In the Supreme Court of Judicature of Jamaica

Claim No. HCV -0811 of 2003

Between	*Richard Patterson*	*Claimant*
And	*Becki Patterson*	*Defendant*

Mrs. P. Benka-Coker instructed by Mrs. Debra E. McDonald for the Applicant/Respondent Richard Patterson

Mr. Gordon Steer instructed by Chambers Bunny and Steer for the Respondent /Applicant Becki Patterson

In Chambers

Heard:
16th May, 2007, 21st September, 2007
& 16th April 2008

Marsh J.

The parties referred to above, Richard Patterson and Becki Patterson are respectively Applicant and Respondent in two applications before me. In the one dated the 22nd day of February, 2007, the Applicant Becki Patterson seeks the following orders:

1. That paragraph 1-3, as well as paragraphs 5-7 of the Consent Order made on the 27th November 2006, be varied to read:-

a.) *The parties have joint custody with care and control to the mother.*

b.) The father shall have access to the relevant child one half of all major school holidays, or at any other time as agreed by the parties.

c.) The father is to pay the sum of One thousand United States Dollars per month for the maintenance of the relevant child.

d.) the father to provide the relevant child with a health card.

e.) that the mother is to pay the relevant child's educational expenses.

f.) That the mother is allowed to leave the jurisdiction with the relevant child to reside in the Republic of Trinidad and Tobago.

g.) The father is to return to the mother the relevant child's passport forthwith.

In the application dated the 6th day of March, 2007, the Applicant Richard Patterson seeks an order in the following terms:-

1. That the order made by the Hon. Mrs. Justice Beswick on the 17th June, 2003, as to custody, care and control to wit:-

"[1]. Ordered that joint custody to both parents with care and control to his father Mr. Richard Patterson.

[2]. That the Defendant deliver to the Claimant the Jamaican and Trinidadian Passports of Child "N".

Both Applications were heard together as they related to issues affecting custody, care and control of the child born during the marriage, (since dissolved) of the Applicant and the Respondent.

A brief background should be painted of the history of the applications made of this matter to date and the Court orders made therein. On the 28th May, 2003 the first order was made by Mr. Justice Brooks. This was an Ex Parte Interim Order giving care and control of the child 'N' to his father for a period of fourteen days. The mother, inter alia, was restrained from removing the child 'N' from Jamaica.

2. On the 17th day of June, 2003, Mrs. Justice Beswick ordered, at an inter partes hearing, that there be joint custody of the child to the mother and father, with care and control to the mother and also the father was granted access to the child 'N' every Friday from 6 p.m. to Sunday at 6 p.m.

It was also here ordered that the father should pay to the mother the sum of $49,000 per month for the child's maintenance as of the 26th day of June, 2003 and thereafter on the 26th day of each succeeding month until further order.

It was also ordered that the father pay medical and dental expenses for the child 'N'.

This order was an interim order.

3. On the 13th day of June, 2005, the access arrangements made consequent on the order of Mrs. Justice Beswick was varied by Mr. Justice James but the arrangements for Custody remained the same.

The order for payment of $49,000 for N's maintenance remained the same. However, the father was ordered to pay one half of the educational expenses for child 'N'.

4. On the 27th day of November, 2006, the parties, consenting, Mr. Justice Morrison varied the order made by Mr. Justice James on 13th June, 2005, by reducing the sum payable monthly for N's maintenance to $38,000 and that the father should now pay all the child's educational expenses. Each parent was granted leave to take the child out of the jurisdiction with the written consent of the other.

I now return to the application of each parent, the subject of the current hearing and earlier referred to.

In support of her application to vary the consent order made on the 27th November, 2006 (the order made by Mr. Justice Morrison) the Applicant Becki Patterson swore to an affidavit of some 30 paragraphs, and appended thereto were certain exhibits referred to in the affidavit. In paragraph 2 of this affidavit, dated the 28th day of February, 2007, she asks that the Court make the order sought by her as it is her belief that the proposed arrangements "are the best that can be devised in the circumstances at this time."

The proposed arrangements are then listed as follows: _

(a). the child 'N' will live in a two bedroom apartment in Trinidad and will have his own room.

(b). the child 'N" will attend Briggs Preparatory School and will receive "his religious teachings" at Our Lady of Perpetual Help, a Roman Catholic Church.

(c). The father is asked to contribute the sum of One Thousand United States dollars for the child's maintenance as well as to provide for the said child 'N' a regionally accepted health card. Other expenses related to the child will be bourne by his mother.

(d) Access by the father to the child will be during one half of all major school holidays, Christmas and New Year's days will remain "alternated", and any other time that can be agreed by the parties.

At paragraph 4 of this said affidavit the Applicant Becki Patterson expresses her desire to leave this jurisdiction in these terms for

(i) The move at this time to Trinidad is in the child's best interest.

She goes on to explain her reasons for holding that view.

She says so because 'in' November, 2005, the Claimant/Respondent, my former husband, sought a six month moratorium on paying the $49,000.00 child maintenance by way of a letter to my lawyer. Unilaterally, that is absolutely without any discussions or agreement, he then proceeded to short pay by almost half the stated amount each month for the year 2006. Sometimes he paid $25,000.00 and sometimes he paid $30,000.00 and always later than the court appointed time of 25th of each month, though he backdated the cheques to the 25th of the month. Only on the verge of committal proceedings did he clear the arrears." (emphasis is mine)

She blames the unwillingness of the Claimant/Respondent to abide by the Court's orders as it curtailed her ability to "protect the physical welfare of my child 'N'."

This led her to have to move to "smaller more cramped" living accommodation from what both had been accustomed to. In 2006 the standard of living to which the child had been prior to that time exposed, deteriorated because of the Claimant/Respondent's choice of disobeying the order set in place to help her care for her son.

She contrasted the living conditions of her former husband the Claimant/Respondent with hers and her son's. He occupies a townhouse at a rental of more than twice what she can afford, rental of the said townhouse being US $1000 per month.

She, on the other hand has faithfully obeyed the Court's order which regards to access despite the flagrant disrespect shown by the Claimant/Respondent with regards to the Court's order for maintenance of the child.

Towards the end of the year 2006, in an effort to 'bring' some stability to the negative effect to his poor pay performance and his refusal to seek full time regular work that would aid in his being able to contribute to the child's upkeep," she agreed to accept a reduced $38,000.00 per month for the child's maintenance, towards the child's living expenses. This was in 2006 towards the end of that year.

A consequence of this is that she can no longer support the child on that amount and has therefore sought to secure Richard Patterson with a Notice of Application for auxillary relief - this could contribute to her upkeep.

She has secured a position in Trinidad, with a 'commencement date' of 2nd April 2007. This will allow her to provide comfortably for the growing and longer term needs of herself and of the child N.

The Claimant/Respondent, with his Bohemian lifestyle, inconsistent daytime income and "work schedule as a 'consultant" is in no position to care for the child financially nor can he provide the child with family support means.

Her family in Trinidad, immediate and extended is willing and able to aid in the child's emotional and physical welfare. The child's maternal grandfather

is currently incurably ill and should be given an opportunity to know the child and the child to know him besides the child will also be able to know his maternal uncles and his cousins in Trinidad. By taking up the job in Trinidad, she will "relieve the Claimant/Respondent of the demonstrated financial strains to meet these responsibilities."

She proposes to take over completely and consistently paying the child's school fees, fees for all extra curricular activities, some other domestic expenses and to have the opportunities to save for the higher education needs of the child. The proposed new job in Trinidad will enable her to provide health care, despite the request made of the Claimant/Respondent for a contribution to the child's medical expenses.

This proposed move will not disturb his education or emotional progress because he is so young. The Claimant/Respondent Richard Patterson can "come to Trinidad when he so desires to visit with 'N' and also to partake in his school and other activities."

The only financial support sought of the child's father is the sum of U.S. $1000.00 per month towards the child's upkeep. She also seeks the return of the child's Trinidadian Passport intact and unaltered, forthwith.

Pursuant to his Application for Court orders dated and filed on the 6th day of March, 2007, Richard Patterson sought an order in the following terms:-

> "That the order made by the Honourable Mrs. Justice Beswick made on the 7th June, 2003 as to custody, care and control, to wit:-

"1) Ordered that joint custody to both parents with care and control to father Mr. Richard Patterson.

2). That the Defendant deliver to the Claimant the Jamaican and Trinidadian Passports of 'N' Patterson."

The ground on which Richard Patterson seeks this order is very tersely stated, as follows:-

> "The Claimant is of the view that such an order would be in the best interests of the child."

The Claimant/Applicant in the last mentioned application dated the 6th of March 2007, deponed in answer to the Respondent Becki Patterson's affidavit, in an affidavit dated the 7th March, 2007.

He attributes the efforts of his former wife, to make the application to remove herself and the child from Jamaica to her wish to "deprive 'N' and himself of reasonable access to each other and to reduce the access currently enjoyed. Should the efforts of the said Becki Patterson be successful, the result would be effectively to deprive this Court of jurisdiction since both mother and child would be resident abroad thereafter.

The order of the Court awarding joint custody of the child 'N' to both parents requires that there be consultation between both parents regarding all major decisions relating to the child's upbringing.

As indicators of Becki Patterson's failure to consult him re major decisions regarding the child, Richard Patterson has cited the following instances:

(a). details of the proposed living and educational arrangements for the child in Trinidad.

(b). unilateral change of pediatricians;

(c) changing her address without alerting him until about one month later.

This move to Trinidad would have the effect of depriving him of regular access to the child and cannot be in the child's best interest.

The child would be deprived of the frequent interaction that he has with his only sibling, 13 years old Gabrielle. Currently, there is access to the child "N" every other weekend and preceding the 4th weekend in each month, the Applicant father has access to the child from Monday evening to Friday evening. This means that he collects the child from school on the Monday evening and takes him to school each day of the remaining school week - Tuesday to Friday. Also during the week when the child is with his father, he takes him to school two days per week.

The child and his sister Gabrielle are very close and spend a great deal of time with each other. Separation of the children would be devastating to both. The child has forged a very close relationship with his paternal grandfather.

It has been agreed between the parties, since the marriage and on the birth of the child "N" that he would be raised and grown up in Jamaica. Were the child to continue to reside in Jamaica he would "remain happy, playful and energetic" and be able to stimulate his enquiring mind.

He explained the reason for the reduction in payment of court ordered sum per month for the child, attributed it to a loss of a consultant position with the National Solid Waste Authority. He further added that despite the reduction sought in the monthly sum to be paid, to $39,000 from $49,000 he also sought to be solely responsible of the child's school fees and his health expenses. A perusal of the Consent Order dated the 27th day of November, 2006, will indicate the details of the substituted arrangements regarding the child's maintenance. His efforts to live up to his financial obligations regarding the child included borrowing from family and friends when his income suffered a sharp decline.

The contention of Becki Patterson that Richard Patterson's "failure to abide by the Court order" resulted in her having to find cramped and smaller accommodation for herself and the child was untrue. The accommodation to which she had relocated was adequate (kitchen, living room and two bedrooms) in a clean, comfortable and quiet well established middle class neighbourhood.

The sum sought by the Applicant Becki Patterson of US $1000.00 per month would not relieve Respondent Richard Patterson of "demonstrated

financial strains to meet his responsibilities "as this new amount would equate to a sum greater than the Court had initially ordered him to pay for the child's maintenance.

The child's welfare and his best interests are not met by his mother remaining in Jamaica and having care and control, but it is in the best interest of the child were he to reside with his father, even if the Applicant mother relocates to Trinidad.

The Respondent father also made allegations concerning the Applicant mother's care of the child; that she would some nights leave the child with one Sidna Wellington who had worked with both Applicant and Respondent during the marriage. There were several mornings when the child, having been picked up by the father would indicate that he was hungry, not having had breakfast and had not bathed. The Applicant mother is bad-tempered and has used expletives in the child's presence.

The father further deponed that he can provide a stable environment and can attend to all aspects of the child's welfare so that he may continue to be brought up in Jamaica. He has however not indicated what suitable alternate arrangements he would put in place in the mother's absence.

The Applicant Becki Patterson has responded by Affidavit to the Respondent Richard Patterson's response to her affidavit of February 28, 2007 she deponed that, inter alia, that it is not possible to communicate effectively

with the Respondent father on all matters relating to the child. The father is unable to separate how he feels about the Applicant mother from their consulting as parents. This has made communication difficult. He further refuses to speak to her or his often caustic remarks would cause conversation to escalate into a disagreement.

As to the assertion that the Respondent was not spoken to about the proposed move, he was spoken to but his rebuttal of same led her to place the matter into the hand of her attorneys-at-law to have the matter placed before the Court.

Viva voce evidence was also elicited from cross examination of each of the parties in the proceedings.

The Law

The Children (Guardian and Custody) Act provides in Section 7, that

> **"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 of the mother as well as the father, and may alter, vary or discharge such order on application of either parent."**

Section 18 of the said Act emphasizes in unmistakable language the paramountcy of the welfare of the child in such proceedings. The section reads"

> **"Where in any proceeding before any Court the custody or upbringing of any child is in question, the Court in deciding that question, shall regard the welfare of the child as the first and paramount consideration and 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 in respect of such custody, upbringing administration or application is superior to that of the mother, or the claim of the mother to superior to that of the father."

Where the Applicant seeks leave to leave the jurisdiction, with the child, the application has to be reasonable and to be reasonable; it had to be genuine, practical and not motivated by any desire on the Applicant's part which can be described as inappropriately selfish.

However, the mere fact that a proposal to move abroad has been shown to be reasonable does not automatically mean that permission to leave the jurisdiction would be granted.

The Court, having come to the conclusion that the application is reasonable, then it must consider, as a sequitar whether the grant of the application would best considered to be for the welfare of the child. It must consider the manner in which competing welfare factors applied in the particular case.

Should the Court conclude that a refusal would impact detrimentally on the care that the primary care giver would give, then that harm would usually outweigh the livelihood of harm flowing from other aspects of the proposed moved because of the importance of the need to promote happiness and stability in the home. Usually the harm likely to flow from a reduced contact to the non-residential parent, as a result of the move from the jurisdiction could not be

basis for a conclusion that the welfare of the child would best be promoted by refusing an application by the residential parent to take the child to another jurisdiction.

See Re C (Permission to remove from jurisdiction (2003) EWHC 596 (Fam.)

The reasonable proposals of the parent created no presumption in favour of the Applicant parent although this carried great weight. However the child's welfare was always paramount.

Thorpe LJ in Payne v. Payne (2001) 1 FLR 1053 reviewed decisions re cases.

The relocation cases such as the instant case are usually decided, as the authorities have shown over a number of years, upon the application of two propositions:-

(a). the welfare of the child is the paramount consideration; also

(b) that refusing the primary carer's reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent child (one).

Therefore her application to relocate will be granted unless the Court concludes that it is incompatible with the welfare of the child(ren).

The Applicant is usually the mother and prima carer; the motivation generally for the move arises out of her remarriage or her urge to return home; and the father's opposition is commonly founded on a resultant reduction on contact and influence. In most relocation cases the most crucial

assessment and finding of the judge is likely to be the effect of the refusal of the application on the mother's future psychological and emotional stability.

Where as in the instant case the father makes a cross application of the custody and control of the child, the two applications should not be compartmentalized. They should be tried together and decided together.

There must be a comparative evaluation of each option for the child – evaluating a home with mother in this jurisdiction against a home with the mother in another jurisdiction as against a home with the father.

In the instant matter both applications were heard together, the mother's and the father's, the mother's being first in time. In considering the custody of a child, despite the wishes and desires of the parents of the child, the welfare of the child should be the primary focus of a Court.

The guidance given by ***Lindley L.J. in re (McGrath (Infants) 1893 1 Ch. 143*** (and often repeated), at page 148 is contained in the following passage:

> ***"The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of the child is not to be measured by money only or by physical comfort only. 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 ***Payne v. Payne (2001) FLR page 1052, Dame Elizabeth Butler Sloss P. at p. 1079,*** summarized the considerations which should occupy the fore-

point of the judge's mind when "trying one of these difficult cases." She was quick to point out that the considerations to which she directed the judge were not exclusive of other important matters which arise in the particular case which falls to be decided. From this I gleaned the following considerations:

The child's welfare is paramount.

There is no presumption in favour of the Applicant parent.

The reasonable proposals of the parent (with a resident order) (the equivalent of a custody order) to live abroad carry great weight.

These proposals should be scrutinized with care so that the Court can be satisfied that there is a genuine motivation for the relocation and not the intention to bring contact between the child and the other parent to an end. The effect upon the child of the denial of contact with the other parent and his family is also very important.

The opportunity for continuing contact between the child and the parent left behind may be very significant.

All the considerations suggested by Dame Butler-Sloss P were predicated on the basis that the question of residence was not a live issue.

Where as, in the instant situation, one parent wishes to remove to another country, remove the child from school, surroundings and from the other parent and his family, this may be an important factor to weigh in the balance.

The uncontroverted evidence in this instant case is as follows:

The Applicant mother is Trinidadian and has lived in Jamaica since 2002, since her marriage (now dissolved) to the Respondent father. The father is Guyanese by birth to a Jamaican father and a Guyanese mother. The child "N" was born in Jamaica in September, 2002, has lived all his life to now in Jamaica and is currently at school at Mona Preparatory School in Jamaica. There is one sibling, the father's child 'Gabrielle' who is thirteen years old. There is a close relationship between the child 'N' and Gabrielle his sister.

There is a very close relationship between the child and his father. The father has liberal access to the child. There is in existence an order for joint custody of the child since the year 2003. Care and control of the child is to the Applicant mother.

The child is well balanced, well rounded, pleasant, outgoing with a pleasant personality.

It is agreed that the environment in which the child now functions "in Jamaica has been conducive to his excellent development."

The Applicant mother has no relatives in Jamaica but her parents and her two brothers reside in Trinidad. She also has an aunt there.

The child has visited Trinidad but is not close to any of his relatives there. The Applicant mother has indicated that were the Court not minded to allow the child to leave with her to Trinidad she would remain in Jamaica.

The mother's desire to relocate to Trinidad is explained in paragraph 13 of her affidavit sworn to on the 28th day of February, 2007 and is expressed in the following manner "I have resorted to finding a job in my native Trinidad that will allow me to comfortably provide for the growing and longer term needs of my son and myself."

She had outlined instances of the Respondent father's poor payment performance when honouring the Court's order for maintenance. She contrasted the cost of the accommodation occupied by the child and herself and that occupied by the Respondent father. The rent paid for the father's accommodation was stated to be US $1,000 per month versus $25,000 per month Jamaican for the mother's accommodation. The cost of the father's rental is more than twice that of hers.

The Applicant has admitted that when she agreed to the reduction of the monthly maintenance sum of $49,000 to $38,000, that the Respondent had assumed responsibilities for all the child educational, medical expenses and for all extra curricular activities. The school fees at Mona Prep amounted to $40,000 per term.

Asked in cross examination to account for how the $38,000 per month is spent, Applicant stated that it goes to food, recreational, clothing, shoes, books, toys – gas for transport up and down taking the child to outings, entertainment, non-prescription drugs, haircuts and other incidentals.

It is clear from the evidence of the Applicant that the prime reason for wanting to take the child from this jurisdiction is financial. Her desire to see and be with relatives seems to be a lesser motive for wanting to leave Jamaica.

The father's self acclaimed declaration that he is the better parent is not supported by any item of fact. His credentials as a father however, have been supported by the Applicant/mother who has not been unwilling to state that in her opinion, not only has the child got an excellent relationship with his father but that the father is "a caring and devoted father" to the child. The Respondent/father on the other hand has sought to make allegations which, if accepted would render the Applicant a less suitable parent. I do not accept the Respondent's attempts at reducing the suitability of the Applicant as a parent or that he is a better parent than the Applicant.

Having concluded that the decision to remove from Jamaica is a financial one, I have to look at and assess other factors in the instant case.

I have to assess the reasonableness of the proposals, how the exercise of my discretion will affect the Applicant and how a refusal of the application will affect the child. The decision is this case is at best a very difficult one.

I accept that the Applicant is seeking to return with her child to her native land from a country in which she has resided since 2002, because of the obligations of a marriage which is now at an end. She has no relatives in Jamaica. She has however stated that she is prepared to remain in Jamaica if the

Court refuses her application. The circumstances of this particular case are typically difficult.

The child is currently thriving in an environment of some regulation and working inter parental contacts. He resides with the Applicant but spends very extended periods with the Respondent. He has regular contact with and close relations with his paternal grandfather and his only sibling Gabrielle. He is, admittedly very bright and sociable, balanced and well rounded.

He is attending Mona preparatory School, considered by the Applicant "a very good school, where he is doing well." Apart from his academic work, he also does karate and swimming.

His father participates in every aspect of his life – this is attested to by the Applicant in cross examination. This is important that the relationship between the child and his father continues.

The child has friends at his school. It is the opinion of the Applicant, expressed in her answers in cross examination that "the environment in Jamaica has been conducive to N's excellent development.

I am not convinced that the excellent development of this child should be alerted in any way. I sympathise with the Applicant's situation but when I consider all the factors which I have been reminded by Dame Butler-Sloss, (supra) I should, in a case of this sort, I am not of the view that it is in the

child's best interests for him to leave the only environment he knows and which environment has so contributed to his excellent development.

However, nothing in the evidence before me propels me to the view that the father should have sole care and control of the child, while he remains in Jamaica (even if the Applicant mother remains here). I am not of the opinion that the child's Trinidadian Passport be delivered to his father.

The status quo remains and the orders sought by the Applicant mother and Respondent father respectively are hereby refused.