

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

CV 392 of 2014

BETWEEN:

S.W.

CLAIMANT

AND

J-A. J.

DEFENDANT

Before Dr. The Honourable Madam Justice Sonia L. Richards, Judge of the High Court

2015: July 09

2017: March 09, 13

April 03, 11, 25

2018: February 05

Mr. Philip A. McWatt for the Claimant.

Mr. Tariq Khan for the Defendant.

DECISION

Introduction

[1] The proceedings in this matter were halted on 09 July 2015, pending the outcome of the Defendant's application for the written notes taken by a

Child Care Board Officer (“the Officer”), during her investigation and preparation of two reports for use by the Court.

- [2] In April 2017, the Caribbean Court of Justice (“the CCJ”) confirmed this Court’s judgment that the Defendant was entitled to the contemporaneous notes of interviews between the Officer and the Defendant, the principal’s of the minor’s primary and secondary schools, and a teacher at the secondary school. Disclosure was made to the Defendant on 03 and 28 April 2017. The hearing of the oral evidence resumed on 03 April 2017.
- [3] Counsel for the Claimant informed the Court that the affidavit filed by the Claimant’s mother was being withdrawn. There was no objection to this action by the Defendant.

The Issue and the Law

- [4] The central issue for the Court’s determination is whether care and control of the minor male child should be granted to the Claimant.
- [5] Section 8 of the Minors Act, Cap.215, provides that:
- “Where in any proceeding before the Court, the custody or upbringing of a minor...is in question, the Court, in deciding that question, shall regard the welfare of the minor as the first and paramount consideration....”.
- [6] The law is crystal clear that this Court must regard the minor’s welfare as

its “first and paramount consideration”. That welfare is not the only consideration, but it is the primary consideration. In this regard I refer to the analysis of Reifer J. in **Smithen-Ward v. Ward, Suit No. 589 of 2001, H.C. B’dos, decision dated 26 June 2015**, at paragraphs [38] to [41].

The Evidence

- [7] It is for this Court to determine what is in the paramount or best interest of the minor child. To this end the Court took into consideration the oral and affidavit evidence of the Claimant, his sister and the Defendant. The Court also considered the oral evidence, reports and notes of the Officer, and the evidence and report of a counseling psychologist who provided counseling services to the minor child at the request of the Claimant.
- [8] With regard to the evidence of the Officer, the Court is satisfied that the Defendant did not establish that there were significant errors in the notes taken by the Officer. The Defendant alleged that the Officer did not accurately take notes of what was said by her to the Officer. However, the Court finds that the Officer’s notes represent an honest, credible representation of what she was told by the Defendant and other persons.
- [9] The one area of possible concern was the Officer’s agreement with counsel for the Defendant that the minor’s teacher and principals would not have known which Mondays the minor went to school directly from his

father's home. The Court accepts that the Officer accurately reported what she was told. Any challenge to the principals' or the teacher's knowledge was properly for their response. However, there was no application for these individuals to be called to this Court to give evidence.

Discussion

[10] The Court notes that the minor child is conflicted and negatively impacted by the acrimony existing between his parents. Their affidavits were characterized by allegations and counter allegations. In an effort to discern the truth of the matter, the Court relied heavily on the evidence and reports of the Officer. Her second report of 01 October 2014 was of particular concern, and it was the catalyst for the Defendant's application for the contemporaneous notes. In that report the Officer recommended that care and control of the minor child be granted to the Claimant. Despite a lengthy cross-examination by counsel for the Defendant, the Court is persuaded to the integrity of the Officer's investigation and the credibility of her analysis and recommendations.

[11] It is the opinion of this Court that the Defendant has not responded satisfactorily or convincingly to issues raised in the second report. These issues included the necessity for the maternal grandmother to bring breakfast and lunch for the minor child, almost daily, while he was at

primary school; the low visibility of the Defendant and other maternal relatives at the school compared to the paternal relatives; and the casualness of the Defendant's reaction to a principal's concerns about bruising to the minor's body. This led the principal to inform the Child Care Board.

[12] Individuals at both primary and secondary schools noted that the minor's homework, punctuality and deportment were much improved when he came to school from the Claimant's home. The Court has addressed the challenges made to this evidence. (Supra at para. [9]).

[13] The Court had other areas of concern. The Court finds that the mother took a cutlass from her car in the sight of the minor child who had just been lashed and asked to sit outside the home as a punishment for rudeness. The Court accepts the Officer's evidence from her notes that the Defendant admitted taking a cutlass from her car while the minor was still outside the house. The Defendant did not say who the cutlass was for, but her explanation was that the cutlass was not for the minor, but to protect herself, if necessary, if the situation escalated. The Court also accepts that the Officer cautioned the Defendant about the possible negative effects of this action in the mind of the minor child.

[14] The Court believes that something drove fear into the heart of the child, and caused him to run into his maternal aunt's house. Neither the child nor the

aunt came outside until the police arrived. Why does a mother need to protect herself with a cutlass in anticipation of the escalation of a disciplinary impasse between herself and the minor?

[15] The Court was not convinced that the Defendant adopted a serious approach to the child's need for lessons at a critical period. The Defendant also denigrated the maternal aunt's attempts to assist the child with extra lessons. The Defendant did not appear to support tennis as an extracurricular activity for the child. There is no evidence that she encouraged him to become involved in any additional activities either at school or privately.

[16] Another area of concern is the mother's admission that her partner engages in illegal activity, that is, the smoking of an illegal drug. While there is no evidence that this occurs in the home which the partner shares with the mother, it caused the Court to question his ability to be a positive role model for either the minor child or his younger half-sister.

[17] The use of corporal punishment by the mother is not as pronounced in recent times, and the minor's reports about receiving lashes diminished significantly. The Court finds that the Defendant appears to have taken on board the Officer's suggestion for alternative methods of discipline.

- [18] The Officer's investigations reveal that the minor child prefers to spend weekdays with his paternal relatives and weekends with the Defendant. This was confirmed by the counseling psychologist who noted that the minor was happier with his paternal relatives. The minor is now 16 years of age and the Court may take his wishes into account.
- [19] The Court finds that the Claimant's domestic arrangements are better suited to nurture the needs of the teenaged minor. The Claimant, the paternal aunt and husband, and the paternal grandmother are all positively involved with the development of the minor. In comparison the Defendant is not on speaking terms with a sister who lives nearby; and another sister at the maternal grandmother's home felt free to be uncooperative and uncouth to the Officer who wished to visit the minor at that home.
- [20] The Court has already raised a note of caution with respect to the illegal activity of the Defendant's partner. (Supra at para.16). In addition, the Defendant's evidence is that she resides in a two bedroom house. The minor child has his own bedroom. The other bedroom is occupied by the Defendant and her young daughter. It is also the Defendant's evidence that sometimes her male partner sleeps in the same room with the Defendant and her daughter. The daughter was approximately 8 years old when the

Defendant gave this evidence. The minor child's move to the Claimants home might release his sister from this unsatisfactory sleeping arrangement.

Apology

[21] The minor child has had to endure too much stress in the tug and pull between his parents. This was further compounded by the length of time taken to complete this matter in the High Court. The Court apologizes for the delay, but wishes to record that it is called upon to deal with urgent applications such as this in the midst of an overextended workload that has long passed the point of critical mass. There are other urgent and pressing matters that were before this Court prior to the filing of this case.

[22] The Court also read with interest the final paragraph of the Claimant's fourth affidavit filed on 21 May 2015, in which he informed the Court that this matter was placed before another Judge after it had reached this Court. That Judge advised a particular course of action to the parties in relation to the proceedings in the Magistrates' Court. For reasons unknown the parties never received a date of hearing from that Judge, and the matter made its way back to this Court.

[23] This Court does not allocate matters to itself, and cannot be held responsible for a system that until recently made no attempt to offer significant off-bench time for judgment writing. The Court is mindful of the CCJ criticism

of the time taken to produce the judgment in the application by the Defendant. The observation from this Court is that if a court is regularly hearing and completing trials, all of them are not amenable to oral judgments. And if several complex matters are completed in quick succession, all the judgments cannot be produced properly in 3 to 6 months.

Disposal

- [24] The Order of this Court is that it is in the interest of the welfare of the minor child that his care and control be granted to the Claimant.
- [25] The parties will be heard with respect to the consequential orders for maintenance, access and counseling.

Sonia L. Richards
Judge of the High Court

Postscript: Judgment upheld by the Court of Appeal in Civ. App. No.4 of 2018 - JJ v. SW (16 Oct. 2018)