

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN EQUITY
SUIT NO. E425 OF 2001

IN THE MATTER of the application of
ROHAN WILLIAMS AND ANDREA
WILLIAMS

AND

IN THE MATTER of the application of
GUARDIAN in respect of KMAB

AND

IN THE MATTER OF THE CHILDREN
(GUARDIANSHIP AND CUSTODY) ACT

IN CHAMBERS

Gordon Steer and Deborah Dowding instructed by Chambers Bunny and
Steer for the applicants

Akilah Anderson and Frank Halliburton instructed by Knight Junor and
Samuels for the respondents

December 19, 22, 2008 and January 27, 2009

APPLICATION FOR SUMMARY RETURN OF CHILD - FACTORS TO BE
CONSIDERED - WHETHER SUMMARY RETURN IS IN THE BEST
INTEREST OF THE CHILD

SYKES J.

1. The application of the legally appointed guardians of the child KMAB to have her summarily returned to them in the United Kingdom was granted by me on December 22, 2008. I dismissed Miss Barrett's applications for (i) custody and control of KMAB; (ii) discharge of the order appointing Mr. and Mrs. Williams the legal guardians of KMAB as

well as the alternate remedy of removing them as the legally appointed guardians of the child. The application was heard on December 19 and 22, 2008, and the orders were made on December 22. These are my reasons for so deciding.

The facts

2. KMAB is the natural child of Miss Geraldine Barrett. She was born January 14, 1994. On September 20, 2001 the Supreme Court granted an order appointing Mr. and Mrs. Williams legal guardian of the child. At the time, KMAB was seven years old. Shortly after this appointment, Mr. and Mrs. Williams migrated to the United Kingdom, taking KMAB with them. She has been residing there since and returned to Jamaica from time to time to visit her mother and grandmother.
3. For three years prior to the summer of 2008, KMAB did not come to Jamaica. Her explanation for this was that it was her decision not to come to Jamaica because she had an inkling that her mother might not let her return to the United Kingdom. In effect, she was saying that it was not her legal guardians that dissuaded her from visiting her mother and grandmother. Her guardians were, at best, neutral in the matter and there is no evidence that they prevented her coming to Jamaica in those years.
4. When she came to Jamaica in summer 2008, it was the understanding of all concerned that KMAB would return to the United Kingdom. However, these well understood plans took a different course. Her mother decided to keep her. She was enrolled at the Convent of Mercy Academy, more commonly known as Alpha High School, for the Christmas term of the academic year 2008/2009.
5. Needless to say, her guardians were quite anxious over these developments. They applied, Notice of Application for Court Orders dated October 23, 2008, for summary return order in the following terms:

That the child KMAB is to be returned forthwith to England to the custody, care and control of her guardians Andrea and Rohan Williams.

6. The application was opposed by Miss Barrett. A number of affidavits was filed on both sides. The common theme in both sets of affidavits, as pointed out by Mr. Gordon Steer, counsel for the applicants, is that there is no allegation that the guardians are doing a bad job or that the child is being ill-treated, neglected, or abused in anyway whatsoever. Mr. Steer pointed out that when the totality of the evidence is looked at, what the application by Miss Barrett is really saying is that she ought to have custody of the child now because she is the mother and is now able to provide for the child. I was reminded by attorneys on both sides that the focus of the court ought to be on what is in the best interests of the child which means that I cannot take into account the best interests of the parent or guardian although their wishes are accorded respect and given due consideration.
7. The main area of concern raised by Miss Barrett was KMAB's early sexual activity. When the child was interviewed by me, in the absence of counsel and her mother, she stated that she had only two sexual contacts. One in Jamaica during her stay here between summer 2008 and December 2008, and once in the United Kingdom, with the latter being her first sexual contact. She indicated that her two sexual encounters were voluntary on her part. I say this to say that, in the circumstances of this case, the fact of two instances of sexual contact, cannot, without addition information, transform either the guardians or the mother into careless and negligent individuals.
8. KMAB is now fourteen years old and with the best will in the world, it is very difficult to prevent sexual contact short of imprisoning the child, if a child of that age is absolutely determined to have that experience. There is nothing to suggest that the sexual encounters occurred in the context of an established pattern of irregular behaviour which would have been detected if there was proper supervision. It would seem to me that there is not much separating the guardians and the mother in terms of their love for KMAB and

their ability to care for her adequately. I need to stress this last point because I wish to make it clear that I am not saying that Miss Barrett is an unsatisfactory parent in any way. From all the evidence in the case, Miss Barrett has more than demonstrated that she has indeed improved her education and financial position since the birth of KMAB. She has shown great tenacity in overcoming the fact of a pregnancy at eighteen years old.

The law

9. The applicable legal principles are no longer in doubt in this jurisdiction. These principles were exhaustively laid out in the Court of Appeal's decision of *Lisa Hanna Panton v David Panton* SCCA No. 21/06 (delivered November 29, 2006). As early as page three of that judgment Harrison P. stated in clear and unequivocal terms:

A court considering the summary return of a child to another jurisdiction must be guided at all stages by the principles of what would be in the best interests of the child. A balance must exist between the summary return and a hearing on the question of custody.

10. The learned President continued at page 5:

The summary return order may only be made after considering several factors.

11. At page 10 there is this powerful statement from the President:

In child custody cases, because the welfare of the child is paramount, all else is subordinate to that concept.

12. At page 13 Harrison P. said:

It is the duty of the a judge, therefore, who is asked to exercise his discretion in respect of the summary return of a child to another jurisdiction, to examine the various competing factors relevant to the well-being of the child involved. He has to keep constantly in his mind, in that balancing exercise the paramountcy of the welfare of the child.

13. The judgment of Smith J.A. in the same case complements that of the President in that his Lordship stated quite explicitly at pages 42 and 43:

The authorities clearly show that the court does have power, in accordance with the welfare principle, to order the immediate return of a child to a foreign jurisdiction without conducting a full investigation of the merits.

14. So the courts have the clear power to order summary return without full investigation if that is the appropriate course to take after giving full consideration to what is in the best interest of the child. However, Smith J.A., was careful to point out that summary return should not be the automatic reaction to an unauthorized taking or keeping of the child. The judge must still determine what is in the best interests of the child. His Lordship also highlighted a number of important considerations in summary return applications, the strength of which will vary from case to case. These include:

- a. the length of time the child has spent in each country since uprooting a child from one environment and bringing him to an unfamiliar one may not be in the best interests of the child. On the other hand, the facts of a particular case may show that it may be better for the child to remain in his "new home" a while longer while his "medium and long term interests are decided";
- b. the degree of connection the child has with each country.

- c. there can be no a priori assumptions about what is the best interest of the child. The court has to weigh a number of factors.

15. The judgment in *Panton's* case, with its emphasis on the welfare of the child, means that the wishes of the parent are not decisive. Nationality of the child or parent is not decisive, that is to say, the fact that the mother and the child are Jamaican, without more, cannot mean that it is in the best interest of the child to remain in Jamaica. The focus is always on the best interest of the child.

16. What I have gathered from the *Panton* case is that where, on the evidence, the persons who have custody for the child are doing a satisfactory job and there is nothing to suggest that the welfare of the child has been, is being or is likely to be undermined, then unless there is some compelling reason not to do so, there ought to be summary return of the child because there would be no rational basis to conclude that the welfare of the child would be better served by granting custody to another person even if that other person is the natural parent of the child. There has to be something present in the evidence that would suggest to the court that a full investigation is necessary. Therefore it is not enough simply to keep a child contrary to the terms of a court order and say to the court, "Please reopen the matter and conduct a full investigation."

The factors considered

17. I have indicated that I spoke to the child in the absence of counsel and the litigants. What KMAB said was instructive. She said that she was having difficulty in school at Alpha because the curricula for the various subjects are different from what she was doing. For example, she was asked to write an essay about a West Indian novel she had read but she said that she had never read one. Another example: in the mathematics class she found that while she had covered concepts already there were others she had not done before. So too with the other sciences. She was placed in the fourth form which meant that she had to master the subjects in order to have realistic opportunity of doing well in the Caribbean Secondary School Examination Council's examination ("CSEC") in May/June 2010. This is in contrast with her

current position in the United Kingdom where she is in a programme that is structured to meet the requirement of the examinations there. From all indications her progress in the United Kingdom has been satisfactory.

18. KMAB indicated that she did not really know her mother because she has not spent much time with her for the past seven years. Indeed, she said that she had not lived with her mother long enough to form an opinion of her. What she was indicating was that she would have to be adjusting to her mother as her provider while at the same time coping with work necessary to prepare for the CSEC examinations.
19. According to KMAB, she has not detected any favouritism by her guardians for their natural children in relation to her. She has never felt that her guardians were treating her unfairly. I conclude from this that KMAB was comfortable emotionally and psychologically with her guardians.
20. I have taken the views of KMAB into account. She is old enough and mature enough for her views to be given serious weight. During the conversation with her I did not detect that she was the kind of child that was looking for a home where she could have her own way and where the discipline was lax or permissive.
21. It would seem to me that her schooling has been severely disrupted. She has missed a term of school and her transition to the Jamaican school system has had its difficulties. I am of the view that given the proximity of the examinations here and in the United Kingdom, her educational opportunities would be better served by continuing in a school system with which she is familiar and from the report card, she was performing adequately.
22. KMAB has clearly been disturbed by the whole affair. She misses her friends in the United Kingdom and the smell and sound of familiar places. This would suggest that psychologically, she would be better served by being with her guardians than being with her mother at this point. KMAB is well integrated into the family of her guardians. This process of integration, if she remains in Jamaica, would only now be

beginning and has presented its fair share of difficulties. The risk of her not doing as well in the major CSEC examinations is significant. It is well known that the result of these examinations can exert a significant influence on the life of the examination candidate.

23. There is no evidence before me to raise the remote possibility of the guardians being unfit persons. There is no suggestion that they are unsuitable. The question of KMAB's sexual activity has been explained by her and cannot be attributed to the guardians' neglect. Thus there is no hint that would suggest a further enquiry in order to determine who should have custody of KMAB is necessary in this case.

24. I therefore concluded that in all the circumstance of this case the welfare of the child is best served by ordering a summary return to her guardians. There is no reason to keep her in Jamaica in order to conduct a full investigation into the matter.