate accommodation. Smith, J.A., (as he then was), quoting Lindley, L. J., in **In re McGrath (Infants)** (supra), that

> " ... the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense ...",

said, at page 79:

> "It would be very unfortunate indeed if the idea was put out in Jamaica that a well-to-do father can take away and deprive the mother of an illegitimate child of the custody of her child merely because he is financially better off than she is and able better to provide for the child's material welfare. A child's physical comfort is, however, an important consideration when deciding what is in the child's best interest. A child can be made comfortable in a poor home though he might be more comfortable in a rich one. And if the comfortable poor home is his mother's (in the case of an illegitimate child) it would be difficult, if not impossible, to justify an order removing him to a rich home."

The evidence before the learned trial judge was that the child Brian, 5 years old was happy and comfortable in the modest home of his mother, in the company of his sisters. The accommodation was not shown to be inadequate. He was receiving proper schooling for his age, and the respondent mother already had plans for his advanced schooling. Certainly, there was no indication of educational retardation as contended by the appellant. The child was shown to be healthy, on the medical evidence, except for the periods where he was treated, satisfactorily and successfully, for the illnesses stated. He is not shown to be suffering physically and psychologically as the applicant claims.