



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2008 HCV 00495

BETWEEN JERMAINE FULLERTON CLAIMANT
A N D PETA GAYE POWELL DEFENDANT

Faith Hall instructed by Fullerton DeLisser & Co. for the Claimant

Simone Jarrett instructed by Leroy Equiano of the Kingston Legal Aid Clinic for the Defendant.

Custody – Child in need of academic reinforcement – whether mother should be given custody - Variation of Order

Heard: 16th October 2013, 18th October 2013.

Coram: Batts, J.

- [1] This judgment was delivered orally on the 18th October 2013. I have called the child 'X' in order to protect her privacy.
- [2] In this matter the applicant Peta Gaye Powell seeks custody, care and control of her daughter who is, 9 years old as well as Orders in relation to maintenance.
- [3] In order to obtain this relief the applicant has to convince this court that a variation of the Order of the Court made on the 28th July 2010 is required. That Order was made by the Hon. Mr. Justice Roy Anderson. Although filed on the 4th October, 2010 it appears never to have been perfected. The minute of the Order is on the court's file and reads:

- “1) Joint custody awarded to Peta Gaye Powell and Jermaine Fullerton with care and control to the father Jermaine Fullerton, the said child and that Peta-Gaye Powell is given full access to the child as stated in the Order dated 6th April, 2009 (sic).
- 2) The telephone number of the mother, father and grandparents are to be exchanged among the parties.
- 3) Interim Order varied and the sum of \$1,500 to be sent to the mother each fortnight.
- 4) Liberty to apply.

[4] The Order of the 16th April 2009 was an Interim Order and provided,

- “1. Joint custody granted to the Claimant and the Respondent with care and control to the respondent.
2. The Claimant to have the child “X” every other weekend from 4 p.m. on Fridays and to return child on Sundays between 4 and 6 p.m.
3. The father or grandparents to have the said child for the summer holidays except the 1st to the

7th of August 2009 when the child is to return to the Respondent.”

[5] It is to be noted that the applicant mother of the child was not legally represented when those Orders were made. The Claimant father was represented by Bishop & Fullerton attorneys at law. The applicant is now represented by attorneys instructed by the Kingston Legal Aid Clinic.

[6] When the matter of variation of an Order of the Court arises it is usually best that the judge who made the Original Order be asked to consider the application to vary. This is however a matter where the court is exercising its *Parens Patriae jurisdiction*, furthermore the judge who

made the order in question has retired. For both reasons I decided to hear the application.

[7] The matter is of some urgency because the pith and substance of the applicant's case before me is that the child ("X") needs urgent academic reinforcement. At 9 years old it is said she functions at a much lower age group level. It is important it is said that changes be made now. The applicant relied upon the following:

- a. "X" school report for the year 2011-2012 in which her final grade (Term and Exams averaged) were: Integrated Studies 48%, Language Arts 42%, Mathematics 53%, Literacy 54%, Projects 72%.
- b. In that same report her personality traits were assessed as Punctuality (N1), Courtesy (N1), Industry (N1), Initiative (N1), Dependability (N1), Attendance (N1), Self Confidence (N1), "N1" means Need Improvement. Her sociability, deportment and rapport, and honesty were considered "satisfactory".
- c. Her teacher's comment was as follows:

"X" lacks focus and sometimes struggles to complete given tasks. She needs help at home."

This latter sentiment about the need for reinforcement at home was echoed by the Guidance Counsellor as well as the principal.

[8] The Applicant relies also on a report dated the 25th February 2013 from the Child Development Agency and sent to the Registrar of the Supreme Court under cover of letter dated 25th February, 2013. The following features of that report are noteworthy

- a. "X" was described as being aware of her surroundings and exuding much confidence in her paternal grandmother with "a sense of belonging and acceptance

within the family.” She seemed confident when she spoke and had a general understanding of good family life.

- b. “X” was in grade 3 (at the time of the assessment) and her teacher Mrs. Alexander described her as a “slow learner” but that she was usually well prepared for school and was a helpful and loving child.
- c. The social worker contacted Ms. Jones and Ms. Johnson (relations of the applicant) who confirmed their role in assisting with “X” brother Vetarje and that such assistance would be extended to “X”.
- d. At home with her grandparents “X” had access to a television, DVD player and other gadgets and educational toys and to books.
- e. “X” lived with her mother and paternal grandparents from birth to 2 years. She was then relocated to St. Catherine in 2006. In 2009 pursuant to the Order of the Court she was returned to her paternal grandparents in Bensonton. The report states, ““X” has now settled in the custody of her father and paternal relatives.”
- f. When interviewed “X” spoke well of her aunt, grandfather and paternal grandmother. She shares a good relationship with paternal relatives and her stepmother Mrs. Shanna Gaye Fullerton.
- g. Vetargje (her five year old bother) when interviewed was crestfallen and wanted to know why his sister was sent to the country and whether she was coming back to live with them. He said he wanted his sister to play with.

- h. Ms. Powell lives in a 2 bedroom house and bathroom, kitchen, living and dining combined. It is built on “leased” land for which herself and her husband pay. The verandah is not yet completed. Piped water and electricity are supplied by the relevant authorities. (The present house is at the same address “X” once lived but behind the original 1 bedroom structure).
- i. Her grandparent’s house is a 3 bedroom structure, one bathroom, a kitchen and a dining/living area. One bedroom is shared between “X” and her adult aunt, another bedroom is occupied by her paternal cousin Ryodeno Thomas and the other is occupied by her grandparents.

There is a separate unfinished one bedroom structure in the same yard which is occupied by “X”’s father, his wife and her smaller brother Demaine Fullerton. Electricity is provided while water is fetched from a tank in the yard. Social worker was informed that when completed “X” would live in that house with her father and his wife. At the time of visit by the social worker the home was adequately furnished clean and tidy.

- j. The social worker noted positive responses by neighbours about the Fullerton’s as well as about the applicant in their respective communities.
- k. when interviewed “X” said she enjoyed the time spent with her mother but quickly interjected that she only wanted to spend holidays but prefers to live with her grandparents. When asked to draw members of her family she only drew her father’s relatives and did not draw her mother or any of her mother’s relatives. When asked if she had left anyone out she said she could not think of any.

- l. The community of Drummily, Bensonton is a predominantly farming community quiet and peaceful. It is 8 kilometers from the town of Claremont St. Ann and has access to Post Office, Health Centre, churches, basic and Junior High Schools, Police Station and a bank.
- m. The applicant's community (Johnson Pen) is close to Spanish Town which has a hospital, police station, churches, private medical practitioners, schools, health centres and public transportation.

[9] The report makes no recommendation but concludes as follows:

“The following are of concern and must be considered in order to make a determination as regards custody decision:

- a. “X” has expressed a willingness to remain with paternal relatives and holiday with her mother.
- b. Though Ms. Powell has expressed that she is willing to allow “X” to spend time with her father, if she gains custody, it is not her desire for Mr. Fullerton or his wife to call her (Miss Powell) and interfere.
- c. Parents must endeavor to relate harmoniously to each other so that “X” will not be negatively affected.
- d. “X” is at a tender age of 8 years and could be gravely affected “if permanent placement is not in her best interest.”

[10] The Applicant relies also on the report of Mico University college CARE centre. The date of their assessment is 21 August 2013. It is a psycho-

educational assessment. The report describes the 7 “instruments” used to assess “X”. These were: Wide Range Achievement Test, Mico Diagnostic Reading Test, Boehm Test of Basic Concepts, Mann- Suiter Visual Memory Screen, Mann-Suiter Auditory Discrimination Screen, Test for handwriting. The following were noteworthy findings:

- a. “X” is extremely weak with reading. She will need special help with phonics and will need focused attention on a one to one basis and must do a lot of reading for practice.
- b. Her performance on Achievement Test results was –

Mathematics	Early Grade 2
Spelling	Kindergarten
Word Spelling	Kindergarten
- c. The adaptive behaviour test showed her skills in the low range, indicating mild intellectual deficits in adaptive behaviour.
- d. Her scores on the Wechsler Intelligence Scale for children were extremely low: Thus,

“X”s overall cognitive abilities were within the extremely low range of functioning indicating moderate cognitive deficits.”
- e. The report concluded with 27 detailed recommendations for whoever would be seeing to her further education at home and at school. The overall recommendation was as follows:

“Given the findings from intellectual testing, observation and the history provided by her caregiver, it is strongly recommended that “X” be placed in a remedial intervention programme where her literacy and numeracy skills can be strengthened.”

[11] The applicant has placed before the court evidence of the following to demonstrate her ability to best take care of "X":

- a) She is now married and living in a two bedroom house with appropriate amenities.
- b) "X" brother of five (5) years will share her room and he has a 90% average in school and had a very good report.
- (c) She has made arrangements for "X" to be admitted to the St. Johns Primary School which has a Resource/Reading room to help children who are performing below their age level. The school has confirmed "X" will be placed in a regular class but will be pulled out on specific days for remedial classes were students are taught by a Specialist teacher.
- (d) The applicant says she is prepared to give the necessary attention to "X" as she does with her other child.

[12] By an Affidavit dated the 5th October 2013 "X"'s paternal grandparents state that they brought the Mico report to the attention of the teacher at "X"'s present school. The school can give extra lessons and is prepared to have remedial classes with "X". The school has confirmed this by a letter dated 15 September, 2013. They say they have a Literacy Specialist as well as extra classes by her form teacher.

[13] It is evident to this court that the applicant has made very great efforts to improve her circumstance and to demonstrate that "X" will be better off with her. This is admirable and speaks to her love for "X". Similarly it is clear that "X" enjoys the love and attention of her grandparents with whom she now resides.

[14] Two issues are of great concern. Her academic performance on the one hand, and on the other is the need for stability in her young life. The social workers who gave the CDA report outlined the frequent change of residence in her early life. It is not surprising perhaps, that her cognitive functions are below par. Indeed the stresses and tug o war and movements between parents most likely impacted her self confidence. That she has been 3 years at Bensonton Primary School without their noticing or taking the initiative to treat with "X" is troubling. Indeed I note that there are only 12 children in her class and yet her performance is so wanting. It is cause for concern. In this matter my decision must be based on what is best for "X" the wishes or desires of her parents are secondary.

[15] I have, with no little diffidence, come to the conclusion that it is best for "X" at 9 years to enjoy the stability she so craves. A readjustment now to a new domestic arrangement and to a new school with quite probably larger classes and with children who perhaps have different attitudes, is in my view not in "X"'s best interest. I therefore refuse the Order claimed but intend to do so on certain conditions.

[16] My order therefore is as follows:

1. The application to vary the Order for custody dated 28th day of July 2010 is refused on condition that,
 - a. An appropriate educational arrangement is made with the literacy specialist at Bensonton Primary School.
 - b. "X" is enrolled in an appropriate after school programme with her class teacher at the Bennington Primary School.

- c. Someone in the household of her paternal grandparents expressly undertakes to assist her with homework and the activities recommended by the Mico Report.
2. This Order will therefore remain inchoate unless and until an Affidavit is filed attesting to compliance with the 3 conditions stipulated, or for 14 days whichever is earlier.
3. The matter is therefore adjourned to the 8th November, 2013 at 10:00 a.m. before me at which time the Order will be made final if a satisfactory Affidavit in proof of the conditions is satisfied. I will then hear submissions on the matter of access/maintenance and any other matter on which Counsel wishes to address me.
4. No order will be made as to Costs.

David Batts
Puisne Judge
18th October, 2013