[2024] JMCA Civ 2

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE G FRASER JA (AG)

PARISH COURT CIVIL APPEAL NO COA2020PCCV00030

BETWEEN	**MERRICK NICHOLS**	**APPELLANT**
AND	**KEISHA FOSTER**	**RESPONDENT**

Lemar Neale instructed by NEA|LEX for the appellant

Ms Vivienne Washington for the respondent

29 June 2022 and 19 January 2024

Family Court - Custody Petition - Application for the production of a child- Whether the powers of a Parish Court are limited by statute- Whether the learned Parish Court Judge erred when she made the orders she did - The effect of orders made without application – Peremptory return order - Judicature (Family Court) Act - Order XVI, and rule 3 of the Parish Court Rules - Children (Guardianship and Custody) Act sections 7 and 12

F WILLIAMS JA

[1] This is an appeal from the order of a judge of the Family Court for the parish of Saint Catherine ('the learned judge'). The learned judge had ordered, *inter alia*, that K, a minor, was to be brought back to Jamaica and returned to her mother ('the respondent') pending the conclusion of a custody petition that K's father ('the appellant') instituted against K's mother. At the time the order was made for K's return, she was residing in Florida, United States of America ('the USA') with her father, while her mother lived in

Jamaica. The appellant sought to have the learned judge's orders set aside and the matter remitted to the Family Court for trial.

[2] We heard this appeal on 29 June 2022. At the conclusion thereof, we gave our decision, with a promise of brief reasons to follow, which we now provide. It was ordered that:

> "1. The appeal is allowed.
>
> 2. The orders made on 11 March 2020 by Her Honour Mrs. Creary-Dixon are set aside.
>
> 3. The matter is remitted to the St Catherine Parish Court for trial at the earliest possible time before a different Parish Court Judge.
>
> 4. Each party is to bear their own costs."

Background to the custody petition

[3] On 3 February 2020, the appellant filed a petition in Jamaica against the respondent for joint custody, care and control of his daughter K, who was born on 13 November 2015 in this country. His petition was supported by two affidavits, both sworn on 15 January 2020. At the time of filing his petition, the appellant was living in Florida. He stated that, since October 2019, K had come to live with him, his wife and their two other children, while the respondent still resided in Jamaica. The appellant further deponed that K had travelled to Florida on an immigrant visa and averred that the respondent had initially consented to K living overseas with him but had subsequently changed her mind.

[4] The appellant also averred that when K was born, he and the respondent lived together briefly but that he later migrated to the USA, where he had gotten married. He further averred that since K had arrived in the USA, she had been enrolled in school and placed under the care of a medical practitioner. He posited that if K was ordered to return to Jamaica she would lose the benefits she had acquired since living in the USA.

[5] In a letter to the appellant from the United States Department of State, dated 28 January 2020, he was informed that the respondent had applied to the Jamaica Central Authority pursuant to the Hague Convention on the Civil Aspects of International Child Abduction to have K returned to Jamaica. He was also invited to make arrangements for K's voluntary return to Jamaica or to arrive at an agreement with the respondent, failing which, judicial proceedings would be instituted to determine K's country of habitual residence, where the issue of custody should be decided.

The learned judge's order and reasons

[6] On 11 March 2020, when the matter first came before the learned judge she made the orders appealed against. The learned judge later provided her written reasons, dated 16 November 2020, to the parties. The order contained in her written reasons are set out below, that K should:

> "(a) be brought back to Jamaica and returned to the Respondent on the 13th April 2020; a custody report to be done during this time.
>
> (b) reside with the Respondent until this matter is determined.
>
> (c) be returned to the United States on April 20, 2020 for a surgery to be performed on April 28, 2020, provided details of the surgery were presented to the Respondent; the child was then to return to Jamaica after recovery to reside with the Respondent."

[7] The learned judge considered primarily whether K should be returned to the jurisdiction. She relied on the cases of **Lisa Hanna-Panton v David Panton** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 21/2006, judgment delivered 29 November 2006; **Re J (A Child) (Return to Foreign Jurisdiction: Convention Rights)** [2005] 3 All ER 291; **LPM v MAJ** [2017] JMCA Civ 37 and **Suzeanna Williamson v Gregory Williamson** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 51/2007, judgment delivered 18 July 2008 as

cited in the article 'Flight or Right? Custody and Access in International Child Abduction Cases', written by Mrs Georgia Gibson Henlin KC and Mrs Suzanne Risden-Foster.

[8] The learned judge found that the child was ordinarily resident in Jamaica and as such the issue of custody should be determined here. The learned judge also held that she accepted the respondent's account of how K came to be in the USA and had found that K's life would not be severely disrupted should the court order that she be brought back to Jamaica. The learned judge also held that Jamaica was the best jurisdiction to weigh the relevant factors and give effect to the welfare principle in deciding the issue of custody between both parents.

The ground of appeal

[9] The appellant gave oral notice of appeal and paid the required amounts for security for costs and the due prosecution of his appeal. One ground of appeal was advanced, and it was this:

> "The learned Parish Court Judge erred in law when she made the orders she did and this amounts to a serious miscarriage of justice."

Submissions before this court

[10] Mr Neale, counsel for the appellant, argued that the learned judge lacked the jurisdiction to make the orders which she had made and that she had failed to comply with the procedure set out in the Judicature (Family Court) Act and order XVI, rule 3 of the Parish Court Rules. The cases of **Gary Morgan v Natalie Williamson-Morgan** [2016] JMCA Civ 53 and **Peter Holmes v Bryan Gray** [2019] JMCA Civ 11 were cited in support of the foregoing submission. Counsel also submitted that the learned judge had erroneously considered the issue of *forum conveniens*, which did not properly arise, since the appellant had submitted to this jurisdiction by filing the custody petition in Jamaica.

[11] Counsel for the appellant further submitted that the learned judge had also erred in that she made the order of her own volition and not on the application of either party. Additionally, counsel posited, the learned judge had erroneously made findings adverse to the appellant when the only affidavit evidence before the court was that filed by and on behalf of the appellant and supported the appellant's case. Counsel further submitted that, in the circumstances of this case where no oral evidence was received on oath, the summary order had the effect of an interim custody order.

[12] On the other hand, Ms Washington, for the respondent, submitted that there was no error on the part of the learned judge to justify the interference of the appellate court, (citing **G v G** (1985) 1 WLR 647). She further argued that the learned judge had considered all the relevant factors in ordering K's return to this jurisdiction. She also maintained that the learned judge's decision was based on a proper understanding of the law but conceded that the respondent had placed no affidavit evidence before the court, neither was there any examination on oath. Counsel stated, however, that the absence of evidence for the respondent was insignificant because the Family Court is not a court of record, and the learned judge benefited from full submissions for both parties. Accordingly, she submitted, the parties (and in particular the appellant) were not prejudiced and the court's discretion was properly exercised.

Discussion

[13] In making the orders stated at para. [2] herein, we found merit in the submission that the learned judge lacked the jurisdiction to order that K be brought back to Jamaica. Our decision in this matter was guided by the admonition of the court in **G v G** (cited by Ms Washington), the relevant portion of which, as recorded in the headnote, states:

> "(1) that an appellate court reviewing the decision of a judge in the exercise of his discretion relating to the custody and welfare of children, was bound by the principle applicable to any appeal from the exercise of a judicial discretion, namely, that before it could intervene, it had to be satisfied, not merely that the judge had made a decision with which the court might reasonably disagree, but that his decision was so plainly

> wrong that the only legitimate conclusion was that he erred in the exercise of his discretion;"

[14] We were accordingly satisfied that the learned judge was plainly wrong in the exercise of her discretion.

[15] The Family Court is established by the Judicature (Family Court) Act ('the Family Court Act'). The Family Court Act is divided into three parts, the first two of which pertain to the Family Court for Kingston and Saint Andrew and Family Courts outside the corporate area, respectively. Section 6A pertains to Family Courts outside the corporate area, such as Saint Catherine. Section 6A(1) provides that:

> "Court of Records, to be called Family Courts, shall be established in such regions outside the Corporate Area as the Minister may, from time to time, by order designate, and such Courts shall have such jurisdiction and powers as may be conferred upon them by virtue of this Act or any other law."

[16] Section 6B then confers the jurisdiction of those Family Courts. It provides that:

> "6B-(1) The provisions of subsections (1), (2) and (4) of section 4 shall apply *mutatis mutandis* to each Court established under section 6A in respect of the jurisdiction of such Court."

Section 4 makes provision for the jurisdiction of the Family Court for the corporate area. It provides that:

> "4-(1) The Court shall have jurisdiction to try or otherwise deal with offences, causes, or matters, as provided in that behalf in any of the enactments for the time being specified in the Schedule.
>
> (2) The Court shall have all the functions and authorities incident to the jurisdiction conferred upon it by subsection (1).
>
> (3) ….
>
> (4) Subject as otherwise provided by or under this Act, **the like process, procedure and practice as relate to the exercise of jurisdiction of a [Parish Court], and**

> **otherwise to the conduct of its business, shall be observed**, in so far as they are applicable (with necessary adaptations), in relation to the exercise of jurisdiction, and otherwise to the conduct of business, of the Family Court and, without prejudice to the generality of the foregoing, the judgments and orders of the Family Court and the attendance of persons before it, whether as accused persons or witnesses or otherwise, may be enforced accordingly." (Emphasis supplied)

[17] Section 9(2) of the Family Court Act (which is subject to section 4(4) of the said Act) provides that:

> "(2) Without prejudice to the generality of the provisions of subsection (4) of section 4, where no other provision is expressly made by this Act or by rules, pursuant to this section, the procedure and practice for the time being prescribed by rules for [the Parish Courts] shall apply to a Family Court, so far as such rules may be appropriate and with such variations as the circumstances may require."

[18] The import of the sections quoted above are that: (i) the Family Court is a court of record; (ii) the Family Court has the jurisdiction to try offences, causes, or matters arising under the Children (Guardianship and Custody) Act (as stipulated in the schedule); (iii) the Family Court observes like processes, procedures and practice as it relates to the exercise of the jurisdiction of the Parish Court; (iv) the attendance of persons (inclusive of witnesses or accused persons) in the Family Court is enforced in a manner similar to that done in the Parish Court; and (v) in the absence of express provisions, the procedure and practice of the Parish Court apply to the Family Court.

[19] Harrison JA, in delivering the judgment of the court in **Tracy Taylor v Rudolph Melliphant** (unreported), Court of Appeal, Jamaica, [Resident Magistrates'] Civil Appeal No 14/2008, judgment delivered on 12 December 2008, observed that the Parish Court has no inherent jurisdiction and so its power is limited to that conferred by statute. The court observed at para. 12 that:

> "Since the Resident Magistrate is a creature of statute he therefore enjoys no greater power in the exercise of his duties

> other than what is expressly or impliedly granted by statute. The courts over which he presides are inferior courts without any inherent jurisdiction and with only such jurisdiction as conferred upon them by Statute. See **Lindo v Hay** Clarke's Reports 118."

Since, in the absence of express provision, the Family Court shares a similar jurisdiction to that of the Parish Court, it too is limited by its statutory provisions. Thus, it is important to consider the extent of the powers of the learned judge in the matter when it came before her in the Family Court.

[20] Order XVI, rule 3 of the Parish Court Rules makes provision for the reception of evidence. Its provisions are in the following terms:

> "Evidence to be taken orally.
>
> 3. Except where otherwise provided by these rules, **the evidence of witnesses on the trial of any action or hearing of any matter shall be taken orally on oath**; and where by these rules **evidence is required or permitted to be taken by affidavit such evidence shall nevertheless be taken orally on oath** if the Court, on any application before or at the trial or hearing, so directs." (Emphasis supplied)

[21] The case of **Gary Morgan v Natalie Williamson-Morgan** is helpful in understanding the implications of order XVI, rule 3 of the Parish Court Rules. In that case, on behalf of the court, McDonald-Bishop JA, at para. [31], elaborating on the significance of rule 3, in the context of the Maintenance Act, observed that:

> "Therefore, in the absence of such special and specific provisions in the Rules that are applicable to the Family Court, then the general rule laid down in Order XVI rule 3 of the Parish Court Rules would apply, that is to say that the evidence of any witness in the "hearing of any matter" shall be taken orally. There must be a hearing of oral evidence, in other words. The rule provides even further that the oral evidence must be taken on oath. So, once it is accepted that it was incumbent on the learned judge to have held a hearing, which is accepted, then based on the provisions of Order XVI

> rule 3, it would follow that evidence should have been 'taken orally on oath'."

[22] It may be regarded as settled that, in the absence of any provision to the contrary, where there is a hearing and evidence is required from a witness, it should be taken orally and on oath. Against that background, it is important to note that the only evidence before the learned judge in this matter was in the form of affidavit evidence filed by the appellant. There was none by or on behalf of the respondent. However, at para. 3 of her written decision, the learned judge stated that the respondent had expressed that she was unaware of where K was living or of her living conditions. Unfortunately, those statements were not elicited from the respondent in a proper evidentiary form or on oath, as required by the relevant rule. In these circumstances, any information considered by the learned judge from the respondent, ought to have been on oath, as required by the rules (see **Metalee Thomas v The Asset Recovery Agency** [2010] JMCA Civ 6, para. [35]). Oral arguments or submissions presented by a party are not enough and cannot be a substitute for sworn testimony.

[23] The order that K be brought back to the jurisdiction was in effect a peremptory return order. While these orders require no in-depth investigation into the merits of the case, for it to be properly made, there must be sufficient material before the court, upon which it might, in keeping with the statutory requirements, be able to exercise its discretion. The court in the case of **Re M (Abduction: Peremptory Return Order)** [1996] 1 FLR 478 explored the characteristics of a peremptory return order. Waite LJ opined that:

> "A peremptory return order…is…an order made without investigating in depth the general merits of the parents' dispute over the future care of the child, but after making sufficient inquiries to establish that they have been wrongfully removed from the jurisdiction of the country of their habitual residence and should be returned there so that the dispute can be determined in the courts of that country."

[24] This case involves disputes of facts and issues of credibility. In such circumstances, the learned judge was required to have made sufficient enquiries into the matter on evidence properly before the court. Regrettably, that was not done. In this regard, the learned judge fell into error and that required the making of the orders reflected in para. [2] of this judgment.

[25] Additionally, however, another important matter which concerned us was that the orders made by the learned judge seemed to have been made of her own volition and without any application by either side. The submission to that effect made by Mr Neale was not (and, perhaps, could not be) refuted by the respondent's counsel.

[26] The Children (Guardianship and Custody) Act, applies in this jurisdiction to custody proceedings and applications for the production of children. Section 7 makes provisions for applications for custody of and access to a child. It stipulates that:

> "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, or, after the death of either parent, of any guardian under this Act; and in every case may make such order respecting costs as it may think just." (Emphasis supplied)

Section 12 of the Children (Guardianship and Custody) Act stipulates the circumstances in which the court may refuse an application for an order for the production of a child. The section provides that:

> "12. **Where the parent of a child applies to the Court for a writ or order for the production of the child**, and the Court is of opinion that the parent has abandoned or deserted the child, or that he has otherwise so conducted himself that the Court should refuse to enforce his right to the custody of the child, the Court may, in its discretion, decline to issue the writ or make the order." (Emphasis supplied)

[27] What is evident from this review is that both sections are predicated on the making of an application by a parent. Accordingly, pursuant to section 7, the court may exercise its discretion to make orders where the mother or father of a child applies for custody or access. In such an instance, the court would be required to have regard to the welfare of the child and the conduct and wishes of the parents. Likewise, the court has the power to vary or discharge such order, but that would also be done on the application of either parent.

[28] With regard to section 12 of the Children (Guardianship and Custody) Act, the court can, in certain circumstances (such as where a parent has abandoned or deserted the child or acted in such a manner for the court to refuse that parent's right to custody) make or refuse an order for production of a child. However, such an order would be made on the application of a parent, and there is nothing demonstrated in the record of proceedings taking this case outside the norm. Again, regrettably, the learned judge erred in proceeding in the manner that she did.

[29] We wish to remind judges of the Parish Courts that they should bear in mind that they and the courts over which they preside are creatures of statute. Therefore, they enjoy no inherent jurisdiction, and the judges are limited in the exercise of their judicial functions to the powers conferred on them either expressly or impliedly by the statute(s) governing the particular matter with which they might be dealing. Making orders in excess of the powers conferred on them by relevant laws and rules (however well-intentioned and motivated by a desire to see justice done in a particular case, those orders might be), will invariably result in a reversal of their decisions.

[30] It was for the foregoing reasons that we found that the learned judge was palpably wrong in making the orders which she did, which warranted our interference and resulted in the orders reflected in para. [2] hereof.