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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. M03930/2007

BETWEEN BERNT LIDSTROM PETITIONER
AND ERMA R. M. VITAL LIDSTROM RESPONDENT

Mr. Bert Samuels and Ms. Jacqueline Wilcott instructed by Knight Junor and Samuels for Petitioner

Mr. Gordon Steer instructed by Bunny Chambers and Steer for the Respondent

Heard: March 19, May 4, June 8, and July 2, 2009

Custody – Welfare of the Child – Section 18 of
the Children (Guardianship and Custody) Act

Straw J

The petitioner, Mr. Bernt Lidstrom and the respondent, Mrs. Erma Lidstrom were married on May 5, 1999 and the marriage produced one child, a son, Bernt Sebastian Lidstrom, born on the 1st day of July 1999 in Sweden. Both parties are non-Jamaicans but domiciled in Jamaica since 2003. They separated in September 2007. The son, Sebastian, has been under the care and control of his mother with access to the father.

The respondent gave birth to another son, Sebalaixy Lidstrom on the 17th day of July 2007. A DNA test dated June 30, 2008 has revealed that Mr. Lidstrom is not the father of the child.

Application of the Petitioner

Mr. Lidstrom has applied to this court for the sole custody, care and control of Sebastian and secondly, that the Registrar General be instructed to remove his surname from the Certificate of Birth of Sebalaixy which names him as the father of the child.

During the hearing of the application, he varied his request from sole custody to joint custody with care and control to him.

The Law

The guiding principle to be followed in the resolution of questions pertaining to the custody, care and upbringing of young children is mentioned in Section 18 of the Children (Guardian and Custody) Act. It is that, in deciding such questions, a court shall regard the welfare of the child as being of first and paramount importance.

In **J v C** (1969) 1 All ER 788 at 820, 821, Lord McDermott stated as follows:

“The second question of construction is as to the scope and meaning of the words ‘--- shall regard the welfare of the infant as the first and paramount consideration.’ Reading these words in their ordinary significance --- it seems to me that they must mean more than 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 best in the interest of the child’s welfare as that term has now come to be understood.”

Section 18 of the Act has specifically stated that, in deciding on the questions concerning the child, the court:

“--- shall not take into consideration whether from any other point of view the claim of the father or any right at common law possessed by the father --- is superior to that

of the mother, or the claim of the mother is superior to that of the father."

In certain cases, the court may give consideration to the 'mother/factor' although the law does not consider either mother or father's claim to be superior.

The consideration of the 'mother/factor' was highlighted in *Re S (A Minor) (Custody)* 1991 2 FLR 385. Butler Sloss LJ, who delivered the judgment of the court, said at pg 390:

"The welfare of the child is the first and paramount consideration under the Guardianship of Minors Act 1971, under which this matter is being dealt. There is no presumption that one parent should be preferred to another parent at a particular age. It used to be thought many years ago that young children should be with mother that girls approaching puberty should be with mother and that boys over a certain age should be with father. Such presumptions, if they ever were such do not, in my view, exist today. There are dicta of this court to the effect that it is likely that a young child, particularly, perhaps a little girl, would be expected to be with her mother, but that is subject to the overriding factor that the welfare of the child is the paramount consideration. When there is a dispute between parents as to which parent should take the responsibility of the care of the child on a day-to-day basis, it is for the justices or for the judge to decide which of these parents would be the better parent for the child, who cannot have the best situation since they are not together caring for her. I would just add that it is natural for young children to be with mothers but, where it is in dispute, it is a consideration but not a presumption."

In the present case, Sebastian is actually ten (10) years old. He cannot be considered to be a young child who should remain in the care of his mother.

In determining the primary question of the welfare of the child, the court is required to take into consideration the conduct of the parties in all the circumstances of the case.

The court will therefore take into account the various allegations of improper conduct by both parties against each other.

In re **McGrath** (Infants) (1893) 1 Ch 143, Lindley LJ, commenting on the principle by which the court is guided said, at page 148:

“---but the welfare of the child is not to be measured by money only nor by physical comfort alone. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.”

In **Dennis Forsythe v Idealin Jones** SCCA No. 49/1999 (at pg 8), Harrison JA, in delivering the judgment of the Court of Appeal stated 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 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 court is also to consider, the issue of sibling bonding and whether it is desirable that Sebastian should be separated from his half-brother, Sebalaixy.

In **Buckeridge v Shaw** RMCCA no. 598 (delivered on July 30, 1999) Walker JA stated as follows (at pg 8):

“Another consideration for the court must be the desirability for children born of the same parents and whose births

closely follow each other, to grow up together in the same environment thus facilitating a bonding between the children.”

There are therefore three major issues for the court’s consideration:

1. To whom should care and control of the relevant child be granted?
2. Should joint custody be granted or sole custody to one or other parent?
3. Is Sebalaixy Lidstrom, a child of the family and whether an order is to be made for the applicant’s name to be removed from the birth certificate as the father of the child?

Firstly, I will consider the issue of Sebalaixy Lidstrom.

Background

Sebalaixy is almost two (2) years old.

The evidence reveals that both parties had been having unresolved conflicts for years before his birth. Both parties have stated that Mrs. Lidstrom became pregnant previously with a second child of the union but that this pregnancy was aborted. Both parties blame each other for the termination.

It is not important to determine who influenced such a decision. However, the decision highlights the ongoing marital crisis. Mrs. Lidstrom has stated that her husband has been providing for herself and her two sons and that he has accepted and treats Sebalaixy as a child of the family.

Mr. Lidstrom has stated that he was in Sweden when the child was born and that he knew he was not the father. He returned to Jamaica in August 2007, that he went on a training course in September and on his return in October, he removed from the matrimonial home.

It is important to note that he was accused by the respondent in September of trying to kill Sebalaixy and that this was the applicant's stated reason for leaving the home.

In relation to his name on the birth certificate as father, he has stated the he did not fill it in and he merely saw his name on it. He admits paying expenses for the child before any court orders were made but that this was not done willingly as he felt that the natural father should be responsible, but he could do nothing to achieve that result.

In the case of **W (RJ) v W (SJ)** 1971, All England Law Reports, pg 63, a wife gave birth to two children, born in June 1967 and May 1969 respectively. Up to December 1969, the husband had thought that the marriage was perfectly normal and that both children were his.

The relevant legislation to be considered by the court was Section 27(1) of the Matrimonial Proceedings and Property Act 1970, where 'child of the family' is defined in these terms:

“Child of the family,” in relation to the parties to a marriage, means –

- a. child of both these parties; and
- b. any other child --- who has been treated by both of these parties as a child of their family.’

Park J, in examining this section, referred to **Rayden on Divorce**, (11th Edition, 1971, p 867) which reads as follows:

“Now, under the provisions of the 1970 Act, to establish that a child is a child of the family it is sufficient to show that the child was treated by both parties as a child of the family. The knowledge, or lack of knowledge, possessed by one or both parties of the facts relating to the child, for example, as to the identity of its parents, would seem to be

no longer material in determining whether it is a child of the family. It follows that a child who is the child of a wife and a man other than the husband would be a child of the family if it had been treated as such by both husband and wife, although the husband erroneously believed he was the father and it would seem to be equally immaterial that the wife deliberately deceived the husband into such a belief. The child must, however, be treated as a child of the family by both parties."

Park J, in the above case, found that both children were treated by both parties as children of the family and declared both children to be children of the family.

In our jurisdiction, the relevant legislation is Section 8(3) of the Maintenance Act:

- 8(1) ---
- (2) ---
- (3) For the purposes of this Act, a person is the parent of a child if –
 - (a). the person's name is entered as a parent of the child in the general register of births pursuant to the Registration (Births and Deaths) Act, ---
 - (b). the person is or was a party to a marriage --- and the child is a child of the marriage or cohabitation;
 - (c). the person is a party to a marriage --- and accepts as one of the family a child of the other party to the marriage.
 - (d)
 - (e)

This court is of the view that there has been no course of conduct demonstrated by Mr. Lidstrom in order for the conclusion to be drawn that Sebalaixy is a child of the marriage. He has been maintaining Mrs. Lidstrom since 2003.

The fact that the hospital bills were paid by his employers and that Sebalaixy benefits from the funds given to her, or spent on her behalf, lacks cogency as an indication of any acceptance on his part.

The circumstances surrounding his departure from the home within months of the birth add credence to his assertions.

The facts of this case are quite distinguishable from **W (RJ) v W (SJ)** supra. The child, Sebalaixy, is therefore not a child of the family.

Custody, Care and Control of Sebastian Lidstrom

Sebastian is ten years old and attends Hopefield Preparatory School. If he is still within the jurisdiction in 2010, he will be sitting Grade Six Achievement Test (GSAT) examination as a prelude to a placement in a high school.

Both the expert report of Dave Williams who conducted counselling sessions with Sebastian and individually with the parents and the Social Enquiry Report ordered by the court reveal that Sebastian loves and is loved by both parents.

The evidence reveals that both parents shared a dysfunctional marital relationship which has resulted in unresolved issues between them. They have both accused each other of improper conduct.

Conduct of Mr. Lidstrom

The respondent, Mrs. Lidstrom has asserted violent and abusive behaviour by Mr. Lidstrom against her. There are various reports to the police, counselling sessions with Dr. Aggery Irons, reports to the Women's Crisis Centre that give support to her allegations.

She has also stated that he is alcoholic. Mr. Lidstrom has admitted that he has over consumed alcohol for which he has sought counselling. He has stated that he has reduced his drinking dramatically and now considers himself a social drinker.

There is no indication from any of the reports that his consumption of alcohol presently affects his ability to care for Sebastian.

Similarly, the issue of abusive behaviour is linked to the actual cohabitation of the parties. There is no evidence to suggest that Mrs. Lidstrom is in any physical danger from her husband.

It is interesting to note that the Social Enquiry Report reveals that Sebastian has witnessed his father punching his mother's head through a pillow and his mother slapping his father in the face.

Mrs. Lidstrom has also stated that Mr. Lidstrom dresses in female clothing and has exhibited a picture of him so clad.

Mr. Lidstrom explained that the picture relates to a costume birthday party to celebrate his 40th birthday in Sweden. He describes it as a practical joke and that it is not a reflection of personal habits. The pictures were taken three-and-a-half years before he met his wife and he has shared them with her and also his son as an occasion for humour.

The court accepts his explanation and does not consider it to be any indication of a deviant behaviour pattern that could affect Sebastian's moral upbringing. In fact, in an electronic mail sent by Mrs. Lidstrom to her husband on January 14, 2008, she stated, "You are a great dad no matter what and a good human being."

Conduct of the Respondent

Mr. Lidstrom has described Mrs. Lidstrom as a manipulative person who uses Sebastian as a bargaining tool in order to extort money from him. He gives examples of such behaviour before and during the court action.

He has also stated that she threatened to commit suicide with both children in the car on December 12, 2007 in and September 2007, she accused him of attempting to kill Sebalaixy. No report was made to the police about this. The court does not regard it as cogent evidence against Mrs. Lidstrom.

The court bears in mind that neither the report of Dr. Irons or Mr. Dave Williams speak to any suicidal tendencies on her part. The court is of the view that any manipulative patterns displayed by the applicant are not an indication of any lack of care for Sebastian but a reflection of the unresolved issues between both parties. She is 21 years younger than her husband and has no fixed income.

In fact, Mr. Lidstrom has stated under cross-examination that she has exceeded the court's recommendation in relation to his access to Sebastian and has been most generous. There has therefore been progress made in relation to the parties co-operating to protect the welfare of the child.

The court does not consider that either party are 'unfit' for the purposes of being granted custody of Sebastian.

It is, however, not a perfect world, as Mr. Lidstrom has expressed. The court must make an order granting care and control to one or the other. In coming to a decision, the court considers that the following factors are relevant:

1. Mrs. Lidstrom's living arrangements have been subject to frequent change. She has changed several addresses since the separation with her husband. He has not been informed of these changes as he should have been since Sebastian is presently under her care and control. Previously, she did not reveal her change in location for safety reasons but on the last occasion she did not tell him

before as he was never there, and they do not talk on the phone. This statement lacks credibility.

2. Both the report of Dave Williams and the Social Enquiry Report dated April 25, 2008 and October 10, 2008 respectively, are more favourable towards Mr. Lidstrom in relation to the home environment, schooling and daily interaction with parents.

Mr. Williams' report reflects that Sebastian has more flexibility with regard to his home work being done when he is with his mother. However, at his father's apartment, homework has to be done and his father assists him.

Mrs. Lidstrom also admits that Sebastian does his homework when he is with his father. However, she asserts that she also ensures that he does. She further stated that when she has any problem while helping Sebastian, she calls and asks Mr. Lidstrom, although he does not assist all the time as he is sometimes drunk.

The Social Enquiry Report under the heading 'School Report' reads as follows:

“Reports are that both Mr. and Mrs. Lidstrom are known to school officials. Indications are that Mrs. Lidstrom seemingly lacks the ability to properly nurture and care for Sebastian. Officials explain that whenever Sebastian is in respondent's care he often came to school dishevelled, poorly groomed with homework undone. According to officials, this situation has resulted in his parents being called to meetings with teachers---”

It was further stated that when Sebastian was in Mr. Lidstrom's care, his appearance and academic performance improved significantly. Additional reports are that Mr. Lidstrom frequently monitors Sebastian's progress through meetings with teachers. Officials noted that Mrs. Lidstrom collects him after school but does not monitor his academic performance.

In relation to out of school activities, the evidence reveals that Mr. Lidstrom is highly involved, going fishing with Sebastian, playing games with him, visits to the barber.

Mrs. Lidstrom supports this evidence of joint activity between father and son.

The Social Enquiry Report reflects that Sebastian enjoys being with his father as they spend time doing things together while this is not the case with his mother.

Sebastian stated that this mother paid more attention to his baby brother. Similarly, Mr. Williams' report speaks to Mr. Lidstrom cooking for Sebastian, assisting with his homework and taking him fishing and expresses that Sebastian did not say much about his mother but expresses his love for her.

The Social Enquiry Report concludes as follows:

“Both parties living environment is conducive to Sebastian's physical and academic development, however, Mr. Lidstrom seemingly is better able to offer the type of structure, security and stability that Sebastian currently needs.”

Mr. Williams' report concludes that, having visited both apartments, 'I am of the view that the father's living environment is more conducive to his academic and personal development.

Mr. Steer has submitted that I disregard the hearsay statements in the Social Enquiry Report. However, both reports, although months apart, arrive at remarkable similar conclusions.

3. **Mr. Lidstrom's arrangements for Sebastian if granted Care and Control**

Mrs. Lidstrom is a stay at home mother and presently exercises care and control. She has asked the court to consider that Mr. Lidstrom is a

corporate executive employed by Erickson Limited and travels frequently as part of his portfolio.

Mr. Lidstrom stated that he received a promotion in 2007 and since then, his travelling duties have been reduced by fifty (50) percent.

He explained to the court that in March 2009, he had to travel in relation to some new developments but that these are now completed. He further stated that when he travels, his maximum days of absence is seven (7) days including five (5) working days.

Mr. Lidstrom stated as follows:

“I have the luxury to decide if I travel, if I accept to travel. I have the luxury to determine or adjust travel to when deemed necessary and possible.”

He has also indicated to the court that if he travels, a nanny would be in position to look after Sebastian but if the court grants joint custody, he would leave Sebastian with Mrs. Lidstrom.

He has set out in paragraphs 27 to 30 of his affidavit (filed on 10.10.08), the arrangements for the daily care of Sebastian:

27. That I have a full time helper in place to take care of the needs of Sebastian. That Sandra Bowman (o/c Sonia) has been in my service for over a year and is used to Sebastian and his needs. That her qualifications have been vetted by my company. That she will be at the residence to receive Sebastian after school and stay with him until I return home. That on average I am home by 6:00 p.m. in the evenings. That my home has the relevant space to accommodate Ms. Bowman in that she will have her own bedroom and private bathroom.

28. That it is true that I travel for my job however with my new position in the company, travel is at a minimum. That Sonia is contracted for residential stay to be with Sebastian
29. That Sebastian is picked up from school when he is staying with me by me. That if I am unable to do so, the company has a pick up system in place – and the school is informed of the name of the driver to pick up Sebastian and the relevant identification etc is faxed to the school. Sebastian is well acquainted with my driver and the school is aware of his credentials and identification.
30. That I work approximately three (3) minutes away from my home and should an emergency arise I can be there in short order. That I am allowed to take Sebastian to work with me and have done so on occasions. That I am five (5) minutes away from his school Hopefield Preparatory should an emergency arise.

The Question of Sibling Bonding

It is clear that Sebastian loves his brother and likes spending time with him.

In the expert report of Dave Williams dated April 25, 2008, Sebastain is reported to enjoy the company of his little brother, which is one of the reasons he gave for liking his mother's apartment.

He reported to Mr. Williams that his greatest desire is to see both his parents living together and he and his brother enjoying their company. This factor is not a compelling one in the circumstances under consideration as both Sebastian and Sebalaixy do not share the same paternity and Sebastian is eight years older than Sebalaixy.

From a practical point of view, Sebastian will be involved in pursuing different interests, than Sebalaixy, a toddler, in the near future.

The court also considers that he will be able to spend time with his brother on visits to his mother's residence.

Conclusion

Having considered all the above factors, this court is of the view that it is in the best interest of Sebastian at this time to grant care and control to the applicant, Mr. Lidstrom.

The final issue for the court's determination is whether joint custody should be granted to both parents or sole custody to Mr. Lidstrom

The applicant has requested that joint custody be made. Mr. Steer, counsel for the respondent has submitted that joint custody is not feasible as a result of the acrimonious relationship between both parties.

In **Fenton v Fenton** SCCA/FD1797/2003, my brother, Brooks J considered the issue of joint or sole custody and made the following remarks (at pg.4):

"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 is in the best interest of the child that sole custody, be granted to Mrs. Fenton."

In **Caffell v Caffell** 1984 FLR pg 169, it was held that in many cases joint custody of a child should only be ordered if there was a reasonable prospect that the parents would co-operate. However, such an order might be equally appropriate to

recognize the responsibility and concern of the parent who did not have the day to day control of the child and might ease any bitterness between the parties.

The court has previously stated that there has been a softening of the stance between both parties. It is quite clear that each appreciates the significance of the other party's role in the life of Sebastian.

The court further considers the fact that both parties are non-Jamaicans. At any point in time, a decision may be made by either party to leave the jurisdiction. In all the circumstances, the court has come to the conclusion that it is in the best interest of the relevant child that he be in the joint custody of both parents.

The following Orders are therefore made:

1. Joint custody of Bernt Sebastian Lidstrom granted to Applicant/
Respondent with care and control to the applicant.
 - a. The respondent shall have access to Sebastian on alternative weekends commencing on Fridays after school to Sundays at 6:00 p.m. The respondent is also to have general access to half of every major school holiday, and alternate mid-term holidays, alternative Christmas days, Mothers' day and Mother's birthday.
 - b. Mr. Lidstrom is granted permission to remove Sebastian from the jurisdiction between July 4, 2009 and August 5, 2009 and to return to the jurisdiction on August 6, 2009.
Neither party is permitted to remove Sebastian from the jurisdiction without the written consent of the other party or the order of the court.

- b. If either party wants Sebastian's passport either for travel or documentation purposes, then the same is to be promptly made available to the other party and returned.
2. The name of Bernt Lidstrom is to be removed on all official documentation including passport, birth certificate and all documentation in relation to the child Sebalaixy.
3. By consent, the applicant is to pay US\$2,808.00 per month as maintenance to the respondent on August 1, 2009 and thereafter on the first of each succeeding month.

A handwritten signature in black ink, appearing to be "J. Lidstrom", with the word "Judge" written below it.