

J A M A I C A

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S MISCELLANEOUS APPEAL NO. 6/89

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.  
THE HON. MISS JUSTICE MORGAN, J.A.  
THE HON. MR. JUSTICE GORDON, J.A.(Ag.)

BETWEEN DALTON SMITH PLAINTIFF/APPELLANT  
A N D GAYE ORRIGIO DEFENDANT/RESPONDENT

Canute Brown for Appellant

Roger Davis for Respondent

October 23 and December 20, 1989

MORGAN, J.A.:

This is an appeal by the father of a girl child L.S. from an Order made by the Judge of the Family Court sitting in Montego Bay in the parish of St. James on the 17th July, 1989, awarding the custody of his daughter to the Respondent, her Aunt. At the end of the hearing we allowed the appeal and ordered that custody of L.S. be granted to the father and delivery of the child to him on or before 31st October, 1989.

We now state our reasons. It is necessary to set out the facts. Mr. Smith a waiter at Sandals Hotel now 27 years of age had an intimate relationship when 19 years old with one Thelma Orrigio and as a result a female child L.S. was born in 1962. He had lived with her in the house-hold at Cascade since 1976 along with her mother Belta Orrigio and sister the respondent Gaye Orrigio, but in 1984 the relationship came to an end and he left that home to Montego Bay.

He ceased visiting the home but Mrs. Orrigio would take L.S. regularly every week to visit him at Sandals Hotel when she went to the market to sell. Gaye moved to Esher to live with her boy-friend Clifford Headley, a teacher. Her sister and the child L.S. went later to live with them. The appellant visited L.S. there but in 1985 on the application of the child's mother a maintenance Order was made in the Court for payment of \$25.00 per week for the child. In 1988 this order was varied to \$35.00 per week.

By then the mother became very ill and he applied in March 1988, to the Court for custody of L.S. as he felt that the conditions which prevailed at the mother's home were not conducive to the child's presence and that the child was not being properly cared. The mother died in May, 1988. He was unable to see L.S. who was now with her maternal grand-mother **Belta**, the true respondent in this matter and when he visited the home the aunt who was then there ran him away. He could not find the child thereafter as the Aunt took her to Kingston presumably to hide her from him. He accordingly renewed his application to the Court as the Aunt continuously refused him access to the child. Because he is able to see to all her needs he now asks for custody of the child. He complains:

- (a) The child was not attending school regularly and has fallen from an average student to below average.
- (b) The child is shuttled between Cascade (maternal grand-mother) and Kingston where her Aunt is now living with her boy-friend.

These allegations were confirmed by the Probation Officers to whom the matter was referred, but the Respondent provided an explanation in her evidence. She said she was unsettled because of her removal from Cascade, Hanover, to Kingston; that she is now settled living on Red Hills Road, Kingston with her boy-friend; that she is working in a garment

factory and that L.S. had, since April, been enrolled at Excelsior Preparatory school on Mountain View Avenue, Kingston. She wants the child she said because she loves her and the child loves her also, and her boy-friend of 5 years and herself, who intend to get married, were capable of looking after the child who has always lived with her.

The Resident Magistrate found that there is a strong bond with the child and her Aunt. The child L.S. goes between this Aunt, the grand-mother in Cascade, Hanover, and another Aunt at Mountain View Avenue in Kingston. Respondent says she is a Quantity Controller at Magnum Enterprises, Kingston. She has enrolled L.S. at a school on the other side of the city of Kingston. Prior to this L.S. was not attending school for three months while the Aunt and her boy-friend leisurely settled in Kingston. It is significant that as a teacher this boy-friend was not able to assist her to see to the child's education during this period, and this can be regarded as a clear indication that he has little or no interest in the welfare of the child whom his girl-friend seeks to bring into his household.

It is patent from this evidence that this six year old child is put into a situation here which is not conducive to her welfare. Who is responsible for her in this setting is a question that calls for serious consideration and I am not satisfied that an acceptable answer appears from the evidence.

The Resident Magistrate having found that the reasons for the father's applications were - his concern about lack of access, and poor school performance of L.S. found that the appellant "had a genuine concern for the welfare and development of his child L.S." but that the application for custody was one of "financial consideration" in that a maintenance Order was

made against him. This consideration was never put forward by either counsel and there is no foundation for that finding.

The Resident Magistrate accepted that the appellant has a steady job and that he was near completion of a three bedroom house which would then afford adequate accommodation for L.S. He found two adverse facts - that the appellant prior to his present common law union was unstable in his intimate relationships and that the child had never before lived with him save for a period of two weeks. He found that although the father's environment would provide stability to enable the child to attend school regularly, yet, since three other children were at the father's home the necessary emotional support would be absent.

Indeed these three children are actually the children of his common-law wife, being two by a previous union and a boy which the appellant has fathered - a brother for L.S. It should follow that in this environment L.S. would find:

- (a) other children to live and play and attend school with
- (b) a brother of her own
- (c) a father who cares for her; and
- (d) a step-mother who has indicated that she is willing to have her.

In fact the father has accepted as children of the family his common-law wife's two children of another union, and has been caring for them. It seems to me plausible and certain that she in turn, as she says, will take his child into the home to be cared and loved equally as the others. True enough the child has not lived with the appellant before for any protracted period but no judgment should be based on that as the appellant has never been given the opportunity although he has shown love and care for her while in her mother's

custody. Additionally, the appellant and his common-law wife work on shifts one 9 a.m. to 6 p.m. and the other 6:30 - 10:30 a.m. and 5 p.m. to 9:30 p.m. and a full-time helper lives in the home. In these surroundings the children are at school for the greater portion of the day and at other times one or both adults would be at home to share their emotional needs.

The Resident Magistrate correctly addressed himself to the law thus:

"The welfare of the child is not to be measured by money only. The word welfare must be taken in the widest sense. The moral and religious welfare of the child must be considered as well as at its physical well being - nor can the ties of affection be disregarded."

Clarke v. Carey (1977) 12 J.L.R. 637 p. 646. He unfortunately failed to apply this to the facts. Indeed the Court must have regard to the welfare of the child as the first and paramount consideration but it is not the only consideration. The justice of the case must be equally considered - all the circumstances including the benefit of the child living with the father and the fact that his partner was prepared to take her and care for her in a good home where proper arrangements for the child children of the family are already in place, an arrangement into which L.S. can easily fit. Because there are competing interests all the factors on either side must be weighed and resolved. The question is where would the interest of the child be best served to secure that welfare, moral, emotional, spiritual and material, now and in the future. Indeed, these considerations clearly outweigh the adverse finding against the appellant.

The Resident Magistrate came to his final decision on these words that "the child L.S. would not have the necessary emotional and psycholological support that she needs at this time."

On the facts as outlined and those accepted by the Resident Magistrate this finding is ill-founded.

I feel that there is a great imbalance between the parties, that the welfare of the child is tipped heavily in favour of the father and that it is unjust to grant custody to the Aunt. A child will love her Aunt with whom she has had some years of association but will always want and love her father. This child will more proudly say "This is my father" rather than "This is my Aunt." She is just six years old and will in time grow to love her father maybe as much or more than her Aunt.

Counsel who appeared for the respondent conceded that the child's welfare would be better served in this manner.

In my view the Resident Magistrate while quoting the correct law did not approach the matter in the correct manner and came to an unjust decision.

For these reasons I agreed to the appeal, being allowed.

**WRIGHT, J.A.:**

I agree and would venture just one brief comment on the whole case. In current Jamaican situation when so much effort is being made to encourage responsibility among fathers, it seems passing strange that a Court should prefer the claims of an Aunt, who showed such contempt for the Court

1201

that she had to be arrested and kept in custody to enable the Court to adjudicate on the matter, over the claims of a father who has demonstrated his willingness and ability to care for his child.

GORDON, J.A. (Ag.)

I agree.