



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE HIGH COURT CIVIL DIVISION

CLAIM NO HCV 05032 OF 2008

BETWEEN	GRACE LAYNE	CLAIMANT
AND	BARRINGTON LAYNE	DEFENDANT

Mr. Gordon Steer and Miss Deborah Dowding instructed by Chambers  
Bunny and Steer for the Claimant

Mrs. Jacqueline Samuels-Brown Q.C, and Mrs. Tameka Jordon for the  
Defendant

**Application for Custody and Maintenance**

**Heard: October 5, 2010 and April 28, 2011**

**McDonald J**

The claimant Mrs. Layne filed a Fixed Date Claim Form and Affidavit in support claiming sole custody of the two children of the marriage, Taliah and Jayden Layne, as well as maintenance for the children and herself. Specifically she seeks the following orders in detail:

- (1) The claimant is granted sole custody, care and control of Taliah Layne born on the 28<sup>th</sup> January 1998 and Jayden Layne born on the 13<sup>th</sup> December 2004.

- (2) The defendant be granted access to the relevant children on alternate weekends and on half of all major school holidays;
- (3) The defendant contributes the of sum of \$150,000 per month for the maintenance of the relevant children in addition to all educational, medical, optical, dental and travel expenses reasonably incurred on behalf of the said children;
- (4) The defendant pays the sum \$50,000 per month for maintenance of wife.

Mr. Layne in his affidavit in response has asked for joint custody of the children with care and control of the children to him.

The children (Guardianship and Custody) Act empowers the court to make custody orders on the application of either parent and sets out the 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, . . ."

Section 18 of the Children (Guardianship and Custody) Act provides that the welfare of the child is to be the first and paramount consideration in deciding the question of the custody or upbringing of a child.

This definition of the term "welfare" is well defined by Lindley LJ in In re McGrath (1893) Ch 143 at 148 which reads:-

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

In clarifying how this principle is to be applied the Court of Appeal in Jamaica in the case of Dennis Forsythe v Idealin Jones SCCA No. 409 of 1999 delivered on the 6<sup>th</sup> April 2001 set out the following at page 8 of the judgment Harrison JA

"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."

## **The History and Current Arrangements**

### **Father's Role**

The children currently live in the same house as the parties. Mr. Layne is a businessman Pharmacist and majority shareholder in Laynes Pharmacy Ltd. His two siblings are also shareholders but do not physically work in the business. It is he who operates the Pharmacy. Mrs. Layne since July 2010 has been employed as a real estate agent.

It is Mr. Layne's unchallenged evidence that he is the one responsible for dropping and collecting the children from school.

He in his witness statement treated as his evidence in chief he stated that when he takes the children home from school in the afternoon, he stays with them, supervising their homework, prepares their evening meal and interacts with them until just before 6pm when he returns to the Pharmacy to take up duties until 9pm. When he leaves them at approximately 6pm, he has a helper there to supervise them.

He said that because of Mr. Layne's unavailability to assist in taking sufficient care of the children, he has had to make alternative arrangements including employing extra help to supervise them in the evenings until he returns home later.

In cross-examination he said that it was between January and April 2008 that he would prepare the children's evening meals, before he employed Deka.

In cross-examination Mr. Layne stated that on Mondays, Wednesdays and Thursdays he gets home after 3pm or a little later depending on whether the children have extra curricular activities. He said that most of the times he remains at home for the rest of the day.

He said that these working hours commenced around two years from Taliah started grade 5, and that he did so specifically to help her preparations for GSAT.

Mr. Layne said that on Tuesdays and Fridays he works at the Pharmacy for the entire day until 9pm, and gets home at 9:30p.m or something to 10. He is present when the Pharmacy opens and closes and he makes arrangements for the children to be taken home from school.

The children stay with Deka until Mrs. Layne comes home. Deka, Mr. Layne's niece the assistant helper works everyday Monday to Friday and has been there since 2008.

Lurline Reid the helper works Mondays, Wednesdays and Fridays and has been employed from April 2002 to the present. She washes, irons and cleans the house. She prepares the children's meals chiefly Jayden. She has been there from he was a baby.

She spends time with him, reading, playing with his toys with him, and playing computer games with him.

Mr. Layne testified that he works every Saturday, and Sunday. The children are in Mrs. Layne's care during this time and sometimes with members of his family if Mrs. Layne is not there.

The opening hours of the Pharmacy are 9am to 9pm Monday to Saturday and 10am to 6pm on Sundays.

He stated that although he works every other Saturday and Sunday, sometimes emergencies arise and he has to fill in on a Saturday i.e. not on his assigned Saturday.

On the weeks when the Senior Assistant Pharmacist is working on the 9 – 6 shift he would lock up the Pharmacy and get home after 9pm.

It is clear from Mr. Layne's evidence that he has long working hours, but he has put arrangements in place for the care of the children in his absence. There is no complaint by anyone concerning the care given by the helper and Deka of the children.

However this arrangement incorporates Mrs. Layne's presence and input in the care of the children as she currently resides in the house.

To illustrate this, it is Mr. Layne's evidence that the mother makes breakfast every morning for the children Monday to Friday, and that he expects that she cooks for the children on the Saturdays and Sundays when he goes to work and the children are with her. In addition on Tuesday and when he is at work Deka leaves the children with Mrs. Layne once she comes home from work.

The court has not been informed what arrangements Mr. Layne intends to put in place were Mrs. Layne to leave the matrimonial home and the children remain in his care and control.

Defence Counsel submitted that Mrs. Layne in her custody documents gave no hint of her intention or desire to remove herself from the occupation of the family home, nor did she hint to the Caseworker that she had any plans or desire to set up a separate household.

It was also submitted that Mrs. Layne filed a claim for the division of the family property on the same day as the claim for custody, but did not serve the property claim until after the conclusion of evidence in the custody care.

This omission to render full disclosure, and this ploy of serving the property claim after the conclusion of evidence in the custody-care has according to Defence Counsel deprived the defendant of the opportunity to cross-examine the claimant in these matters.

Mrs. Layne has clearly stated at paragraph 6 of her affidavit dated 14<sup>th</sup> October 2008 in support of the Fixed Date Claim Form that she is uncomfortable with the situation of defendant, herself and the children residing under the same roof that she wishes to remove from the matrimonial home with the children and will need assistance from the defendant. At paragraph 9, she itemizes her proposed expenses for the children and herself on a monthly basis.

In the social Enquiry Report dated 11<sup>th</sup> December 2009 under the section dealing with interview with mother the Caseworker states:-

“as it stands Mrs. Layne said the family resides under the same roof and she has no intention of moving out as she is not financially able. She further revealed the following: she is now employed at Tara Courier Service and earns approximately \$16,000 per fortnight. She only buys food for herself and pays her own telephone bill. Mr. Layne pays all the household bills (including children’s school fees).”

Mrs. Layne application for custody of the children and for maintenance for them and herself is indicative of her intention to set up a separate household.

In my view it would be incorrect to hold that she gave the impression that the current living arrangements were to continue indefinitely and that she had no intention to disturb them.

It is Mrs. Layne's evidence at paragraph 15 of her affidavit that:-

"the children have always lived under my direct care and control and it would be in their best interest if care and control were granted to me with reasonable access to my husband."

At paragraph 16 she states:-

"that my husband and I are unable to communicate effectively as to the needs of the children and it would be in their interest if custody, is granted to me."

Mrs. Layne in her affidavit has not provided the court with any details as to the current arrangements relative to the children, nor has she disclosed her proposed arrangements for them should she be granted custody.

The court therefore has to examine her evidence in cross-examination to ascertain what if any "arrangements" exist or are contemplated.

She gave evidence of being currently employed as a real estate agent since July 2010, and that her time is organized by her. She does not work long hours, and on average she gets home by six but sometimes between 7:30 and 8pm.



She has proffered no evidence as to the arrangements she would put in place for the care of the children in her absence.

Mrs. Layne states that Mr. Layne takes both children to school and picks them up or arranges for them to be picked up.

She has failed to address the issue of the children's transportation should she be granted care and control of them.

In addition there is no evidence from her in respect to her proposed change of residence and facilities for the children and how the children will be cared for in her absence.

### **Claimant's Conduct**

The uncontroverted evidence before the court is that prior to the parties separation, Mrs. Layne used to pick up Taliah from school in the evenings. Interestingly and this has not been denied, Mr. Layne disclosed in his interview to the Caseworker that while Mrs. Layne worked with him at the Pharmacy, he had to beg her to pick the child up in the evenings, and if she did not he had to do it.

It is the claimant's evidence that most times she would take Jayden to pre-school.

Since Jayden has started Ardenne Preparatory, 3 years now, she has not taken him to school.

Mrs. Layne's employment at the Pharmacy was terminated in January 2008. The motor vehicle she drove was sold by Mr. Layne in

September 2008, approximately four months after she had stopped driving it.

Between January 2008 and August 2008 he was not aware of her being employed.

It is Mr. Layne's evidence that Mrs. Layne did not discuss with him her intention to stop driving the car. He stated that he asked her for the keys because the vehicle was not being driven and he had to sell it as he could not afford to maintain it or continue to pay the mortgage on it.

It is Mrs. Layne's evidence that she now takes public transportation, but in my view this is no excuse for her failure to attend Taliah's school to meet her teacher and enquire about her progress on her own account.

The same would apply to her visiting Jayden's school – although the Principal told the Caseworker in interview that she had seen her once. There is no evidence that she assists the children with their homework at anytime or exposes and/or stimulates them with any educational activities.

In cross-examination, an occasion in July 2010 was highlighted when she left the children at a friend's house in order to attend a social function related to real estate business. She admitted to collecting them late at 11 O'clock, although she knew Taliah had a diagnostic

test at school the next day which would determine the grade in which she would be placed and which was pivotal to her high school career.

It is Mrs. Layne evidence that as Taliah had a test the next day at her new school, it would have been best to have her at home.

She said that she could have arranged not to attend this particular event. She had initially arranged for Mr. Layne's niece to stay with the children but she did not show up and so she had to seek alternative arrangements. She said that she sought no other alternative but to leave them with her friend.

I am of the view that even if Mrs. Layne felt compelled to attend the social for whatever reasons, it was in her control to returned for the children at an earlier time. It appears that she put her own pursuits first over that of the children.

This particular behaviour is also echoed by Taliah in her interview with the Caseworker where she sites incident where her mother keeps her out late at nights which prevents her from doing her homework.

(See page 5 of the Social Enquiry Report).

The claimant has not addressed this allegation.

Taliah in her interview with the Caseworker stated that her mother was in the habit of beating Jayden for simple things, and that she does not really like her as she used to beat her. She further stated that her father uses other disciplinary methods, for example he would deny

them certain privileges they enjoy. Mr. Layne also disclosed to the Caseworker that Mrs. Layne beats Jayden for simple things such as not picking up his toys after he has used them.

The claimant has not addressed this allegation of her beating the children.

It is the claimant's evidence that Taliah is of dark complexion. In cross-examination the claimant admitted to repeatedly referring to Jayden as her favourite son and as her browning sometimes. When asked if this had any effect on Taliah she said no; when asked what Taliah would say, she said Taliah would say "stop calling him your favourite son, is only are son you have."

The claimant in her interview with the Caseworker revealed that "she does not share a good relationship with her daughter (child is closer to father). She said this might be due to the fact that Mr. Layne demoralizes her in front of child. However she has a better bond with her son. Nonetheless she would want to have her children in her care."

It is clear that Jayden is her favourite and that this show of favouritism can potentially create resentment and jealousy between the children and feelings of inferiority and reduced self esteem.

Mrs. Layne although admitting that she is employed presently and prior to this had been employed to Tara Courier Service at paragraph

14 of her affidavit acknowledges that Mr. Layne has been meeting all their expenses yet at paragraph 17 of her affidavit she states that she has no savings as when she did work the same went to offset the family's expenses.

It begs the question, what family expense, if all the expenses on her own admission were taken care of by Mr. Layne.

This is a patent inconsistency and I find that she is not being truthful when she states that when she did work her money went to offset the family's expenses. This is further borne out when she admits to the Caseworker that "she only buys food for herself and pays her own telephone bill", Mr. Layne pays all the household bills (including children's school fees).

It is my view that Mrs. Layne has unresolved emotional issues which have affected her relations with her husband.

In cross-examination she said that she recalls writing to Mr. Layne and telling him that she resented her mother's restrictions and so now at the time when she was married to him, each time he told her to do a thing in a particular way "the voices in my head are playing mother and me tapes".

Reference was also made to another letter written by the claimant to the defendant in which she admitted saying:- "I have been

misinterpreting your action to mean that you think I am not good enough and for that I resent you.”

It is the defendant’s evidence that the claimant fixes breakfast for the children and it is normal for them to sleep in her room sometimes.

Dr. Pauline Melbourn in her psychiatric evaluation of Taliah dated May 2009 said that “she had matured since her last visit with me, remains very attached to the father, but her relationship with the mother has strengthened. ...Taliah has reiterated that she wishes to live with her father and her little brother and depend on telephone conversation and weekend visits to keep in touch with her mother.”

In relation to Jayden Dr. Milbourn records his indirect but nonetheless desire to an expectation that he will live with his father.

“He indicated that he would feel sad if his parents were to live in different houses but stated that ‘I will miss Mommy, I will visit her, go to her house and she will be glad to see me,’” suggesting a preference for remaining with father and sister.

### **Defendant’s Conduct**

Some aspects of this caption have already been covered under the heading of history and current arrangements.

There is no dispute that it is Mr. Layne who assists the children with their school work.

The Principal of Ardenne Preparatory School indicates that Mr. Layne is the parent who appears to be most active in Jayden's life as he takes him to and from school everyday.

She has only seen the mother once when she came to the school and she explained to her that she does not have a car and as a result she is not able to attend the school when called.

The Principal confirms that it is Mr. Layne who responds to the teacher's call/invitation to school.

It is also undisputed that it is Mr. Layne who interacts with the children's school regarding their progress, development and welfare and who arranges and ensures that their extra-curricular activities are fulfilled.

It is the father who monitors the children health and ensures that they get medical attention when necessary. It is he who meets all the expenses regarding the maintenance of the children.

He arranges and puts it in place and is responsible for the domestic arrangements for the assistance in the care of the children. He arranges for persons to look after the children.

Mr. Layne is responsible for dropping and collecting the children from school or making arrangements for same.

Mrs. Layne conceded that Mr. Layne is a good father who takes care of the children's needs both financially and educationally.

The defendant is seeking an order for joint custody, with care and control being awarded to him.

It is Mrs. Layne's evidence that herself and Mr. Layne cannot communicate about personal matters nor can they communicate about the children.

In her interview with the Caseworker she said that most of their quarrels surround the 'proper' care of the children which he accuses her of not doing effectively.

It is the Caseworker's opinion contained in her report dated 11<sup>th</sup> December 2009 that based on investigation there seems to be a lot of animosity between the parties which is going to take a while to be straightened out.

In her report at page 7 she said "there is no doubt that both parents love their children but it is the worker's view that they are both dealing with the situation in a rather destructive manner which can be detrimental to the children. They blame each other for their shortcomings in the present situation of the children."

Dr. Milbourn's updated report dated March 2010 indicates that the relationship between Taliah and her mother has improved. Taliah said that her mother combs her hair now and helps her to wind down in the evenings when she is hyperactive and cannot fall asleep.



Dr. Milbourn's report dated May 2009 provides the court with useful information concerning the relationship between the parties through the eyes of Taliah as gleaned at her initial interview. Taliah said that her parents are stubborn, they act as if each other is invisible and they need some good counselling. She also spoke of her father's temper, that he has no respect for her mother and her mother's apparent unwillingness/inability to get a job to assist with the financial challenges within the home.

She was also angry at her mother who she felt was too offhand and could not even try to understand her own daughter's worries and fears. She has wishes for "peace in the house" and that her parents would begin to "talk to each other".

In Taliah's last visit in April 2009, she indicated to Dr. Milbourn that the tension in the home is now less and that her parents had begin to speak with each other occasionally. Even if the court accepts this as accurate this aspect of the relationship between the parties was not explored at the time of this hearing.

It is Mr. Layne who is seeking joint custody and he has not stated that the communication difficulties that plagued the parties had in fact improved.

The claimant's attorney submitted that due to the passage of time the psychologists report and intervening events have made the reports and recommendations redundant and in need of further review.

The court is well aware that it not bound to accept the opinion of an expert but is entitled to do so if so satisfied and act upon, especially in light of the absence of credible evidence to the contrary.

In this case the court has to work with what it has. In the absence of an updated report, and/or vica voce evidence concerning this issue the court has not been placed in a position to say with confidence that an order for joint custody would be workable.

It is accepted law that the court's will not grant joint custody when it would be unworkable given the fact that the parties cannot get along.

The concept was encapsulated in a quote from the full court of the Family Court of Australia in the Marriage of Forter (1997) FLC 90-281 at 76, 511 where it was stated:-

"The best interest of a child and the full promotion of his welfare are not generally served by orders for joint custody unless his parents demonstrated that degree of maturity and such an ability to communicate and cooperate with each other as to give the court some confidence that the order for joint custody will be workable ..."

This view was captured in **Caffell v Caffel 1984 FLR 169** where it was stated "in many cases joint custody of a child should only be

ordered if there was a reasonable prospect that the parents would co-operate.”

In **Fenton v Fenton FD 1797/2003** delivered on 23<sup>rd</sup> January 2006 Brooks J set out what he considered to be necessary considerations for the court to consider when granting joint custody – at page 4 of his judgment he said:

“Parties who have joint custody of a child should be able to discuss together the welfare of the child in a manner which is best conducive to that welfare. In that scenario, given the inability or unwillingness of Mr. and Mrs. Fenton to work harmoniously for the child’s benefit despite their personal differences, I find that it is in the best interest of the child that sole custody should be granted to Mrs. Fenton.”

Neither party has addressed the court on the specific arrangements they would put in place if granted care and control of the children in a situation where they are no longer living together. This is paramount, given that it is the welfare of the children that is the court’s primary consideration. It is not open to the court to speculate.

Having taken everything into consideration, the claimant has not satisfied me on a balance of probability that she ought to be granted care and custody of the children. Consequently her application for maintenance of the children fails.

Defendant has also failed to set out the specific arrangements he would put in place if he was granted care and custody of the children in the claimant’s absence from the house.

In the circumstances, in the light of the fact that there is no information before the court that the claimant has removed from the home, or her removal is imminent or that she has stopped caring for the children and that her removal appears to be dependant on her financial ability and taking into account the court's order on the maintenance application for herself and that the application for division of matrimonial property is pending it is the order of the court that the status quo remains.

**Application for Wife (Claimant)**

It is the defendant's contention that the claimant is not entitled to maintenance for herself. The parties are married and there is no evidence, despite their separation, that any application has been made to the court pursuant to the Matrimonial Causes Act for dissolution of marriage that would involve the jurisdiction of the Matrimonial Causes Act and the Maintenance Act thereby legally establishing any jurisdictional basis for the claimant to apply for maintenance as a wife.

The court has not had the benefit of the claimant's response in law to this submission. In determining this issue the court has to examine section 3 of the Maintenance Act which reads:-

"(1) Subject to subsection (2), a person may apply to the Resident Magistrate's Court in the parish in which the person resides, or, as the case maybe, to the Family Court for a maintenance order in accordance with the provisions of this Act.

(2) In any case where an application is made for the division of property under the Property (Rights of Spouses) Act, the court hearing the proceedings under the Property (Rights of Spouses) Act may make a maintenance order in accordance with the provisions of this Act."

Court as mentioned in section 3(2) is referable to 'Court' as defined under section 2 of the Act which means, Resident Magistrate, Judge or court referred to in section 3.

I interpret this to mean that the Resident Magistrate Court and Family Court has jurisdiction to hear an application for maintenance when hearing an application under the Property (Rights of Spouses) Act. Section 20 of the Matrimonial Causes Act reads:-

"(1) on any **decree for dissolution of marriage**, the court may, if it thinks fit (emphasis added).

- (a) order a spouse (hereinafter in this section referred to as the contributing spouse) to secure to the other spouse (hereinafter in this section referred to as the dependant spouse) to the satisfaction of the court –
  - (i) such gross sum of money; or
  - (ii) such annual sum of money for any term not exceeding the life of the dependant spouse, having regard to the means of the dependant spouse, the ability of the contributing spouse and to all the circumstances of the case, the court thinks reasonable ...

And on any **petition for dissolution of marriage** the court shall have power to make interim orders for such payments of money to the dependant spouse as the court think reasonable.

(2) In any such case **aforesaid** the court may, if it thinks fit, by order, either in addition to or instead of an order under section (1), direct the contributing spouse to pay to the dependant spouse during their joint lives such monthly or weekly sum for the maintenance and support of the dependant spouse as the court may think reasonable. (Emphasis added)

(4) An order under subsection (1) (a) or (2) shall have regard to the matters specified in section 14(4) of the Maintenance Act."

Based on the above I find that the Supreme Court has no jurisdiction under the Matrimonial Causes Act to grant an application for maintenance for a wife unless a decree for dissolution of marriage has been made or applied for.

I find that the Maintenance Act of 2005 gives jurisdiction only to a Resident Magistrate's judge save and except where there is a decree for dissolution of marriage or application for same a Judge of the Supreme Court, upon an application, may order maintenance.

In the event that I am incorrect in so finding, I will go on to consider what Mrs. Layne's position would be if the Maintenance Act were applicable to these proceedings.

Under the Maintenance Act, a wife is not entitled to maintenance as of right. She has to establish on a balance of probabilities her need for maintenance based on the factors as set out in section 14(4) of the Maintenance Act. The burden is on her to do so.

The claimant seeks an order of the court that the defendant pay her \$50,000 per month for maintenance.

The claimant on her admission has throughout the majority of the marriage been gainfully employed and at the time of trial is employed.

Since the separation she has availed herself of further training.

It is undisputed that the defendant alone pays all the household bills including the children expenses.

The claimant in her evidence in chief states that she has no savings and when she did work the same went to offset the family expenses.

This evidence is contradicted by what she is alleged to have told the Caseworker in her interview in December 2009 at page 4 of the report.

She live free in the house, she has given no evidence as to her current income and expenses. At paragraph 9 of her affidavit she lists the proposed expenses for the children and herself on a monthly basis but has not broken down what her individual expenses would be.

There is no medical or physical disability that would prevent the claimant from finding or sustaining employment.

There is no evidence of the defendant's desire for the claimant to remain at home to exclusively attend to the children's need.

The claimant has not stated that she personally is in need and is unable to meet these needs.

Mrs. Layne has since the hearing of this application served on the defendant a claim for division of matrimonial property. This is a factor which the court would have to consider in relation to her financial means and resources under section 14(4)(b) of the Act which speaks to the assets and means that the defendant and the respondent are likely to have in the future.

Based on the foregoing I find that the claimant has not put the court in a position to make an order nor has she provided the court with material on which to base or grant her application.

### **Custody Application**

- (1) Status quo in relation to children to remain
- (2) Application for maintenance of children fails/refused.
- (3) Application for wife's maintenance refused.

Leave to appeal by defendant in respect of order 1