

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

IN CHAMBERS

CLAIM NO. HCV. 190/03

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| BETWEEN | HANS GUNTER KRAINZ | CLAIMANT |
| A N D | NAREEN KRAINZ | DEFENDANT |
| | (NEE BECKFORD) | |

Lord Anthony Gifford, Q.C and Miss Stacy Kong Quee instructed by Gifford, Thompson & Bright for Claimant

Gordon Steer on Miss Judith Cooper instructed by Chambers, Bunny & Steer for defendant

Heard May 26, 27, 28, & July 18, 2003

DAYE, J. (Ag.)

On the 7th February, 2003 the Claimant a German national, aged 54 years old, applied to this court for the sole custody of his only child and 7 ½ years old daughter E. Krainz. This child was the off-spring of his marriage with 36 years old Jamaican wife the defendant. The parties were married in

Jamaica on the 11th November, 1987. Their daughter was born in Honnover, Germany on the 20th November, 1995

This application was made in this court because the child was brought to Jamaica by her mother from Germany where they resided without the knowledge or consent of the claimant. In fact the defendant's mother was acting in breach a German custody order dated September 17, 2002 which awarded joint custody to the parents and assigned the right to determine the child place of abode to the father. This conduct of the defendant mother of unilaterally depriving the father of custody by unlawfully taking their daughter out of the jurisdiction of Germany is commonly described as "parental abduction" or "parental kidnapping" (see The International Abduction of Children by a parent. Memorandum by Government of Canada to meeting of Commonwealth Low Ministries, August 1977) also, the defendant mother conduct is considered wrongful and in breach of article 3(a) and 3(b) of The Convention of The Civil Aspects of International Child Abduction 1980 to which Germany is party but Jamaica is not.

It is rule of a private international law that a foreign judgement is not recognised and enforceable in another jurisdiction unless it is final and binding and not subject to variation by the court that made it. Custody orders generally are not final. It is considered that in the interest of the child such

orders are always subject to variation by the court who made it. These orders are only given “grave consideration” between different jurisdiction on the principle of comity. It is the duty of the judge in a foreign jurisdiction to form an independent judgement of the merits of a foreign custody order, taking into account the welfare of the child as the paramount consideration (McKee vs. McKee [1951] ALL. ER.942 of 948 para. E-H)

This rule of private international law can only be amended by a different jurisdiction by legislation or treaty (e.g. “**The Uniform Child Custody Jurisdiction Act**” U.S.A. 1968, “**The Extra-Provincial Orders Enforcement Act**”, Canada, 1974; **The Statute of the Hague Conferences on Private International Law, 1955**).

I accept that in applications for custody by a parent under **The Children (Guardian and Custody) Act** to this Court that the welfare of the child is “the first and paramount consideration” (sec. 17 & 18). The welfare of the child should be the primary focus and in order to determine that question, the Court should take into consideration the conduct of the parties (per **Harrison, J.A.** in **Forsythe v Jones** S.C.C.A 49/99 delivered April 6, 2001 at p.7 para. 2). In custody cases, judgment of the character of the competing claimants is fundamental to the decision (per Latham C.J. **Lovell v. Lovell** (1950) 81 C.L.R.513. It is for this reason that I am of the view that

character evidence is admissible on behalf of either party in a custody hearing to assess the fitness as parent. As a result the Court allowed all the affidavit evidence on the conduct of both parents during the trial. I caution myself to place limited weight on any such affidavit which is (a) based on hearsay evidence and (b) was not tested in cross-examination because the deponents were out of the jurisdiction and could not be present.

There is guidance from the Court of Appeal as to what constitutes the welfare of the child. **Harrison, J.A. in Forsythe v Jones (supra.)** said as follows:

“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 material surroundings.”

Further Harrison J.A. approved Smith’s J.A. views of the meaning of welfare in **Clarke v. Carey** (1971) 18 W.I.R. 70, (1971) 12 J.L.R. 637 where he quoted **Lindley, L.J. In Re McGarth** (infant) thus: “welfare of a child is not to be measured by money, nor by physical comfort only. The word welfare must be taken in its widest sense.”

And further where Smith J.A. himself said:

...a well to-do father can[not] 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 is better able to provide for the child's material welfare.....”

The dicta of Lord McDermont in J. v C. [1969] 1 All E.R. at 826

which was relied on in the written submissions of the claimant on the meaning of welfare is instructive and is accepted. In the instant hearing, E. was a child of the marriage and the same principle is applied to her mother as to the mother of the child born outside of marriage. The relative material and financial advantage of the father Hans Gunter Krainz vis á vis the mother was a factor for consideration relating to the welfare of E. at the time of hearing.

Another factor presented to the Court relating to the child's welfare is that she is of tender years and a female and this favours decision of custody to the mother (i.e. “mother factor”) Nareen Krainz. I accept Butler Sloss L.J's pronouncement on this consideration in the passages below in Re S. (A minor) (Custody) [1991] F.L.R., 388 at 399. He said as follows;

“there are dicta of this Court to the effect that it is likely that a young child, particularly perhaps a little girl would be with the mother, but that is subject to the overriding factor that of the welfare of the child is the paramount consideration.”

And he said further at para. 14:

“I would add that it is natural for young children to be with mothers, but, where it is a dispute, it is a consideration but not a presumption.”

The judge’s final opinion was that age and sex of the child are merely matters for consideration to be taken into account. This opinion was followed by Walker J.A. in **Buckeridge v Shaw** R.M.C.A. 5/98 at p. 6 para. 3 delivered June 30, 1999.

This Court had to consider how to deal with allegation of sexual abuse or sexual misconduct by one parent against another in a custody hearing. This was raised and strenuously relied on by the mother Nareen Krainz and which Hans Gunter Krainz intensely denied and challenged. In **M. v M.F.C 88/003** Mason C.J of the High Court of Australia delivered the following opinions:

- (a) “in consideration of allegation of sexual abuse the court should not make a finding that the allegation is true unless the court is so satisfied according to the civil standard of proof;
- (b) It does not follow that if an allegation of sexual abuse is not made out: that conclusion determines the wider issue which confronts the court when it is called upon is decide what is the best interest of the child;

- (c) “In resolving the wider issue the court must determine whether on the evidence there is a risk of sexual abuse occurring if custody on access be granted and assessing the magnitude of that risk”
- (d) “.....the test is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse.”

I have examined the affidavits of the claimant and the defendant as well as those submitted on their behalf. I have reviewed the medical reports, the social welfare reports, and the Court’s order which were all contained in the judge’s bundle of 180 pages. I have also taken the written submissions of both counsel into account. Having done so, my findings on the conduct character, means of the parents and their relationship to the child are stated below:

The Father Hans Gunter Krainz

Personality

- (a) He is entrepreneurial and has put out great effort to engage in business. In pursuit of this interest he has travelled and lived in the Caribbean including Jamaica for at least 9 years. He socializes and interacts freely with the Caribbean nationals. He is

familiar with the Caribbean culture. He has married a Caribbean national. I do not find him to be a racist as alleged.

- (b) He loves his daughter very much with whom he has bonded very well (para. 8 of affidavit of Mr. Samuel Commissiong). I do not find the claimant's love for his daughter abnormal. Therefore I do not rely on any aspect of the affidavit of Carla Todescston Pellis, Nicola Grote or on Paula Eleanor David to that effect. The opinion expressed by these witnesses I gave little weight because they were based on either personal, cultural or individual bias.
- (c) He is self-willed and has a strong natural affinity to his culture as a German. This is reflected in his views of parenting and plans and arrangements for his daughter's education and social development. He plans and regulates his daughter's life unilaterally and to the exclusion of the child's mother, the defendant. The domineering influence of his culture and heritage is evident from:
- (i) His first affidavit dated 6th February, 2003 where he states that E's extra curricula activities include violin, flute and piano lessons, and horse back riding. (para. 18);

- (ii) His affidavit of the 14th March, 2003 that Ebony is happy and well adjusted in Germany and have a good relationship with her classmates and teachers and participates in violin, piano, flute and horse back riding lessons.
- (iii) His evidence on 22nd May, 2003 that he wants to assist in developing his daughter's talent in music-playing the violin and piano and doing horse back riding.
- (d) The claimant is a father who is interested in his daughter's welfare and development and has presently provided a social infrastructure for his child in Germany.

Conduct

(a) **Financial**

Though the claimant has demonstrated an effort and willingness to engage in private business as a photographer, ice-cream operator and marketing consultant there is no indication that he was successful in these ventures. Thus, there is a question about his financial stability. This is a relevant factor to take into conduct in assessing whether he can provide a stable, long term environment for his child. He admits in cross-examination that

he had to close down the business in St. Vincent because he did not have enough money to live properly on. He also left St. Vincent having a credit card debt of US\$523.00. The most that could be said about his business in Martinique was that it started well. When he left Martinique abruptly with his daughter for Germany on the 3rd January, 2001 his employee was to receive two cheques for contracts. He was unable to state the value of these cheques. No financial statement is available about his present marketing contracts in Germany.

(b) **Sexual Abuse**

The allegation that the claimant behave sexually inappropriately towards his daughter is unsupported by any independent evidence. Dr. Welter's medical reports of February 25, and March 8, 2003 does not reveal any evidence that the child was in any way sexual molested. The probation officer, Miss Keisha Rodriques, submitted report dated May 27, 2003 which the court requested at the commencement of the trial. In her interview with E. the child said that her father did not touch her in any

inappropriate way. I note this officer's opinion that the child was reserved and might not speak to a stranger about such behaviour.

I have to decide whether E faces a risk of sexual molestation or of any other sexual misconduct that exposes her to danger. This is so because this mother complains that father "wet kiss" his young daughter as a practice. This mother further complains her daughter sleeps in her father's room alone and in his bed where sometimes even she herself is excluded from the bedroom. This latter complaint has to be viewed in the context that in Germany the mother and father have been living apart from each other. Even though they lived in the same house at one point they lived in separate bedrooms. This is a factor to take into account if the mother is excluded from her husband's bedroom when he is alone with his child.

However, there is some risk that if a young girl is left alone to grow with her father and sleep with him alone in his bed that the father could sexually molest her if he has such a propensity. There is no evidence of such a propensity in their case. Nevertheless, the Court sought to ensure that any possible risk is minimized in the best interest of the child. I direct myself to assess the risk in this trial. I did not find the risk to be of such a degree that would affect the claimant's application for sole custody of his child.

(c). **Response to Court Orders**

The claimant has shown that he is capable and would breach a Court Order, or the law in order to satisfy his personal benefit. He was tested at length in cross-examination by Counsel for the defendant. I found his evidence to be evasive and contradictory on the following aspects:

- (i) On the 3rd June, 2001 he took his daughter from Martinique to Germany without the consent of the mother. He did this in breach of an order of the Martinique Court dated June 21, 2001 that the child should reside with her mother and he should not take her out the jurisdiction.
- (ii) That he took E from Martinique because he recently discovered that she had physical problem with her hearing;
- (iii) That he told his wife that he was taking E to Germany and she agreed;
- (iv) That he left money to take care of his wife and home in Martinique in his absence;
- (v) That the child does not speak English fluently.

The claimant is found wanting in credibility in these areas, though

relevant to the issue of custody it is not decisive of the issue. It is the welfare of E that is the paramount consideration.

The Mother Nareen Krainz (Nee Beckford)

Personality

- (1) She is self-willed, hard working, a keen business partner and loves E and has bonded with her. (para. 4 and 8 affidavit of Samuel Commissioning is accepted)
- (2) She is intelligent, industrious and self motivated and talented. (Admission of Claimant and para. 12 and 13 of affidavit of Paula Eleanor David accepted by Court)
- (3) The defendant is a loving and caring and a good mother who has provided religious guidance for her daughter.

The claimant admits in cross-examination that:

“My wife is a good mother, in between birth of E and June 2001 my wife has always looked after the child.”

- (4) She is a proud Jamaican female who accepts her culture and heritage and the Jamaica method disciplining a child (affidavit of Samuel Commissioning para. 40 accepted by Court)
- (5) She is assertive about taking a positive role in the education and social development of the child.

Conduct

(a) Response to Court Order

The defendant as with the claimant has breached a court order, viz of Germany dated 17th September, 2002 giving joint custody to herself and her husband. Her appeal of this order was dismissed, so it appears she too would defy the law to satisfy her personal interest. I am mindful that a court should be cautious to award custody order. The reason for this is that the Court may have seen as rewarding the party for their wrongful act. This could undermine the law locally as well as internationally. However, the court's first principle in custody hearings is the welfare of the child and the conduct of the parent is viewed in this context.

(b) Emotional Stability

The defendant is not emotionally unstable or hysterical as suggested is cross-examination. Her behaviour is consistent with someone who is labouring under stress. Her anxiety may have clouded her interpretation of the close relationship between E and her father. She did use deceit to take away E from Germany. However, I do not find her by virtue of that to be deceitful and

malicious. She was unduly restricted in her access to E. in Germany.

(c) Means

She has made provision for the child's schooling and residence in Kingston, Jamaica. These are recent as she only returned to Jamaica in December 2002. She does not yet have steady employment or income, but she is resourceful and a qualified and experienced translator and has the ability to improve her life and the child's welfare in a short time. I also accept Samuel Commissioning affidavit of his assessment of the defendant to this effect.

The Child

E is intelligent, talented, reserved and loves each parent equally. She has no preference to living in Jamaica or Germany. She is socially adjusted to her new home and school. I accept the Probation Officer's finding on these aspects. She is alert and is aware and affected by her parents conflict over her custody. The opportunities for her to explore her talents in music and horse back riding are available in Jamaica equally as in Germany.

There is more weight in favour of E. a 7 year female child remaining in the custody of her natural mother than her father, not by way of

presumption, but by the practical realities that exist. Her father although he works from home relies on his 81 year old mother to assist in taking care socially of E. Commendable though this may be this cannot be a suitable substitute for a natural mother who loves her child and whom the child loves and has grown up with. I do not regard the mother's six month separation from her daughter in Martinique as detrimental.

The conflict between E's mother and father is rooted in differences of personality and socio-cultural upbringing with biases and prejudices. I accept Samuel ComMISSONG affidavit to this effect. He identifies this as the problem in the relationship between the defendant and her husband in paragraph 4 of his affidavit it.

It is in the best interest of the child to remain in her mother's custody in Jamaica. If sole custody is granted to the claimant then there would be insurmountable obstacles to access by the mother as a warrant is out for her arrest in Germany. Also the mother's immigration status in Germany will change as the claimant is filing for divorce in Germany. She was able to live and work in Germany only because she was married to a German. Those circumstances mean that she would be cut off from her daughter, notwithstanding that the claimant has promised to help her immigration status. To allow this would not be in the child's best interest and a violation

of E's right to family. (**The Convention on the Rights of Child 1989**). I am of the view, that this was the dominant factor that influenced the claimant to take E from Martinique to Germany article 2a I find that the claimant is more likely to use his dominant position as a German national living in Germany to his advantage and to his wife's manifest disadvantage.

The converse is not exactly the same for the claimant. There is no immigration restriction on him visiting Jamaica and seeing E. There will have to be some limitations as to when and where he sees his child as he has in the past, breached a custody order. Measures would have to be put in place to put a stop to a repetition of this behaviour by either parent. On a balance of probability he will not be under such a disadvantage in Jamaica as his wife would be in Germany.

In view of the fact that the claimant Hans Gunter Krainz had joint custody of E in Germany and more importantly since he has shown a keen interest in his child living with him the award of custody will reflect this. In this regard I am guided by **Omrod L.J's dicta in Caffell v Caffell [1984]** F.L.R p. 171 para where he said

“.....there are cases in which the party that has not gotten the day to day control of the children is anxious to preserve as much of his or her contact with them as is possible in the new circumstances where the parties have separated and there is good deal to be said in recognising the responsibility and concern of the father

in this case by making some order which shows that the court recognise that he is anxious to take an active part in their upbringing. Therefore, a joint custody order meets his problem...”

Accordingly, the following is the court’s decision:

- (a) Joint custody of the child granted to mother Nareen Krainz, nee Beckford and father Hans Gunter Krainz;
- (b) Care and control of child granted to mother Nareen Krainz;
- (c) Liberal access granted to father Hans Gunter Krainz while in Jamaica on terms to be agreed by the parties.