

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

FAMILY DIVISION

FL No. 300 of 2015

BETWEEN:

KNRM

APPLICANT/WIFE

AND

SPM

RESPONDENT/HUSBAND

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

2016: March 15

2018: January 16

May 22

Mrs. Dawn M. Shields-Searle Q.C., Attorney-at-Law for the Applicant/Wife.

Mr. Amilcar Branche, Attorney-at-Law for the Respondent/Husband.

DECISION

Introduction

[1] The issues to be decided in this case relate to the custody, care, control of and access to two minor children of a marriage, consequent

upon the separation of the parties on or about 12 June 2015. The minor male child is six years old and the minor female child is five years old.

Background Facts

[2] Prior to their separation, and while they occupied the same residence, the parties developed a unique timetable for their shared parenting responsibilities. The purpose of this timetable was to give each parent what they described as “me time”. This is personal time away from the children.

[3] This arrangement continued after separation into different areas of the matrimonial home, and after the Wife left the matrimonial home with the children. The arrangement is as follows:

1. The children spend time after school with the Husband on Mondays, Wednesdays and Fridays, inclusive of a sleep over.
2. Tuesdays and Thursdays after school, and Saturdays, are spent with the Wife, inclusive of a sleep over.
3. Sundays are alternated on a weekly basis.
4. Pick up and drop off times are agreed between the parties.

[4] The Wife took the children with her when she left the matrimonial home, and she wishes to have their day to day care and control. She does not believe that the present arrangement is in the best interests of

the children. In her Application filed on 24 July 2015, the Wife sought inter alia:

1. care and control of the minor children; and
2. access to the children by the Husband every other weekend from Friday to Sunday evening, with an additional afternoon during the week after school.

[5] The Husband indicated his desire to have the existing access arrangement continue, with shared custody, care and control. Alternatively, he would wish to have care and control of the minor children.

The Child Care Board Reports

[6] The Child Care Board (“CCB”), investigated the circumstances of the parties and the minor children, and presented a report to the Court dated 26 January 2016 (“the first report”). The officer who conducted the investigations and prepared the first report found that the children:

“...had grown accustomed to going back and forth between a home they have referred to as home for basically all their lives and another home that they previously referred to as their auntie’s home; now the home of their mother”. (Page 10 para.3 of First Report).

[7] The officer's recommendation in the first report with respect to custody, and access are that:

1. Joint custody be granted to both parents, where they both share in the decision making process.
2. The access arrangement be structured so as to afford the children continued daily interaction with both parents Mondays through Fridays, and spending fortnightly weekends with each parent; in other words, the children's access to their father be daily as he could collect them from nursery and school and return them to their mother's home around 6.00 p.m. or at a reasonable time agreed upon by the Court.
3. The children spend alternate weekends with each parent.
4. Holidays and vacations be shared with each parent.

[8] The Court noted that there was no explicit recommendation in the first report for either parent to be vested with care and control of the children. However, the second recommendation implies that the Wife would have care and control. The officer also expressed the view that:

“Though they continue to present as cheerful and comfortable with this arrangement, the existing arrangement is not considered an ideal access arrangement as it can promote a high level of instability as the children

progress through the different developmental stages”. (Page 10 para.3 of first report).

[9] The officer was examined under oath on 15 March 2016. She explained that she did not support or recommend the existing access arrangement:

“...because moving back and forth is not considered ideal for children. The final decision is left to the Court as to what is in the best interest of the children”.

On the other hand, the officer conceded that there was nothing to indicate to her that the arrangement and the back and forth were upsetting or disturbing the children. The officer also was of the opinion that the Wife’s proposal to limit access to the Husband to alternate weekends “would not be in the best interest of the children”.

[10] The Court ordered a follow up report that was received under cover of correspondence dated 20 July 2017. This second report revealed glowing commendations from both the principal and the administrator of the school they now attend. The educators informed the officer that:

1. Both children had adjusted well.
2. They presented as happy children whose social skills had noticeably developed since their enrolment.

3. Their attendance, attire, general behaviour and academic performance was very good.
4. The children were well provided for, and had excess food items in their lunch packs.
5. Homework projects were always completed regardless of which household they spent the evening and night.
6. The parents, paternal grandparents and maternal aunt all interacted and cooperated well with school personnel.
7. The children had not displayed any behaviour or said anything that caused concern about their well-being.
8. If the parents had not informed the school personnel about the pending divorce, they would not have been aware as neither the behaviour of the parents nor the children reflected the usual signs of dysfunction known to be associated with divorced families.

[11] The second report concluded that the officer found no evidence to suggest that the existing access arrangement had any major negative effects either on the children or on their development. (Page 8 para.3). She gave oral evidence about this report on 16 January 2018. The significant statements made in the oral evidence were that:

1. The officer remained of the considered opinion that the access arrangement would still be challenging for the children, and could promote a high level of instability.
2. The commendations from the school were significant and carried weight in the preparation of the second report.
3. There were neither care and protection issues, nor evidence of child abuse.
4. The officer had no evidence that the children had experienced any degree of trauma in adjusting.
5. Any new access arrangement would have an effect on the children.
6. The children presented as happy; they said that they had two homes, and liked having two homes.
7. The fact that the children were happy and well adjusted was another reason for keeping the access arrangement.
8. The school reports supported maintaining the existing access arrangement.

The Legal Framework

[12] Section 43 (1) of the Family Law Act (“Cap.214”), provides that:

“In proceedings in respect of the guardianship or custody of, or access to, children of a marriage or union,

(a) The court shall regard the welfare of the children as the first and paramount consideration”.

[13] Anthony Dickey writes that the word “paramount” is

“...almost invariably used in Australian and English legislation to signify the role of the best interests, or welfare of the child in the determination of proceedings concerning aspects of parental responsibility”. (Family Law, 5th ed., 2007 at p.299).

[14] Section 1 of the 1925 Guardianship of Infants Act of England is a provision similar to section 43 (1) of Cap. 214. In the House of Lords decision **J.v.C. [1970] AC 668**, Lord MacDermott posited that:

“Reading these words in their ordinary significance, and relating them to the various classes of proceedings which the section has already mentioned, it seems to me that they must mean more than that the child’s welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote the process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child’s welfare as that term has now to be understood. That is the

first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed”. (At p.710-711).

- [15] The abovementioned principles have been applied in a number of Australian cases. (See eg. **In the Marriage of Kress [1976] FLC 90-126; Barnett v. Barnett (1973) 21 FLR 335; In the Marriage of Smythe [1983] FLC 91-337; In the Marriage of H [1995] FLC 92-599**). This Court also takes guidance from Demack J who opined that:

“...the welfare of the child in any particular case must be determined on the facts of the particular case....The inquiry is essentially a positive one designed to promote the interests of the child, not to demote the claims of either parent”. (See **In the Marriage of Jurss (1976) 9 ALR 455** at 458).

Submissions by Counsel

- [16] Counsel for the Wife submitted that the Court should consider the two CCB reports together with the recommendation of the CCB officer that the current access arrangement should be varied. Counsel was of the view that in time the children would come to resent an arrangement which they now found to be exciting.
- [17] The Court was directed to the oral evidence of the CCB officer which spoke to an alleged manifestation of existing confusion in the minds

- of the children. The officer told the Court that she was not surprised by the Wife's statement that "the children had begun to show signs of confusion and would get up some mornings and repeatedly ask what day it was and who would be collecting them from school".
- [18] Counsel contends that it would be in the best interest of the children to grant their care and control to the Wife. In this scenario, the Wife assures the Husband liberal access to the children.
- [19] Counsel for the Husband contends that neither parent provided more care, attention or nurturing for the children than the other parent. However, he urged the Court to find that the Husband has a flexible work arrangement that would permit him to spend more quality time with the children. Moreover, the paternal grandparents have always played a significant role in the lives of the children. In these circumstances, the Husband was the preferred parent to be granted care and control of the minor children.
- [20] Counsel also argues that the current arrangement between the parties has not produced dysfunctional children. Therefore, it is in their best interests that the arrangement is not disturbed.

Discussion

[21] The Court notes that, despite the earlier tensions between the parties, they have achieved a level of communication that protected the children from the adverse emotional effects of moving between separated and divorced parents. The children are happy, well adjusted and thriving. At this time there is no evidence of trauma or dysfunction brought about by their domestic situation. The investigating officer reported that the children liked having two homes. (See para. [11] 6 supra).

[22] There is no doubt that the parents are equally devoted to the well being of the children. The officer found no care or protection issues, or evidence of child abuse on either side. The Wife expressed concerns about the Husband that were not borne out by the evidence. Investigations did not confirm her assertions that he had no interest in his children, or that he would lose interest in being involved in their lives. Also, the minor children provided no support for the Wife's statement that one of the children reported the Husband as saying that he would "shoot up everyone except his girlfriend".

[23] The Wife also indicated that the children were showing signs of confusion about what day it was, and the access arrangement for that day. (See para. [17] supra). The investigating officer informed the

Court that she was not surprised if this was occurring. However, there is nothing before the Court to suggest that the children are confused to a degree that negatively impacts their emotional and/or physical well being.

[24] Given the competing claims of each parent, and the investigating officer's caution that the existing access arrangement could in the future "promote a high level of instability as the children progress through the different developmental stages", how then is this Court to determine what is in the best interest of the minor children? In this case both parents are equally adept at caring for the minor children, and they have equal access to the children.

[25] In the local case of **Hinds v. Hinds (No.82 of 1984, HC, decision dated 22 April 1985)**, Williams PJ, as he then was, commented that the minor child in that case was "indeed most fortunate to have two homes in both of which he would be well loved and cared for". The learned Judge considered section 43 (1) of Cap.214, and determined that:

"As I understand this provision my function is to consider all the circumstances and determine what is in the best interest of [the minor child] on the basis of a balanced appraisal of the competing homes.

He will receive loving care and attention in both. Each will provide him with adequate nourishment and other material comforts. I cannot on the evidence say that he will receive better moral and spiritual guidance from one rather than the other. There seems in general nothing to choose between the quality of the two available homes”.

[26] The mother in the **Hinds** case intended to remarry, and to live permanently in France. The father planned to marry his girlfriend, and to continue residing in Barbados. Williams PJ granted guardianship to the mother for a number of reasons. First, the learned Judge was of the opinion that a four year old boy would be better off with his natural mother who did not work. The mother would be able to devote more time and attention to the child.

[27] The second consideration was that the child would become bilingual if he lived with his mother in France. This was described as “a definite asset” in tomorrow’s world. The learned Judge also mentioned that the father was a medical doctor who had professional obligations and an intended wife who wished to have her own family.

[28] In this case neither parent can be said to have spent more time than the other nurturing the two children. And there is no evidence that either of the children has formed a closer bond to one of the parents.

- [29] The parties reside in Barbados at different addresses. There is no evidence that their physical locations are detrimental to the growth and development of the minor children. At present the Wife shares a bedroom in a three bedroom house with the children. Her sister occupies one of the other bedrooms. This sleeping arrangement between the Wife and the children will need adjustment as the children get older.
- [30] The Husband occupies a two bedroom apartment upstairs the residence of his parents. Presently, the children share one bedroom, but the Husband recognises that a different arrangement will be required in the foreseeable future.
- [31] There is no tangible evidence that either party intends to enter into a permanent relationship with another individual. But the Court is aware that this is an event that may occur on both sides, and if not properly managed, could impact negatively on the children. The Wife expressed her concern that “the children may be sleeping around the Husband’s ‘mistress’, who does not have the children’s interest at heart”. (See page 8 of the first report). There was no evidence to suggest that this was a valid concern.

- [32] Both parties are employed. As a self employed person the Husband has more flexibility that allows him time to pick up the children immediately after school. On the other hand, the Wife relies on an aftercare facility until she is able to collect the children.
- [33] The Wife's support system for the children includes her sister who shares the home. The sister is unemployed, but there is nothing to indicate that if employed she would be unable or unwilling to continue to assist the Wife with the care of the children. The Husband's parents own and occupy the property where the Husband resides. They are retired and have always been actively involved in the lives of the children. The Court was not made aware of any health issues experienced by either grandparent.
- [34] After careful consideration of the critical factors, the Court is of the view that it would be in the best interests of the minor children to grant joint custody to both parents, and care and control to the Husband. It was at his home that the children resided before they were removed by the Wife. Quite frankly, the Husband and the paternal grandparents have more time to devote to the needs of the minor children. The Court anticipates that as the children develop their separate interests and

extra-curricular activities, it is this household that would be better able to facilitate them.

[35] The Court remains conscious of the professional caution of the investigating officer that the current access arrangement may prove to be detrimental to the children as they progress through their various developmental stages. In this regard, the Court does not propose to alter the access arrangement at this time, as the children are well adjusted, happy and thriving. However, the CCB will be required to monitor the children and provide updated reports to the Court at the beginning of each summer vacation. These reports would assist the Court in determining whether the access arrangement requires adjustment.

Disposal

[36] The order of the Court is as follows:-

- (1) The parties shall have joint custody of the minor children, with care and control granted to the Husband.
- (2) The Wife shall have access to the minor children every Tuesday and Thursday after school, and every Saturday, inclusive of a sleep over, and on alternate Sundays.

- (3) The parties shall file and serve Statements of Financial Circumstances on or before 02 July 2018.
 - (4) The CCB shall continue to monitor the parties and the minor children and provide a report to the Court on or before 15 July 2019, and thereafter on the 15 July of each successive year until further order of the Court.
 - (5) There shall be liberty to apply.
- [37] The Court will hear counsel with respect to any consequential orders.

Sonia L. Richards
Judge of the High Court