

A-G

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN EQUITY

SUIT NO. E.143 OF 1997

BETWEEN	COLIN HENRY	APPLICANT
A N D	MARLENE NESBETH	RESPONDENT

Mrs. Pamela Benka-Coker Q.C. and Mr. David Batts for Applicant
instructed by Livingston, Alexander and Levy.

Dr. Lloyd Barnett & Mrs. Priya Levers for Respondent instructed
by Priya Levers Attorney-at-Law.

Heard: January 8, 9, 12, 13, 14, 15;
March 27 and April 24, 1998.

LANGRIN, J.

This is an application by the Respondent Marlene Nesbeth
for revocation and variation of Custody Order, made on the 9th
day of October 1997 awarding custody, care and control of the
child Yitzhak Alexander Henry to the applicant Colin Henry on
the following terms:

- "1. The applicant Colin Henry shall have custody care
and control of the child Yitzhak Alexander Henry.
2. The respondent Marlene Nesbeth shall have appropri-
ate supervised access to the said child;
3. The passport of the said child is to be handed
over to the applicant.
4. Costs to the applicant to be agreed or taxed.
5. Certificate for counsel granted.
6. Liberty to apply.

The factual background as disclosed from the affidavits shows that the parties began an intimate relationship about 1991.

On January 29, 1996 in New York, United States of America the applicant gave birth to a child now aged 2 years. The relationship came to an end sometime after the birth of the child.

The parties engaged only into a visiting relationship since both of them maintained separate homes. The parties were cordial in their relationship until May 1997. An application was made then for equal access and to restrain the child from leaving the jurisdiction without the consent of the other party in writing or order of the Court.

As a result of the application - a Court Order was made on the 29th May, 1997 for joint custody with care and control granted to Marlene Nesbeth, the mother. Up to this time it appears that the father considered the mother a suitable person to be entrusted with the care and control of the child.

On the 11th July, 1997 a notice was taken out to vary the Order for custody and as a result of that notice another Consent Order was made with care and control to the mother on the 21st July, 1997.

There are two significant events which seem to have given rise to enormous hostilities between the parties. The first being the reappearance of the applicant's estranged wife, in July, from abroad who then lived in the same apartment as Mr. Henry. Second, on the 21st August 1997 when Miss Nesbeth travelled to New York with her son for a vacation it was done without the consent of the parties or by order of the Court. A writ of Habeas Corpus as well as a Letter of Request with the intention of going abroad to have the child returned were obtained

at the instance of the applicant but neither was served personally on the respondent.

In relation to what I regard as the first event, Dr. Barnett submitted that the respondent had a natural and genuine fear that the child was going to be looked after by a woman with whom for obvious reasons there would be no cordial relationship. Further her conduct was a response to having been deceived by Mr. Henry.

I am led to the conclusion that the relationship deteriorated as a result of the re-appearance of Mr. Henry's wife in light of the testimony of Miss Nesbeth when she testified as under:

"I had my fears of Mr. Henry taking my son to give to his wife because he told me his wife could not have children. For the time she was around I know we had problems. A deterioration of attitudes started when his wife was around. At that time he was more demanding and always wanted the child. We had frequent quarrels."

Concerning the taking of the child out of the jurisdiction which I would label as the second event, Miss Nesbeth deponed that she was advised by her Attorney-at-Law that she was unilaterally entitled to take the child out of the jurisdiction. Indeed she requested from him a written confirmation of the advice which he gave her. This advice is exhibited to her affidavit and dated 28th August, 1997. This is a completely different situation from the Abduction cases cited to the Court by the applicant/father.

In making orders in relation to children concerning custody and access, while the court will take any adverse conduct of a party in consideration it will not be concerned with penalizing any adult for her conduct. There are numerous allegations and counter-allegations by both parties concerning their respective conduct since

May, 1997 but it remains absolutely clear that hitherto Mr. Henry thought Miss Nesbeth fit to be his regular companion in Jamaica and abroad where he may well have intended to make a home. It cannot be gainsaid that Mr. Henry found her to be a suitable person to become a mother.

A chronology of the proceedings leading up to the making of the order on October 9, 1997 is conveniently set out as follows:

On May 6, 1997, the applicant commenced this matter by way of Originating Summons for Custody and/or Access. Prior to the hearing set for May 26, 1997 the respondent filed her own summons for exclusive custody of the child and for child support of US\$1000 per month. On the hearing of the summons on May 28, a Consent Order was entered whereby the parties were granted joint custody with care and control of the child to the respondent. Specific access rights were given to the father and both parties were enjoined from causing the child to leave the jurisdiction without consent of the other or an Order of the Court.

On July 15, 1997 the applicant filed an application seeking to vary the Consent Order of May 28, 1997 and to obtain an order granting him custody of the child and supervised access to the respondent. On 21st July, 1997 an order was made varying the original order and provided for specific times for access by the applicant. The substantive issue of custody was adjourned for hearing on September 29, 1997. On August 22, 1997 when the applicant sought to collect the child from the respondent he discovered that the respondent had taken the child to the United States of America. The applicant sought and obtained an exparte writ of habeas corpus ordering that the child be produced to the Court on September 3, 1997.

The writ was served on the respondent's Attorney-at-Law in the absence of the respondent. On September 3, the respondent failed to produce the child, as ordered.

The adjourned Summons dealing with the substantive application for custody came up for hearing on September 29, 1997. At the request of the Respondent's then Attorney-at-Law the matter was adjourned to October 9, 1997 to allow the respondent the opportunity to be present. On October 9, 1997 a medical certificate was produced from Harlem Hospital Center in New York indicating that Miss Nesbeth was undergoing treatment for a cardiovascular problem for which she would require an additional six to eight weeks. The Learned Judge proceeded with the hearing and made the order as indicated above.

The applicant applied to the Family Court in New York for the child to be returned to Jamaica. The Court ordered that the child should be given to the applicant who on November 1, 1997 returned with the child to Jamaica.

On December 9, 1997 at the instance of the respondent the matter came up for hearing to deal with the respondent's application that the Order of October 9, 1997 be varied to reinstate joint custody of the child to both parents with care and control to the mother. The substantive hearing was adjourned sine die but a Consent order was entered to enable the respondent to have fortnightly weekend access to the child and under the supervision of Mrs. Lorna Golding.

The two emerging issues before the Court are as follows:

- (1) Whether the welfare of the child who is now two years old would best be served by granting the mother's application.

- (2) Whether this Court has any evidence whatsoever to support the allegation that the mother is not fit and/or suitable to have care and control of the child.

The Children (Guardianship and Custody) Act states clearly the basis upon which the question of custody must be decided.

The Act at the relevant sections provide as follows:

- "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, and may alter, vary, or discharge such order on the application of either parent."
- "7-(5) Any order so made may, on the application of the father or mother of the child, be varied or discharged by a subsequent order."
- "S.18 The Court in deciding that custody shall regard the welfare of the child as the first and paramount 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."

In embarking upon an adjudication of this matter the Court must bear in mind the observation of Stamp L.J. in *Re K (Minors)* 1977 1 ALL E.R. p.647 at p.649:

"Although one may of course be assisted by the wisdom of remarks made in earlier cases, the circumstances in infant cases and the personalities of the parties concerned being infinitely variable, the

conclusions of the Court as to the course which should be followed in one case are of little assistance in guiding one to the course which ought to be followed in another case."

These principles must have influenced the Court in awarding custody to the father. In order therefore to secure a variation of the Order to give custody to the mother, it is necessary to show that the pendulum has so swung that the welfare of the child will now be best served by awarding custody to the mother.

What is the variation sought?

1. That joint custody of the child Yitzhak Alexander Henry, the child of Marlene Nesbeth Mother and Colin Henry, father remain with both parents with care and control of the child YITZHAK ALEXANDER HENRY, granted to Marlene Nesbeth the mother.
2. The Father shall have access to the child YITZHAK ALEXANDER HENRY to reside with the Father on alternate weekends between the hours of 6:00 p.m.; Friday to 6:00 p.m. Monday and during the week preceding a non access weekend for two weekdays from 6:00 p.m. in the evening to mid-day of the second following day and on the Father's Birthday, on Father's Day or at any other time as the parties may agree.
3. The Father and the Mother shall agree in writing on not less than two (2) pediatricians who are approved to provide primary medical care to the child YITZHAK ALEXANDER HENRY.
4. Except in the case of emergency, the Father and Mother shall agree on treatment method, place, time and cost of any major medical treatment and/or care to be provided to the child YITZHAK ALEXANDER HENRY by any health professional.

5. The mother or father shall first notify the other in writing transmitted to the other by fax or hand delivery of the child YITZHAK ALEXANDER HENRY being taken out of Kingston and St. Andrew to stay overnight by the other party. The written notification shall disclose where the said child will be from time to time and how contact may be made.
6. The child, YITZHAK ALEXANDER HENRY shall not be taken from the jurisdiction of this Court except by written consent, which shall not be unreasonably withheld, of either the Father and/or the Mother or both parents if neither accompanies the child, or by Order of this Court.
7. In the event of the child YITZHAK ALEXANDER HENRY remaining out of the jurisdiction of this Court in excess of the period of agreed stay abroad or permitted by Order of the Court either party shall be at liberty to seek an Order in the relevant Court of this jurisdiction for the return of the child to Jamaica.
8. Either party undertakes not to molest the other parent while the child is with that other parent.
9. Either party undertakes that the names of both parents shall be put on any document of record concerning the child.
10. There be no order as to costs.
11. There be liberty to apply.

It is submitted by Mrs. Benka-Coker Q.C. that there is no basis for revocation and variation of the Order of October 9, 1997, since the principle of res judicata must apply in custody matters as it does in other matters. If this is not so then Courts of

concurrent jurisdiction would sit as appellate tribunals over the decisions made by each other. I cannot accept this submission since the statute clearly provides for variation. Further, the circumstances in which the order was made, although no fault of the Court, amounted to an *ex parte* order. However, it is to be noted that a similar application was made by the applicant/father on July 15, 1997 to vary the substantive order made on May 28, 1997 and an order was made on 21st July, 1997 granting the variation. Even so, no preliminary objection was taken at the outset and therefore this Court is now fully seized of the matter. I must hesitate to say that this Court is generally reluctant to interfere with the decision of a Judge on a question of custody and access particularly when the Judge as is frequently the case has had an opportunity of seeing the parties and of judging them for himself. In this case however the Judge in granting the impugned order did not have an opportunity of seeing both parties, and having them cross-examined on their affidavits.

In the instant case all the evidence was given before me and each party had the opportunity of having the witnesses present and to be cross-examined on their affidavits. It was after hearing both parties and all the evidence that I arrived at my conclusion.

In D v. W (1995) FRNZ 336 the Learned Judge in dealing with the operative principle of welfare of the child had this to say:

"For all practical purposes, the only relevant consideration is the welfare of the child. There is an understandable tendency of separated parents to be distracted by personal grievancies and hostilities but these are of no

moment except to the extent that they bear upon the interests of the child."

Where in a custody case the Court considers the facts and fully investigates the merits of a dispute, the welfare of the child concerned is not the only consideration but is the first and paramount consideration to be taken into account.

As to the meaning of "first and paramount consideration" it is useful to bear in mind what was said by Lord MacDermott in J. v. C AC 668 at pp.710-711:

"Reading these words in their 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."

Dr. Barnett in his submission provided a profile of the parties. I accept this as a correct characterization of the parties based on the evidence. This is stated as follows:

"Marlene Nesbeth - The Mother

Miss Nesbeth is a young businesswoman whose financial standing in the community is good. She is divorced and has one child from her second marriage, who has been growing up in her care and is reported to be doing well. She had the subject child outside of marriage for Mr. Colin Henry in 1996. There is evidence

from the Applicant and the Respondent that Miss Nesbeth is a caring, loving mother who had a clear desire to mother the child.

Miss Nesbeth lives in an apartment sufficiently large to accommodate herself, her daughter and the child the subject matter of these proceedings. Her mother is a highly reputable and stable person who helps to care for the child. Miss Nesbeth has a family in Jamaica who lives with her, her mother and a daughter and two brothers. Miss Nesbeth also has a full time helper who helps in caring for the child. Miss Nesbeth's business requires her to leave home for two days in each week but this is limited to normal office hours and she has flexibility in selecting when to go. On these occasions her mother takes care of the child.

Colin Henry - The Father

Mr. Henry is substantially older than Miss Nesbeth and has two (2) children, both outside marriage; these children did not live with him during their early years. He also has a grandchild. He is an Attorney-at-Law with two vibrant practices in Jamaica and Florida.

He has on the evidence presented so far no mother, no father, no family who lives with him or lives in Jamaica. At present, he lives alone with his son Yitzhak who is looked after by part-time hired helper. It is important to note, that there is no evidence as to a caring family that would support him in the upbringing of this child in the island of Jamaica. He does not have full time help with the child and has to place the child in a Nursery, which is unidentified.

Mr. Henry is a divorced man whose marriage he alleges was

undertaken as a result of undue influence being put on him and despite an alleged attempted reconcilliation the dissolution of this marriage took place in August 1997. The same allegation of undue influence was made by Mr. Henry when the child of this union was conceived. His attitude to the conception and birth of Yitzhak was to say the least ambivalent. By his own disclosure he did not initially regard himself as a real father."

It is common ground that the child had been with his mother since birth until October 1997. The mother has not been accused of illtreating the child or neglecting the child. Mr. Henry has conceded that Miss Nesbeth is a good and loving mother.

A parent's conduct is in fact, like everything else subordinate to the paramount interest principle. There were allegations of denial of access, alienation of affection, refusal to take joint decisions and use of bad language. Much of this was exaggerated. On the evidence I find she is a suitable person to continue caring for the child.

The mother has suitable accommodation and a supportive family consisting of grandmother and daughter who can assist in looking after the child. The mother is available for at least five days out of each week to give the child the care and attention he needs. The child never had to go in a Nursery when the child was in the care of the mother. On the contrary, since October 1997 when the Court granted custody to the applicant the child is taken to a Day Care Centre on a daily basis. This Court is unaware of the name, location and suitability of the Nursery and at present is not aware of who looks after the child or as to the reliability and continuity of such help. The Court is cognisant of the fact

that a practising Attorney cannot by himself take care of a child of such tender age.

It is common ground that during the major part of the child's life and up to October 1997, the child maintained a stable health record. Since then there has been numerous infection, scratches marks and colds. There was even a period of loss of weight and appetite. The evidence of the Medical Doctors substantiate this phenomenon. It is the evidence of Dr. McIntosh which has not been disputed by Dr. Gabbay that unclean habits, diahorrea or abuse; marks which indicated that the child was not being cared for properly and/or that the person in whose care and control the child had been at least was neglectful in not noticing these marks and consulting a doctor.

In relation to the child's welfare and the psychological aspects of the Mother Dr. Doorbar, Dr. Pauline Milbourn and Dr. Barry Davidson gave their opinion of clinical examination and observation. Dr. Davidson was even suggested by the Father. Based upon their examination and clinical observation it is their opinion that there is a bond between Mother and child which is important to the child's welfare.

Dr. Davidson states:

"Marlene has bonded with her son Yitshzak Henry and will be able to offer him a warm loving and stable environment which will enhance his development. However, this is not likely to happen if she feels threatened or lives in fear of her son being seized or taken away from her. The ideal is to have both mother and father playing an integral role in the child's growth and development. In my opinion Marlene is able to meet the dependency needs

of her son Yitzhak Henry. It is important that Yitzhak be allowed to continue a warm and intimate relationship with his biological mother."

Dr. Doorbar states:

"In my opinion the child's welfare is at risk, and the home and loving family members, especially his mother, with whom he has resided since birth are the appropriate persons for custody, care and control. Marlene is an intelligent, competent caring mother who has never neglected her responsibility to her children."

Dr. Milbourn states:

"Separating him from his mother, to whom he is already attached, especially at his tender age of 22 months is a grave error and places this child at risk for developing significant emotional and behavioural problems."

Conclusion

The concept of the welfare of the child in this context is not limited to questions as to which parent can produce the best surroundings or even the best education. The father portraying himself to be an intellectual with high moral values though not appearing to be acting consistent with the latter, places tremendous emphasis on these values. But in my view it goes much further than that. The correct approach is that there is no principle or presumption that a young child is best left in the care and custody of the mother and the circumstances of each case should be considered.

One of the factors pointing towards care and control by the mother is that she has always brought up the child Yitzhak for 3/4 of his life. The boy is a child of an age where he ought to have a mother's care and a very close emotional link with his mother which should not be interrupted without risk of damage to his emotional life and character. Where very young children remained for a considerable time with the mother, the relationship of a mother and child would be difficult to displace unless the mother was unsuitable to care for the child. I am very alive to those factors. However, I am mindful of the law that there is no presumption which requires the mother qua mother to be considered as the primary caretaker in preference to the father but the mother relationship factor must only be one consideration in determining the best interest of the child. See Marlene Simpson v. Winston Condappa (1988) 25 JLR 444. In all the circumstances I regard it as highly desirable that Yitzhak should continue to be brought up by his mother. I think the father regarded this as desirable too until the intervention of the events which I previously described.

But I have no doubt on the facts of this case that the solution must be that Yitzhak must be restored to his mother with reasonable access to the father.

Finally, I would like to repeat ad nauseam that any conduct displayed by the parties which is not in the best interest of the child should be stopped.

I would accordingly allow the application and make an Order as follows:-

1. That joint custody of the child Yitzhak Alexander Henry, the

child of Marlene Nesbeth, Mother and Colin Henry, Father remain with both parents with care and control of the child YITZHAK ALEXANDER HENRY, granted to Marlene Nesbeth the Mother.

2. The Father shall have access to the child YITZHAK ALEXANDER HENRY to reside with the Father on alternate weekends between the hours of 6:00 p.m., Friday to 6:00 p.m. Monday and during the week preceding a non access weekend for two weekdays from 6:00 p.m. in the evening to midday of the second following day and on the Father's Birthday, on Father's Day or at any other time as the parties may agree.
3. The Father and the Mother shall agree in writing on not less than two (2) pediatricians who are approved to provide primary medical care to the child YITZHAK ALEXANDER HENRY.
4. Except in the case of emergency, the Father and Mother shall agree on treatment method, place, time and cost of any major medical treatment and/or care to be provided to the child YITZHAK ALEXANDER HENRY by any health professional.
5. The Mother or Father shall first notify the other in writing transmitted to the other by fax or hand delivery of the child YITZHAK ALEXANDER HENRY being taken out of Kingston and St. Andrew to stay overnight by the other party. The written notification shall disclose where the said child will be from time to time and how contact may be made.
6. The child, YITZHAK ALEXANDER HENRY shall not be taken from the jurisdiction of this Court except by written consent, which shall not be unreasonably withheld, of either the Father and/or the Mother or both parents if neither

accompanies the child, or by Order of this Court.

7. In the event of the child YITZHAK ALEXANDER HENRY remaining out of the jurisdiction of this Court in excess of the period of agreed stay abroad or permitted by Order of the Court either party shall be at liberty to seek an Order in the relevant Court of this jurisdiction for the return of the child to Jamaica.
8. Either party undertakes not to molest the other parent while the child is with that other parent.
9. Either party undertakes that the names of both parents be put on any document of record concerning the child.
10. There be no order as to costs.
11. There be liberty to apply.