CP.1

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

HCV 2079/2004

BETWEEN	**NADINE GRANT**	**APPLICANT**
AND	**ANTONIO ROBINSON**	**DEFENDANT**

Mrs. Georgia Gibson-Henlin and Miss Kerry-Ann Rowe instructed by Nunes, Scholefied, DeLeon and Company for the applicant

Miss Jacqueline Cummings instructed by Archer, Cummings and Company for the defendant.

Sykes J (Ag)

September 7 and 16, 2004

FORUM NON CONVENIENS

This matter began on August 24, 2004 with an urgent ex parte application by Miss Nadine Grant for an injunction restraining Mr. Robinson from taking his daughter out of Jamaica back to the United States of America. This was an order made ancillary to a claim for custody made by Miss Grant who is the mother of the child. I granted this injunction and set the matter down for an inter partes hearing on August 30, 2004. Unfortunately the matter was not heard until September 7, 2004. Because of the urgency of the matter

judgment should have been delivered on Friday September 10, 2004 but these well made plans had to yield to pending arrival of Hurricane Ivan, certainly a majestic and one of the most powerful storms in the recorded history of this region.

The matter is urgent because none of the parties resides in Jamaica. Mr. Robinson should have already returned to the United States. His daughter who is enrolled in school in the United States has already missed one week. Miss Grant arrived in Jamaica since August 20, 2004. She now lives in the United Kingdom.

At the inter partes hearing Miss Cummings took one simple point. She says that this court should decline to hear the matter because a more convenient forum is in Maryland, United States of America. It is important to put this submission in context. Miss Grant wants the Supreme Court in Jamaica to adjudicate upon the matter of custody. She says that the mother, father and child are here in Jamaica and so this court should hear the custody application. According to Miss Cummings the presence of all the parties is merely serendipitous as far as Miss Grant is concerned. She submits further, that a court where the child will eventually be should be the proper forum and not a court where neither of the parties lives or is likely to live in the foreseeable future.

The Genesis

I do not propose to summarise all the affidavit evidence. I will only narrate such facts as I think are necessary to resolve this preliminary issue. Miss Grant and Mr. Robinson are parents of a female child born December 18, 1996. Both are Jamaicans who now live in other countries. Miss Grant is a

student. However since her arrival in the United Kingdom in 2002 she has found true love and affection and got married. She is now Mrs. Nadine Grant-Aluede. I will refer to her as Miss Nadine Grant since Grant is the name used in the title of the claim as well as in her first affidavit filed in this matter. There is no indication that she intends to return to Jamaica.

Mr. Robinson has also found true love and affection even though he is not married. He lives with a female in the United States. He is a mechanical engineer and a post graduate student at Howard University. There is nothing to suggest that Mr. Robinson intends to return to Jamaica any time soon.

At this point it is important to note that the application for custody is being made in Jamaica when neither party has any real connection with Jamaica at this time and have not had any since at least 2002. There is no evidence of any ties that would cause them to return to the land of their birth. All the evidence point to permanent residence abroad.

Mr. Robinson has been in the United States for sometime prior to 2002. Miss Grant decided to go to the United Kingdom in 2002. At the time she had the child with her in Jamaica. The agreed plan of action between her and Mr. Robinson was that the child would be sent to him while she resettled in the United Kingdom. It was agreed that Mr. Robinson would send the child to her when she was properly resettled. It is here that the plans fell apart. The resettlement process took longer than expected. During this time Mr. Robinson had enrolled his daughter in school and had her immigration status regularized. The daughter had initially entered the United States on a visitor's visa but she is now there on a student's visa. It seems that Mr. Robinson grew attached to his daughter after he became the primary care giver. It also

appears that he decided not to send the child to her mother, as agreed, but to seek custody of the child.

At some point in 2003 Mr. Robinson agreed to allow his daughter to visit her mother. The passport of the child was sent to Miss Grant to facilitate an application for a visitor's visa for entry into the United Kingdom. The arrangement was that Miss Grant would send her spouse to pick up the child in the United States and take her to the United Kingdom. This was done. Not unexpectedly, Miss Grant decided not to return her daughter to Mr. Robinson. Mr. Robinson flew to the United Kingdom and began proceedings under the relevant international convention dealing with the abduction of children. At the court hearing it turned out that the daughter was smuggled into the country on the passport of another child. This was not known to Mr. Robinson Unsurprisingly, Mrs. Justice Bracewell of the Family Division of the High Court of Justice ordered the return of the child to the United States. She also ordered that the court bundles and the transcript of her judgment be sent to the "appropriate Family Court in Maryland The United States of America." This order explains why the child is still in the custody of Mr. Robinson. The order of her Ladyship is dated July 15, 2004.

The next salvo in this now increasingly vitriolic custody battle was fired in early August of 2004. Miss Grant applied for and was granted daily contact with her daughter by a court of competent jurisdiction in Prince George's County, Maryland. There is no suggestion that the Maryland court treated Miss Grant unfairly or that she was denied access to the court.

The saga is now reaching a crescendo. The custody battle is yet to be fought. These are just preliminary skirmishes before the main contest. Mr. Robinson traveled to Jamaica on August 20, 2004 to visit the father of his

partner. The father was gravely ill and hospitalised. Miss Grant got wind of his visit and flew to Jamaica from the United Kingdom. She quickly retained the services of counsel and filed her application for custody, care and control on August 24, 2004. This narrative now leads to the next issue, namely the relevant principles to be applied where an application is made to stay proceedings on the basis that there is a more appropriate forum.

The principles

The starting point has to be that the welfare of the child is paramount. Welfare in this context is given a very wide meaning (see Harrison J.A. *Forsythe v Jones* SCCA 49/99 (delivered April 6, 2001). The jurisdiction of the Supreme Court, in matters relating to the welfare of children, is not found only in statute but is also derived from the inherent jurisdiction of the court over minors which itself is derived from the role of the sovereign as parens patriae. The learning suggests that nationality is a proper basis for exercising jurisdiction even if the child is not resident in Jamaica (see Dicey & Morris, *The Conflict of Laws*, Sweet & Maxwell (12th ed). 1993 Vol. 2, pp 809-815). The learned editors have also pointed out, quite significantly, that the courts of England can decline to exercise their "inherent protective jurisdiction on grounds of forum non conveniens bearing in mind that the welfare of the child is seldom advanced by the continuance of proceedings in two countries with the risk of conflicting orders being made" (see Dicey & Morris (cited above) at page 817). I would add to this that it seems that the fact that the child or one of the litigants in a custody hearing is living in the jurisdiction of the court does go a far way in persuading the court to exercise jurisdiction in a custody application. I am not to be taken as saying that this is a necessary

precondition for the court to exercise its jurisdiction. There is therefore no question that this court has jurisdiction to hear this matter but the question is, should it do so in all the circumstances of this particular case?

To reinforce the point made about the presence of parties in the jurisdiction of the court I will refer to two cases. In *McKee v McKee* [1951] 1 All ER 942 PC the father was granted custody by a Canadian court despite the fact that he had snatched the child and scurried over the border of the United States of America into Canada in breach of a custody order by a Californian court which had granted custody to the mother. The Privy Council, on appeal, reversed the decision of the Canadian Supreme Court which itself had reversed the lower court's order granting custody to the father. The point being made is that the father, at the time custody was granted by the Canadian court, was living in Canada. Similarly in *Thompson v Thompson* (1993) 30 J.L.R. 414 the respondent was residing permanently in Jamaica. Mrs. Gibson-Henlin urged and I accept that this Supreme Court should not lightly decline jurisdiction if two of its nationals wish to litigate before it and if the question of the welfare of a Jamaican child is raised then it should be in my view only in unusual circumstances that this court should not hear a custody application. This does not mean however that this court can wrap itself in the cloak of nationalism and ignore the fact that there may be other fora that are more appropriate to hear a matter.

Having said this there is nothing in *Thompson's* case (cited above) that indicates that the Supreme Court must hear a custody application if on a proper examination of all the relevant factors a foreign court is the more appropriate forum. I now turn to examine the factors present in this case. I should indicate as well that an examination of the factors must be governed

by the overriding consideration of what is in the best interest of the child at this point. In so doing I am guided by *Thompson* in which the issue of forum non conveniens arose in a custody application.

The factors

1. Both parents and child are Jamaican nationals.
2. The father lives and works in the United States of America.
3. The mother lives and studies in the United Kingdom.
4. There is no evidence that either mother, father or even child intends to live in Jamaica.
5. The child is now in the custody of her natural father who has regularised her immigration status.
6. The child lives with her father and his partner in the Unites States of America.
7. There is no evidence or suggestion that Mr. Robinson and his partner have not cared for the child properly since she has been in their care.
8. Mr. Robinson has applied for custody in the Maryland courts.
9. At the time of this application for custody mother, father and child are temporarily present in Jamaica. But for the illness of Mr. Robinson's partner's father in all probability he would not have been in Jamaica.
10. There is evidence that Miss Grant has had some initial success in litigating in Maryland despite being far away in the United Kingdom.
11. As presently advised Miss Grant does not have any visa to enter the United States of America. There is no certainty that she will be granted permission to enter the United States to litigate this matter.

12. Even if the court heard the custody matter and awarded custody to the mother there is no relative certainty that the child would enter the United Kingdom. The end result may be that the child is stranded in Jamaica without either of her natural parents while she awaits the vagaries of the immigration process.

13. Since living with her father in the United States from May 2002 the child has been enrolled in school and would have resumed her schooling already but for this matter. There is evidence that she is now enrolled at Quest Preparatory School in Jamaica.

14. The child should have commenced schooling in Jamaica on September 7, 2004. This would be the third country in nine months in which she is now enrolled in school. She was attending school in the United States between 2002 and December 2003. Her schooling was interrupted because her mother did not send her back to the United States. Her education in the United Kingdom was interrupted because the courts ordered that she should be returned to the United States. I do not see how this constant movement can be in the best interest of the child. It is time for her life to settle down.

15. There is no suggestion that a court in Maryland would apply different considerations than Jamaican courts. There is no evidence or suggestion that Miss Grant would not receive justice according to law in the United States.

Analysis of the factors

As I have already stated the welfare of the child is the most important consideration. I do not see how it can be in the best interest of the child to

have her out of school with the prospect of further time out of school while the Jamaican courts determine which parent should have custody. I have been assured by both parties that they do not have all the evidence necessary to embark upon a full custody hearing. Some of the information is overseas. Time would be needed to assemble all evidence to be deployed. This can only mean further interruption of the child's schooling for a few more weeks. Albeit that they are Jamaican nationals, there is no indication that either parent intends to return to Jamaica. From all indications the child is being properly cared for at the moment by her father and his partner. Why should the development of the child be put at risk because the parents happen to be in Jamaica for a limited period of time?

Mr. Robinson has a job in the United States. In the United States his conduct can be supervised by the courts there. If any enquiries are to be made about his suitability as a parent the courts in Maryland can make the proper enquiries. The same can be said for Miss Grant. The courts here would be placed in a difficult position. They would have to rely on affidavit evidence, the power of cross examination and the judicial litmus test of truth, called demeanour. Should the welfare of a child depend upon the vagaries of litigation in a context where this court is not able get current, reliable and accurate information about either of the litigants, to examine for example the physical, spiritual and psychological environment in which the child is expected to grow and flourish? It was submitted by Mrs. Gibson-Henlin that cross examination could unearth much information. It is indeed a powerful tool but in this context the Jamaican courts would not have any objective independent evidence by which any of the parties' testimony could be weighed. At the very least the courts in Maryland could if they wish cause a

visit to be made to Mr. Robinson's accommodation. They could visit the school of the child. They could question Mr. Robinson in relation to what they have found. They would be able to interview the child. While they might not have the same level of information about Miss Grant the order of Bracewell J indicates that some kind of report was done by the social services in the United Kingdom. Those reports are to be made available to the courts in Maryland.

At this point I should mention the matter of corporal punishment. In her first affidavit Miss Grant mentioned that Mr. Robinson has slapped the child. I will not comment on the merits of that form of discipline but I will say that there is no allegation of child abuse. Slapping a child, without more, does not become child abuse.

At the end of the day one is left with this: a choice between a Jamaican court that would have at best imperfect information about both parties and a Maryland court that would have access to the best information about one party (Mr. Robinson), less that perfect information about the other (Miss Grant) as well as access to the most important figure in all this (the child). Against this is weighed the possibility that Miss Grant may not be granted a visa to enter the United States to contest the hearing whereas all parties have access to the courts here. This is an important consideration. However during the hearing I was informed that since Miss Grant's husband is a British national he does not need a visa to enter the United States and so he could represent her interests there if she was denied entry. Also she has litigated successfully before the Maryland court with regard to access to the child. There is no evidence to suggest that she will be denied a fair hearing and

neither is there evidence to suggest that the courts in Maryland do not have as their primary consideration the best interests of the child.

Given the fact that Mr. Robinson has applied for custody in Maryland there is the risk that this court and the Maryland court may come to different conclusions. I have already referred to the principle that a court may decline to exercise jurisdiction that it properly has if there is a possibility that another court may make a different order. This factor is not conclusive but one that has to be borne in mind.

It is time for the life of this child to proceed with some certainty and regularity. Even if I were to hear the custody matter and grant custody to Miss Grant that would not prevent Mr. Robinson from proceeding with his custody application in the United States. If the court there comes to a different conclusion then from what I have seen so far there is no doubt that each parent will be trying to give effect to the order in their favour. This environment of uncertainty is unlikely to enhance and promote the welfare of the child. If one court of competent jurisdiction hears the matter then some finality will be brought to this matter. As I have said a court does not lightly deny hearing its nationals but given that the overriding concern must be the welfare of the child if there is some hope of enhancing the welfare of the child by declining jurisdiction then that ought to be done. The child must now know where she is going to live, where she will be going to school and who will be her primary care giver. She is entitled to a stable, safe and caring environment.

In my view the proper forum ought to be either of the countries in which either parents is now domiciled or where the child is now domiciled. Jamaica is not any of those countries. The English courts have sent the child back to

the United States. Unlike *Thompson* none of the parties lives, works or have any further attachment to this country at this time and so I decline jurisdiction to hear the custody matter.

Conclusion

The custody hearing is stayed. The injunction restraining the father from removing the child back to the United States of America is discharged. The travel documents of Mr. Robinson, Miss Grant and the child now in the possession of the Registrar of the Supreme Court are to be returned. Each party to bear their own costs. Leave to appeal granted.