IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO.E. 1978 of 1976

BETWEEN	VALERIE CYNTHIA RICHARDS	APPLICANT
A N D	IVAN KENNETH RICHARDS	RESPONDENT

IN THE MATTER OF SAMANTHA PAULA RICHARDS AND BRENDON DREW RICHARDS

A N D

IN THE MATTER of the GUARDIANSHIP AND CUSTODY of CHILDREN ACT

Mrs. Angela Hudson-Tyndale for the respondent

Mr. Douglas H. Brandon for the applicant

Hearing 16.9.80,18.11.80

WRIGHT J:

This is an application by the Respondent for the variation of an order made on the 4th day of February,1977 awarding custody and care of the two relevant children of the marrige to the applicant in the following terms:-

1. That the custody and care of the infant children SAMANTHA PAULA RICHARDS AND BRENDON DREW RICHARDS be committed to Valerie Cynthia Richards during their minority or until further order of the court.

2. That the Respondent IAN KENNETH RICHARDS do have access to the said children as follows:-

(a) On alternate week-ends commencing on the 11th February,1977 from Friday afternoon at 4.00 p.m, until 6.00 p.m. on Sunday afternoons. The Respondent to collect and return the children on these occasions.

(b) The school holidays to be shared by the parties and Christmas to be taken by alternate years.

3. Neither party shall take the children out of the jurisdiction of this Honourable Court without the written consent of the other or of an Order of the Court.

4. The Respondent shall pay the sum of $200 monthly for maintenance of the children and if the applicant ceases to reside at 13 Seymour Square, Saint Andrew or if the house is disposed of or the company which owns same be liquidated the Respondent to make further payments to her to make up the total monthly payments to a sum of Five Hundred and Sixty-Seven Dollars.

5. The Respondent to pay the costs of and incident to these proceedings with certificate for counsel.

The parties were subsequently divorced and the Respondent has since migrated to the United Kindon, remarried and established a home.

On the 19th August,1978 Samantha went to spend holidays with the Respondent and elected, for the purpose of her education, to stay with him and hiswife the latter being no stranger to her. Her election was endorsed by both parents and it is alleged and not denied, that there has been remarkable improvement in her education since then.

In the meanwhile the applicant took active steps with a view to migrating to New Zealand. Accordingly, the Respondent fearing that Samantha would be taken to New Zealand had her made award of Court with care and control being given to him. The relevant portion of the Order dated 18th October,1979 reads:-

1. "That the said minor do remain a ward of this court during her minority or until further order.

2. That the said minor do remain in the care and control of the plaintiff until further order.

3. That the defendant do have reasonable access to the said minor.

The applicant in her affidavit states that she had received the summons in advance but decided not to contest it because the child had written her to say she was relatively happy.

However, the applicant did not take kindly to this move by the Respondent and castigated it as "sneaky and totally unnecessary" since,as she contends, in sending the child to England it was never intended that she should be deprived of custody.

It is not difficult to appreciate the complaint of one who feels aggrieved, but it must be appreciated that the award of custody to one parent is not a indefeasible title. Indeed,the Act sets out clearly the basis upon which the question of custody must be decided. The Children (Guardianships and custody)Act provides section 7:

> "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, andmay alter,vary or discharge such order on the application of either parent" etc.

The Paramountcy of the welfare of the child to any such proceeding is emphasized by section 18 which provide inter alia.

> "Where in any proceeding before any court the custody or upbringing of a 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..... is superior to that of the mother or the claim of the mother is superior to that of the father"

The principle here enunciated must be taken to have guided the court in awarding custody to the mother. In order,therefore, to secure a variation of the order to give custody to the Respondent it is necessary to show that the pendulm has so swung that the welfare of the child Brendon Drew will now be best served by awarding custody to the Respondent.

What, then, is the basis on which the variation is sought? But first, what is the variation sought?

The Respondent prays that the order dated 4th February, 1977 be varied as follows:-

1. That the custody and care of the said infant children be committed to the Respondent Ian Kenneth Richards during their minority or until the further order of the court;

2. That the applicant Valerie Cynthia Richards do have reasonable access to the said children

3. That on the grant of the orders requested in paragraphs 1 and 2 hereof the Respondent be no longer required to pay the applicant the sum of $200 monthly for the maintenance of the said children.

Now for the grounds on which the application is made. As set out in the Respondent's affidavit they are:-

1. Since his migration to the United Kindon the applicant has refused to allow the infant Brendon Drew to visit him there or to spend any part school holidays with him.

   To this the applicant responds that there is nothing in the Order of the Court requiring her to send Brendon to England.
   This stance is legally correct but does not reflect any consideration of the child's wishes or welfare.

2. That the applicant is in further breach of the Order in that without his knowledge or consent the applicant permitted Brendon Drew to leave the jurisdiction of the Court for a visit to the Cayman Islands in the company of a junior officer of the British High Commission.

   The applicant admitted this breach without any comment but it is to be observed that she now cohibits with this officer.

3. That in or about April,1979 the applicant sold the premises at 13 Seymour Square in the parish of St. Andrew where,to the knowledge of the court(as reflected in the order)a home had been provided for the children and had not accounted to him for his interest in the said premises. Further, that since the sale of the said premises neither the applicant nor the infant Brendon Drew has had a permanent home. They have moved home from time to time and between July and October 1979 had moved home at least four times- a situation which was not in the best interest and welfare of the infant Brendon

Drew. The applicant and the Respondent were share-holders (holding 25% of the shares) in a company at 13 Seymour Drive, the applicant contends that the premises were sold by the mortgagee to a buyer found by her which sale was occasioned by the non-payment of mortgage instatements by the Respondent.
On the other hand the Respondent insists, and correctly so, that the order of the 4th February,1977 did not require him to make any such payments and contends further that the applicant sold the premises and moved out in pursuance of her intention to migrate to New Zealand.

Since the Respondent's interest in t the holding was of such a minor proportion it is difficult to accept that the majority owners would allow their interest to be prejudiced by a minority share-holder.

What is evident/that there was a lack of communication between the parties. The statement of account relating to the sale reflected a short-fall of $105.28. Accordingly,the respondent stood to receive nothing from the sale and the applicant contends she received nothing. The applicant admits the frequent change of address explaining that she was occuping properties for absentee owners rent-free but denies that there is any disruptive effect on the child. However, in cross-examination she admits it was becoming boring.

4. That so far as Brendon Drew's interest are concerned the child had indicated to him that he did not wish to migrate to New Zealand

but wished to be allowed to visit the Respondent in England before making up his mind on the matter. In addition the Respondent avers.

"That I do not believe that it would be in the interest and welfare of the infant Brendon Drew to allow him to migrate to New Zealand with the applicant who is over 50 years and whose employment prospects I verily believe are not good. I AM in a

a position to provide the said infant with a happy and stable home and a good education.. I own the said 29 Dorchester Court and my wife and I both have jobs which allow us to live comfortable even though carefully. My wife has expressed a desire to provide the comforts of a stable home for the said infant as she has already done for the infant Samantha Paula. I verily believe that both infants should be given similar opportunities for education and advancement and that it would be in the best interest and welfare of the infant Brendon Drew that he should be allowed to join his sister and me in the United Kingdom and to attend an appropriate school".

So far as the plans to migrate to New Zealand are concerned the applicant deposed in her affidavit that she has decided not to go in order to be able to give more attention to her mother who at the date of the affidavit (2nd November,1979) was living in Discovery Bay but was expecting, probably in another six months to remove to Kingston to reside with the applicant whose address at that time was stated to be 6 Waterworks Crescent Kingston 10. On the 6th March 1980 her address was given as Staff House No. 1 British High Commission Trafalgar Road St. Andrew which is the residence of Mr. Gwyn Tippet with whom she had formed an association and to whom she planned "to get married in the near future". But more of this anon. However up to the date of the hearing,the 16th September,1980 it did not appear that the mother was living with her. Indeed she testified under cross-examination "I did not get permission to go to Zew Zealand. Mother is coming to live in Kingston". Her stated plans seem rather labile. For the time being therefore, the Respondent's fear that Brendon would be taken to New Zealand,though valid when expressed need not be allowed to affect the question of the child's interest and welfare. Brendon is 13 years of age and the Respondent express dissatisfaction about his progress in school It is a sore point that he was not being kept up-to-date on his progress in school and the last report he had (which was exhibited along with a letter from the child) justified that concern. The report discloses no spectacular attainments and the comments read:-

"He seems competent and probably needs some extra instruction in mathematics".

The letter reveals an "atrocious hand-writing and the spelling is lamentable. By the date of the letter 29.10.79 the child had changed school and confessed to being much happier at his new school where he was pleased to be doing much better. Life at the former school he says was boring because unlike the new school that school "has no girls". One may be pardoned for detecting here a search for a sister- substitute. The applicant admits that Brendon misses his sister. I find also this letter evidence of a normal father-and son relationship. This bears out the applicant's testimony that the relationship between Brendon and his father is good.

Paragraph 10 of the Respondents affidavit dated 6th February,1980 emphasizes the Respondents concern for Brendon's education. It reads in part:

"Because of the of the unsatisfactory quality of his school work I have from time to time suggested to the applicant that he be allowed to attend school in the United Kindon to this end I have made preliminary enquiries and on the basis of school reports two leading Public Schools in the area in which I live Alleyns and Dulwich College one being the school of which Samantha's a student. Both school recommended to me a high level tution school in Dulwich (where I live) called Oakfields a private school with a class teaching level of 10. The headmaster of Oakfields is prepared to accept him as a student on the clear understanding that if after- evaluation he considers additional tution to be necessary, this would be provides on my paying additionally for it. I am prepared to do this to bring him back into the mainstream of his educational abilities which I know he has but which I feel are not being considered at the moment".

It is worthy of note that nowhere in the applicant's subsequent affidavit dated 6th March,1980 nor in her viva voce evidence in cross-examination does she set out to impeach this expression of concern as insincere or unfounded. Indeed,

there is no reference to this. And apart from asserting that the infant's school work has shown some improvement since the change of school no proposal is advanced to assist the child having regard to his apparent need.

As regards the infant Samantha the Respondent's affidavit dated 14th November,1979 states at paragraph 7:

> "That since she commenced to attend school in the United Kindom the infant Samantha Paula's school work has shown remarkable improvement and the benefits of her exposure of the facilities which the United Kindom offers for developing children are now very apparent".

Paragraph 16 of the said affidavit states in para :

> "That the infant Samantha Paula has stated categorically that she does not wish either to return to Jamaica to live with the applicant or to migrate with her to New Zealand".

The applicant does not doubt that Samantha is doing well at school as she always did well in Jamaica and was always in the top quarter of her form. It is reasonable to conclude therefore that where better facilities for learning and development are available this child would respond with profit to herself.

In these circumstances it would be contrary to Samantha's welfare to do otherwise than to confirm her remaining where she is and to award custody to her father the Respondent.

However,there was some contention regarding the payment of maintenance ordered in respect of both children. Of course,the applicant will not be required to make any payments in respect of Samantha for the period since she left Jamaica.

The applicant contends and the respondent admits,that between the 12th September,1979 (this was intended to reflect the date of Samantha's departure) and the 22nd November,1979

the Respondent had remitted only £50 to the applicant. But the Respondent explains that payment was suspended pursuant to an oral agreement with the applicant to enable him to meet the coast of taking Samantha to the United Kindom and getting her into school. It is agreed that he should be given credit for the amount reasonably expended submitted to be £2296.75 (converted to $7.487.40.

Having regard to Brendon's age I thought it only right hear him. I had private audience with him.

He readily impressed me as intelligent child who unfortunately, is forced to grapple with confused and confusing adult problems- a little child caught up in the turmoil of an adult world. There is no doubt that he loves his father, his mother and his sister. He cannot fully appreciate why father should be away. He enjoys a fairly good relationship with Mr. Tippet who at 40 is only 2 years younger than the Respondent his father. Inquiry into his pastime revealed that he is obliged to attend at the Liguanea Club where at least Mr.Tippet is a member. The atmosphere and the engagements there I do not regard is ideal or desirable for a child. It is as though his childhood is being hastened away.

The questions I put to him were designed to test his reaction to certain sensitive areas. He was quite relaxed talking about his father who keeps in touch with him and sends him presents at Christmas and on his birthday in addition to telephoning him. It was obvious that he misses his sister very much and only with difficult restrained his tears as he spoke of her. They speak on the telephone and so/is he made aware of the facilities she is enjoying not only at school but for her general development e.g. travelling to Europe, and/he as put it "he feels left out". This feeling is strengthered by the fact that some of his friends have left for schooling in England. He has lived in England for 4½ years. Accordingly for him life in England would not present the scare of a totally new experience.

In addition to his father and sister he is well acquainted with his father's present wife having spent week-ends with her in Jamaica.

These factors are strong indicators as to where the child's welfare would best be served, but they do not constitute the whole picture. The other factors have to do with the applicant. She demonstrates a penchant for dealing with the truth with less that full regard. In dealing with her plans to migrate to New Zealand she gave the impression she had abandoned the idea in order to take care of her ageing mother who would be coming to live with her in Kingston. In answer to a direct question in cross-examination she admitted that she did not get permission to New Zealand a totally different thing. But while she contends her mother would be coming to live with her in Kingston the Respondent discloses that the applicant's mother who is English, had written expressing an intention to return to settle in England whereupon he had made enquiries of the relevant authorities as to how she would fare and upon the information supplied he has located a home near his home where she could have accommodation. The applicant has made no reference to this aspect of the matter. It remains unchallenged. The place where the applicants mother eventually settles have no bearing on the question. How will the child's welfare be best served?. But the handling of the issue does reflect on the type of person the applicant is and consequently on the atmosphere in which the child would continue to be brought up should be remain with her. Also it affects the applicants credit.

However, in this regard what I find to have a most telling effect is her treatment of her relationship with Mr. Tippet. As stated earlier she deposed that she and Tippet plans to get married in the near future". This would be a happy augury in favour of a settled home for the child Brendon

putting an end to the element of instability is manifested in this regard. The only thing wrong with that statement is that it is deceptive. It took cross-examination to reveal that Mr. Tippet is a married man with two children aged 11 years and 7 years respectively. Not to be out-done she countered that Mr. Tippet was in the process of being divorced. Indeed she justified this by stating "the nisi went through five weeks ago and the absolute is expected in 10 days time. That's obsolutely true" Frankly this performance was so slick find it difficult to accept.

Moreover there is no word from Tippet. What if he does get a divorce will his next step be to marry her however much she may habour the hope ? Then again, no court can release him from the obligation to maintain his two children and the divorce wife may be thrown in for good measure. How could Brendon fare in all this ? Is it fair to consign him to so equivocal a situation which could well find him along with the applicant out on trial again with everchanging addresses?

I pity the applicant who is not at all devoid of the motherly feeling and who is doing all she can to hold on to the infant Brendon the moreso now that Samantha is gone. But it would be wrong to resolve the question of the child's welfare on the basis of pity for the mother.

The factors that are worthy of consideration over whelmingly indicated that the welfare and interest of Brendon will best be served by his being with his father. It was this day (18th November,1980 been brought to the attention of the court though not by way of evidence that since the matter was adjourned the applicant married Mr. Tippet but this does not affect my finding.

Accordingly the Order dated 4th February,1977 is hereby varied and it is ORDERED:-

1. That the custody and care of the said infant children be committed to the Respondent Ian Kenneth Richards during their minority or until

further order of the court.

2. That the applicant Valerie Cynthia Richards do have reasonable access to the said children.

3. That the Respondent Ian Kenneth Richards be no longer required to pay the applicant the sum of $200 per month for the maintenance of the said children but shall be required to pay to the applicant commencing 19th August,1978 the sum of $100 per month for the maintenance of the child Brendon Drew until such time as the Respondent takes the said child into his custody.

4. That the respondent do pay to the applicant all sums due by way of arrears for maintenance of the said child Brendon Drew and any such arrears due in respect of the child Samantha Paula up to the 19th day of August,1978, the date of the departure from the Island provided that the Respondent Ian Kenneth Richards shall be allowed a credit of $5200 agreed to have been incurred as expenses in respect of the child Samantha Paula.

5. That forthwith the applicant Valerie Cynthia Richards do deliver to the Registrar of the Supreme Court all travel documents relating to the child Brendon Drew to be kept by him and to release the same to the Respondent Ian Kenneth Richards or his agent duly authorised in writing on proof of due compliance by the said Respondent Ian Kenneth Richards with this order.

6. That each party bears his own costs.