

JAMAICA**IN THE COURT OF APPEAL****RESIDENT MAGISTRATES' MISCELLANEOUS APPEAL NO. 01 OF 2009**

**BEFORE: THE HON. MR. JUSTICE COOKE, J.A.
 THE HON. MRS. JUSTICE HARRIS, J.A.
 THE HON. MR. JUSTICE MORRISON, J.A.**

**VENKET MALLADI
 V
 REGINA**

Gordon Steer, instructed by Chambers, Bunny & Steer for the Appellant

Ricardo Sandcroft for the Child Development Agency

Jeffrey Daley observing for Bhagyalaksmi Malladi

Ms. Opal Smith & Ms. Sanchia Burrell for the Crown

May 19, 2009 and July 30, 2009

HARRIS, J.A.

1. On May 19, 2009 we allowed this appeal and ordered that orders made by Her Honour Mrs. Primo-Griffith on July 4, 2008 and December 11, 2008 were unlawful and that they be set aside for want of jurisdiction. In obedience to our promise to put our reasons in writing, we now do so.

2. The factual circumstances giving rise to this appeal are that the appellant, the father of two infant children Sa, born September 10, 1992

and Sr, born on August 15, 1997 made a report to the Child Development Agency (CDA) that the children were abused emotionally and psychologically by their mother. He also reported that one child had attempted suicide. (The full names of the children have not been disclosed in order to protect their identities). The CDA, being of the opinion that the children's welfare was in jeopardy, sought the intervention of the Kingston and St. Andrew Family Court in keeping with Sections 7 (1) (a) and 13 of the Child Care and Protection Act which empowers the CDA to investigate and initiate proceedings in circumstances where the welfare of a child is in danger.

3. On July 4, 2008 information was laid by the CDA under section 8 (1) (a) of the Act and on that date a hearing was conducted. The learned judge made an interim supervision order granting care and control of the children to their mother. She further ordered that the children should travel abroad with the mother on July 28, 2008 and return on August 23, 2008, that the appellant purchase airline tickets for the children and that such tickets be brought to the Court on July 23, 2008. The tickets were not presented to the court by the appellant.

4. On July 28, 2008 the father sought and obtained, on an *ex parte* application in the Supreme Court, an order granting him interim custody of the children and an injunction restraining the removal of the children

from the jurisdiction without an order of the court. The order was set aside on September 4, 2008, save and except for that portion which related to the prohibition from removing the children from the jurisdiction. A Fixed Date Claim Form for custody of the children and affidavits relative thereto which were filed by the father, were remitted to the Family Court.

5. On August 13, 2008, a Notice of Application for the committal of the appellant for failure to obey the interim supervision order was issued at the instance of the mother. On December 11, 2008, pursuant to this Notice, the learned Resident Magistrate made the following order against the appellant:-

"compensation in the sum of \$190,000 to be paid forthwith or in default serve ten (10) days imprisonment."

Magistrate. The following grounds of appeal were filed:

- "(a) The learned Resident Magistrate in the exercise of her discretion took into consideration factors which ought not to have been considered and did not consider factors that were to be taken into consideration.
- (b) The learned Resident Magistrate in the exercise of her discretion did not attach sufficient weight to what would be in the children's best interest."

6. Mr. Steer submitted that the learned Resident Magistrate had no jurisdiction to have made an interim supervision order awarding care and

control of the relevant children to the mother. The powers of the court, he argued, are those prescribed by section 14 (1) and (2) of the Child Care and Protection Act, and a fit person order had not been made in compliance with section 14 (2) (b) of the Act.

7. It was Mr. Sandcroft's submission that section 14 (1) and (2) of the Act must be read in conjunction with section 2 (2), which enables the court, in the making of the order to take into consideration the welfare of the children.

8. Section 8 of the Act governs the requisite circumstances under which a child is in need of care and protection. It provides:

"8 - (1) For the purpose of this Act a child shall be considered to be in need of care and protection if that child –

(a) having no parent or guardian, or having a parent or guardian unfit to exercise care and guardianship, or not exercising proper care and guardianship, is falling into bad associations, exposed to moral danger, or beyond control;

(b) is being cared for in circumstances in which the child's physical or mental health or emotional state is being seriously impaired or there is a substantial risk that it will be seriously impaired;

- (c) ...
- (d) ...
- (e) ..."

9. Section 14 of the Act empowers the court to make certain orders where a child is brought before the court in need of care and protection.

Section 14 so far as is relevant to these proceedings reads:-

- "14 - (1) A Children's Court before which any child is brought under this Part, or before which is brought any child in respect of whom any of the offences mentioned in the Second Schedule has been committed, may, if satisfied that the best interests of the child so require, make an order in accordance with subsection (2).
- (2) An order under subsection (1) may-
- (a) require the child's parent or guardian to enter into a recognizance to exercise proper care and guardianship;
 - (b) commit the child to the care of any fit person, whether a relative or not, who is willing to undertake the care of the child;
 - (c) either in addition to, or without making any order under paragraph (a) or (b), place the child for a specified period not exceeding three years, under the supervision of a probation and after-care officer, or some other person

to be selected for the purpose
by the Minister;

(d) ...

(e) ...

(f) ..."

10. The learned Judge of the Family Court stated that the order was made under section 14 (2) (b) of the Act, and had done so in the best interest of the children. The language of the Act is clear. Section 14 (2) (b) expressly provides for the committal of a child, who is deemed to be in need of care and protection, into the care of a fit person. Section 2 of the Act defines a fit person as the "Minister, and any person or body whether corporate or unincorporate, designated by the Minister". By section 2, a fit person order is described as "an order which commits a child into a fit person's care".

11. In observance of the statutory scheme, any order made under section 14 (2) (b) for the care and protection of a child, must be to a fit person as contemplated by section 2. Such person must be the Minister and any person designated by him. The words "fit person" as appearing in section 14 (2) (b) are vital. Section 2 makes it abundantly clear that the Minister is the only person in whose favour an effective order for the care of a child can be made.

12. Any order made as a consequence of section 14 (2) (b) must initially entrust the care of the children into the domain of the Minister, who would subsequently nominate a second fit person. The Minister was not made a fit person, neither was the mother appointed a fit person by the Minister. The order of the learned judge is not in conformity with the requirements of the Act. She had clearly erred and had without doubt, exceeded her jurisdiction in the making of the order.

13. It was Mr. Steer's further submission that the learned judge had no authority to have made an order granting permission for the children to leave the jurisdiction. He further argued that the order that their father should pay the costs of their airline tickets effectively imposed on him an obligation for the payment of maintenance for them which the learned judge had no power to make under section 29 of the Act.

14. The order granting the mother leave to take the children out of the jurisdiction is indubitably wrong. Under section 60 (1) of the Act, permission to take a child out of the jurisdiction can only be granted by the written consent of the Minister to a fit person. The section reads:

"Subject to the provisions of this section, it shall be lawful for a child who is, by an order under this Act, committed to the care of a fit person, to emigrate or to be taken out of Jamaica with the written consent of the Minister."

The mother did not qualify as a fit person within section 2 of the Act. The order granted was clearly a nullity.

15. That part of the order for the purchase of airline tickets by the appellant is clearly misconceived. Such an order is impermissible. There are no provisions in the Child Care and Protection Act which confer on the learned judge the power to place an obligation on the appellant to meet the costs of the tickets for the children. Under Section 29 of the Act, where a fit person order has been made, the court is at liberty to make an order for contributions in respect of a child. No fit person order had been made. However, even if such an order had been made, the cost of an airline ticket could not be regarded a contribution for the purposes of section 29 of the Act. The order does not accord with the statutory requirement and is clearly invalid.

16. Section 30 (5) governs the circumstances under which a contribution order becomes enforceable. Section 5 (a) reads:

"A contribution order shall be enforceable —

(a) where a child has been committed to the care of a fit person, at the instance of the Government agency responsible for children; or

(b) ..."

The learned judge, in her judgment said:

"The fact that the respondent/Mr. Malladi engaged in an activity which prevented the applicant/mother and children from enjoying the benefits of the order made on the 4th July, 2008 has made her the aggrieved party thus giving her the status to file the notice of application for committal pursuant to Order XXII Rule 33 of the Resident Magistrates' Court Rules."

She then found, *inter alia*, that the act of the appellant was contemptuous and could not be purged and after citing dicta of Rigby L.J. in **Seaward v Patterson** [1897] 1 CH 544 and of Lord Atkin in **Ambard v Attorney General of Trinidad and Tobago** [1936] 105 L.J.P.C. 72 [1936 AC 322, made the order for committal of the appellant. The order is not one which could properly fall within the scope of section 30 (5) (a) of the Act.

17. The mother was never designated a fit person. She was clearly not a party to the proceedings. She cannot be classified as an aggrieved party and ought not to have been heard on the committal application. There was no valid order which could have formed the foundation for an order for the committal of the appellant. The order being void is rendered ineffective.

18. The foregoing are our reasons for allowing the appeal.

COOKE, J.A.

ORDER

The appeal is allowed. The orders made by Her Honour Mrs. Primo-Griffith on July 4 and December 11 2008, are unlawful and are hereby set aside for want of jurisdiction.