IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN EQUITY
SUIT NO. E 428 OF 2000

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| BETWEEN | NOELIA SEOW | PLAINTIFF/APPLICANT |
| AND | HAROLD MORRISON | DEFENDANT/RESPONDENT |

Mr. Gordon Steer instructed by Chambers Bunny and Steer for the Applicant
Mr. Raphael Codlin instructed by Raphael Codlin and Co. for Respondent.

Heard: March 19, July 20, 2001.

**HARRISON J.**

Let me first of all apologize for the delay in handing down this judgment.

The applicant has brought an Originating Summons seeking the following orders:

1. Custody of the child DARIEN QUINN MORRISON born on the 20th day of November 1992.
2. That the child continues to reside with the Applicant who shall have care and control of him.
3. That the Respondent shall have reasonable access to the said child.
4. That the Respondent do pay by way of maintenance of the said child the sum of Two Thousand One Hundred United States Dollars (US $2,100.00) per month plus all educational, medical, dental and optical expenses.
5. That the costs of and incident to this application be borne by the Respondent.

The Affidavit Evidence

The applicant is single and is a Bookkeeper by profession residing in the United States of America. The Respondent on the other hand, is a businessman and Architect residing in Jamaica. The parties met in 1990 and an intimate relationship commenced but at that time

the respondent was a married man. This relationship resulted in the birth of the child Darien Quinn Morrison who was born on the 20th day of November 1992 in the United States of America.

The applicant deposed that prior to the birth of the child, the respondent had arranged for her to reside in the U.S.A and was settled in a house in Florida, U.S.A. He supported both herself and the child to the extent of U.S $3,000.00 monthly. She further deposed that the relationship between them broke down in 1994 and as a result of this he began paying her only U.S $1,500.00 monthly for the child's maintenance. He however reduced this sum to U.S $750.00 in 1998 and finally in 1999, he stopped sending her monies.

The child and herself live at the premises she occupies. He attends school at Embassy Creek Elementary School and worships at Saint Bartholomew Roman Catholic Church in Miramar, Florida. She states that he is in a healthy condition and that the Respondent would be able to have reasonable access to him.

The respondent has deposed inter alia, in an affidavit sworn to on the 20th October 2000 that both the applicant and himself had agreed that they would make an endowment for the support of the child until he attained the age of adulthood. It was agreed that the endowment would be made over a period of time and that that was done. He also deposed that the endowment included a new 1992 Nissan motorcar that was to be used by the applicant in the U.S.A. He further deposed that between 1992 and 1998 he had paid her a total of US $135,000.00. He then states:

> "9. That our arrangement is that the total sum, together with the value of the car, would establish a fund on which the plaintiff was expected to earn considerable interest for the support of the child until it attained adulthood.
>
> 10. That at the time when I ceased making further contributions, it was clearly understood by the plaintiff and the defendant that the plaintiff had already been

given enough money in United States currency to be invested for reasonable support of the child until he attained adulthood."

The applicant in response denied that there was any agreement for the establishment of an endowment for the child. She contends that the respondent had purchased the motorcar because it was necessary and that one-half of the cost for the vehicle came from the sale of her Honda motorcar. She has admitted that she received a total of U.S $134,750.00 from the respondent.

The parties were cross-examined upon their respective affidavits and the applicant insisted that there was never any discussion between them about any agreement and for the sum of money paid by the respondent to be held on trust.

She is asking the Court to make an order for US $1500 per month for maintenance albeit that she had claimed U.S $2,100.00 in her affidavit. She admitted that she could have received U.S $200,000.00 cumulatively from the respondent and that none of that money has been saved for the maintenance of the child. She denied that the sum was paid in order to enable her to set up a trust fund for the child.

Submissions

Mr. Steer submitted that the respondent ought not to be believed that the money that was given to the applicant was to create a trust fund. He argued that there could be no merit in what the respondent claimed as the applicant would have had to be spending out of the money since the birth of the child. He submitted that there was no trust in place and even if there was the setting up of a trust for the benefit of a child could not be a bar to the applicant's request for his maintenance. He further submitted that the applicant could not covenant, consent, agree or contract with the respondent that she would not institute or take out proceedings to compel the respondent in paying maintenance for the child in excess of the sum provided by the respondent. He also submitted that it would be contrary to public policy and would therefore be void. Finally, he submitted that the powers of the court cannot be restricted by the private agreement of the parties and that

the court has the power to discharge vary or modify any agreement or order. (See **Bennett v Bennett** [1952] 1 All E.R 413).

Mr. Codlin submitted inter alia, on the other hand, that the fact that the applicant has chosen to bring proceedings in this court, does not by itself give the court jurisdiction to deal with the matter. This Court he said, has jurisdiction to deal with foreigners in civil proceedings only when the foreigners are within the jurisdiction or when it is established that Jamaica is the lex loci, say of a contract. He argued that since the child is not a Jamaican citizen, this court's jurisdiction over that person, if any, must be limited to when the child is in this jurisdiction. He further submitted that if an order was made in favour of the applicant and she did not use the fruits of that Order to support the child, this court could do nothing about it hence, the Court ought not to act in vain. On the other hand, if an order for maintenance was made in the United States of America any judgment given there could be enforced in this jurisdiction if the criteria set out in the Jamaican case of **Riley v Dempster Lloyd Riley** (un-reported) SCCA 2/90 delivered on the 26th November 1990, were met.

Mr. Codlin further submitted that if the submission on the jurisdictional point was wrong, then by setting up the fund, there was a trust and the applicant who was the trustee was obliged to carry out all the duties of a trustee. Furthermore, if it was not a trust, it was certainly a power that was given to the applicant and which carried all the duties of a trustee. He submitted that by not taking care of the money in support of the child, the applicant was in breach of the trust or in breach of the exercise of the power that was given.

Finally, Mr. Codlin submitted that the Court had no jurisdiction to grant custody to the mother who is out of the jurisdiction and is not a Jamaican but is a citizen of another country. He argued that the respondent has asked for custody and has undertaken to send the child to a suitable school and eventually to Munroe College if he gets custody.

The jurisdiction issue

I do not agree with Mr. Codlin that the Court has no jurisdiction to deal with this matter. The child's father (which is not in dispute) is a Jamaican residing here. There is no evidence before me to even suggest that the applicant is no longer a citizen of this country. Both parents are therefore Jamaican. In the circumstances, I hold that the court has jurisdiction to entertain an application for custody and maintenance brought on behalf of the child albeit, that the child is out of the jurisdiction, and for that matter was born out of the jurisdiction.

The law as it relates to the custody and maintenance of children

The Children (Guardianship and Custody) Act empowers the Court to make custody orders on the application of either parent. Section 7(1) reads:

> " 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..."

With respect to the welfare of the child section 18 of the Act provides:

> "18 – Where in any proceeding before any Court the custody or upbringing of a child or the administration of any property belonging to or held on trust for a child, or the application of the income thereof, is in 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 is superior to that of the father."

It seems to me therefore, that despite the wishes and desires of parents, the welfare of the child is "the first and paramount consideration". It is therefore my considered view that the welfare of the child should be the primary focus of a court considering a custody application.

**In re McGrath (Infants)** [1893] 1 Ch. 143 Lindley L.J said at page 148:

> " The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only nor 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."

Where maintenance in respect of that child is concerned, section 7(3) of the Children (Guardianship and Custody) Act provides as follows:

> "Where the Court makes an order, giving the custody of the child to the mother then whether or not the mother is then residing with the father the Court may further order that the father shall pay to the mother towards the maintenance of the child such weekly or other periodical sum as the Court having regard to the means of the father may think reasonable."

The Court's determination with respect to custody

The child was born on the 20th day of November 1992 so he is now close to nine (9) years of age. He and his mother are residing together since his birth in Florida, U.S.A. He attends school at Embassy Creek Elementary School and worships at Saint Bartholomew Roman Catholic Church in Miramar, Florida. His mother deposes that he is in a healthy condition. The respondent did not challenge any of these facts.

The respondent has also prayed for custody of the child and has merely stated that he will undertake to send the child to a suitable school and eventually to Munroe College if he gets custody.

What ought the court do in view of the competing claims? To determine what is in the best interests of a young child regard must necessarily be had to its relationship with the mother with whom it is living. He has been with her since birth and is in the best of health. Certainly, there has been no criticism of the applicant's ability to care for the child. He is at present attending school and goes to Church. I do not believe that the mere intention on the part of the respondent to send him to school is sufficient to justify an order in his favour. Sending him to school is one thing, but where and with whom would he reside. The respondent is silent on this. Why should the Court then, at this stage make any changes to the present arrangements? I do believe that custody of the child ought to be granted to the applicant.

The payment of maintenance

Let me now deal with the vexed issue relating to the sum of money paid by the respondent towards the maintenance of the child. If the respondent is to be believed that there was this agreement that he would have paid a monthly sum to be invested and the income derived therefrom used to maintain the child, then according to him he ought not to be called upon at this time to make any further payment. It is an admitted fact however, by the applicant that she has disposed of all the monies paid by the respondent and she has not received any maintenance for the child since 1999. Does it mean that because she failed to commence suit until 2000, that this lends credence to the respondent's story of this agreement?

It is recognized that the father of a child has a continuing responsibility, and the court a continuing jurisdiction to make such orders as it thinks appropriate for the maintenance of the child.

Now, section 7(3) of the Children (Guardianship and Custody) Act provides as follows:

> "Where the Court makes an order, giving the custody of the child to the mother then whether or not the mother is then residing with the father the Court may further order that the father shall pay to the mother towards the maintenance of the child such weekly or other periodical sum as the Court having regard to the means of the father may think reasonable."

In **Smith v Smith** (1985) 37 WIR 100 a decision of the Court of Appeal for Bermuda, it was held inter alia, that a judge has no jurisdiction to make an order which would bar a subsequent application for maintenance on behalf of any child of the marriage and the parties themselves cannot oust the court's jurisdiction to protect the interests of children, but the parties are not thereby prevented from entering into financial arrangements as a matter of practical reality.

I have had the opportunity of seeing and hearing the parties being cross-examined upon their respective affidavits and I must say that the applicant's credibility has not been affected in any way. I cannot say the same however, for the respondent. He has found himself in a dilemma. He is a married man and in order to protect his marriage he had arranged for the applicant to have this child abroad and for them to reside there as well. He seemed to have accepted his responsibilities at the time and spent lavishly in the maintenance of the applicant and child when the "going was good". Now that the relationship has come to an end he now seeks in my view, to come up with the idea of this endowment agreement. I am not convinced at all, that there was any such agreement between the parties and I so hold.

I must now consider the means of the respondent and what would be a reasonable sum for him to pay monthly. He is a businessman and Architect by profession. The applicant has stated in her affidavit that his monthly income exceeds $1 M (Ja) and that he has in excess of J $70 M invested. There is no evidence however, to substantiate these allegations.

The applicant has claimed a monthly sum of U.S $2100.00 and has set out at paragraph 9 of her affidavit in support sworn to on the 22nd June 2000, how she arrives at the expenses for the child. They are quoted in United States dollars and are as follows :

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| Mortgage (1624 divided by 2) | 812.00 | |
| Electricity (100 divided by 2) | 50.00 | |
| Water (95 divided by 2) | 47.50 | |
| Telephone (50 divided by 2) | 25.00 | |
| Cable (34 divided by 2) | 17.00 | |
| Maintenance (145 divided by 2) | | 72.50 |
| Security (32 divided by 2) | | 16.00 |
| Aftercare at school and sitter | | 360.00 |
| Groceries | | 250.00 |
| Clothing | | 100.00 |
| Health, Dental, Insurance, Medical | | 200.00 |
| Extra curricular activities | | 150.00. |
| Total | U.S $2,100.00 | |

The total monthly sum from the breakdown was never challenged. Neither was there any challenge with respect to the individual items. I do believe however, that the sum for Health, Dental, Insurance and Medical expenses ought not to be quantified monthly. Rather, when these expenses arise the respondent should be called upon to make them good. I also believe that the sums estimated for groceries, clothing, electricity, water and telephone are on the high side bearing in mind the age of the child.

Under cross-examination, the applicant testified that she is requesting the Court to make an Order for U.S $1500.00 monthly. She gave no reason however, why she was only seeking this sum.

I am further of the view that the expenses for after care at school and extra curricular activities ought to be paid directly to the school.

When all the circumstances are taken into consideration, it is therefore my considered view that a reasonable monthly sum for maintenance would be U.S $1000.00.

The Order

It is hereby ordered as follows:

1. Custody of the child DARIEN QUINN MORRISON born on the 20th day of November 1992 to the Applicant.
2. The child shall continue to reside with the Applicant who shall have care and control of him.
3. The Respondent shall have reasonable access to the said child.
4. The Respondent do pay by way of maintenance of the said child the sum of One Thousand United States Dollars (US $1,000.00) per month plus all educational, medical, dental and optical expenses until the child attains the age of eighteen (18) years with effect from the 1st day of August, 2001. The respective sums itemized for "Aftercare at school and Sitter" and "Extracurricular activities" should be paid directly to the school that the child attends by the Respondent.
5. The costs of and incident to this application be borne by the Respondent.
6. There shall be liberty to apply.