BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Magisterial Appeal No. 2 of 2018

BETWEEN:

A L P **Appellant**

AND

E K L **Respondent**

Before: The Hon. Sir Marston Gibson, K.A., Chief Justice, The Hon. Kaye C. Goodridge, Justice of Appeal and The Hon. Margaret A. Reifer, Justice of Appeal (Acting)

2019: April 11
May 16
July 16

Mr. Hal Gollop QC for the Appellant
Ms. Diana Doughlin for the Respondent

DECISION

REIFER JA (ACTING):

INTRODUCTION

[1] This is a magisterial appeal filed 16 April 2018 challenging a decision of

the Magistrate's Court District "B" Oistins Civil Jurisdiction, delivered on 6 April 2018.

[2] It raises for this Court's attention the consideration of the proper process to be followed by the Magistrate's Courts on the hearing of applications filed under the regime of the **Maintenance Act Cap. 216 (the Maintenance Act)** when issues arise with respect to the custody and guardianship of a child and arrangements for access and visitation by the parent who does not have custody and guardianship.

BACKGROUND: FACTUAL AND PROCEDURAL

[3] The facts can be stated shortly. The appellant is the single mother of the minor **JDL**, born to her on 22 August 2006 at the Queen Elizabeth Hospital. On 6 April 2018, **JDL**, a male child, was 11 years of age. Pursuant to the requirements of the **Maintenance Act** and the **Maintenance Rules, 1984 (the Rules)**, the appellant filed a **section 8** (Procedure where application made after birth) Form 1 application in accordance with **Rule 4 (1)** of the **Rules** on 23 November 2017. This is an application for maintenance *simpliciter* by a single woman having the custody of her child.

[4] As prescribed by the said Form 1, the application applied for a summons to be served on the respondent whom the appellant alleged is the father of her already born child. She swore before the clerk of the Magistrate's Court for

District "B" Oistins that the "allegation as to the paternity of my child is true" and that all other matters stated in the application are true.

[5] It was as a result of this application that the magistrate granted custody of the minor child to the respondent and the appellant filed her notice of appeal.

THE NOTICE OF APPEAL

[6] This notice of appeal was filed 16 April 2018, ten days after the decision of the magistrate. Prior to the **CCJ** judgment delivered 26 March 2018 in the case of **Sandy Lane Hotel Co. Limited v Juliana Cato, Wayne Johnson and Charmaine Poyer, CCJ Appeal No. BBCV2017/004 (Sandy Lane v Cato)** this appeal would have been deemed to have been filed out of time, as the relevant statute, the **Magistrate's Courts Act Cap 116A (Magistrate's Courts Act)**, mandates at **section 240** that such appeal must be brought within 7 days of the court's decision. This was affirmed by the **CCJ** in the decision of **Deane v Allamby [2016] CCJ 21 (AJ)**.

[7] However, the **CCJ** in the **Sandy Lane v Cato** case held that the scope of **CPR 62** encompassed appeals from a magistrate's court, when at paragraph [19] their Honours stated:

> "It is, therefore, beyond doubt that Part 62 provides for an appeal to be brought from the magistrate's court by filing a notice of appeal at the Supreme Court Registry and it further provides for sundry other matters, including a 28-day time limit and for service on respondents."

[8] In seeming response to the argument that subsidiary legislation cannot repeal the provisions of a primary statute, their Honours addressed this issue as follows:

> "[20] … what exists as the reality is a situation where, under section 240, one method for appealing is provided and, under Part 62, another method for appealing is provided. We are satisfied this is the correct view of the situation that exists; however unsatisfactory such a situation may be."

[9] And at paragraph [22], in an interpretation of **section 59** of the **Supreme Court of Judicature Act**:

> "[22] The expression "rules of court" is stated in the definition section of the Supreme Court Act to include then existing rules as well as rules to be made under the authority of that Act. It is the fact, therefore, that the Supreme Court Act, [sic] the primary legislation, made the regulating provisions (such as time for appealing) contained in the Magistrate's Courts Act subject, or subordinate, to the rules of court which would be made in the future.
> [23] That future came to pass in the form of the rules of court, the CPR, which included Part 62. As ordained by the Supreme Courts Act, [sic] those rules (and that Part) have overriding effect."

[10] In consequence, the notice of appeal filed 16 April 2018 was filed within time in accordance with **CPR 62**.

[11] The Grounds of Appeal contained therein are as follows:

> "(i) The Learned Magistrate erred in failing to thoroughly consider the fitness of the parties to determine which of them would be more suitable to be granted custody of the minor child.

(ii) No means report was submitted to the court either by the Child Care Board or any other appropriate body in order to assess the welfare of the minor child which ought to have been of paramount consideration in matters concerning guardianship and/or custody of the said minor child.

(iii) The Learned Magistrate erred in failing to consider that an application for maintenance was brought against the Respondent by the appellant."

[12] At the hearing of this matter on Thursday 12 April 2019, counsel sought and received the permission of this Court to add a fourth ground of appeal as follows:

"(iv) That the order made by the Learned Trial Magistrate discharging the maintenance order be re-instated including all matters relating to arrears."

A GENERAL COMMENT

[13] It is of more than passing concern to this Court, that while the appellant's application as long ago as April 2018 sought a stay until the resolution of this matter by the Court of Appeal, there is no evidence that a hearing was sought on this issue with the magistrate or this Court. This was in effect an application for urgent interlocutory relief concerning a minor child and it is imperative that as part of our ongoing streamlining of the system and strengthening of our case flow management that such matters be given early dates of hearing. Indeed, it is imperative that all appeals involving minor

children be placed on a "fast track" to facilitate early hearing and resolution. Regrettably, there was no follow-up request by counsel for the appellant.

THE MAGISTRATE'S REASONS FOR DECISION

[14] The magistrate's Reasons for Decision with his notes of proceedings attached clearly set out the chronology of events before him as follows:

1. The parties appeared before him twice on the application for maintenance: 23 February and 6 April 2018 respectively.
2. On the first occasion an interim order was made for maintenance after the respondent accepted that he was the father of the child and stated his earnings. This order was with effect from 2 March to 6 April 2018.
3. The magistrate stated in his reasons that the matter was then adjourned "for the child for whom maintenance was being sought, to have a say in which parent he would reside with". This, as stated in the said document was after the respondent indicated that the child could reside with him, to which the appellant had no objection. It is noteworthy, that a Family Services Division of the Welfare Department report or a Child Care Board report were not requested to investigate the living circumstances of the parties and their suitability to the needs of the child. Nor was the advice or recommendation sought of these two professional agencies.
4. On 6 April 2018 the magistrate addressed the issues of maintenance and custody. On the issue of maintenance, no payments of maintenance having been made for the period 2 March 2018 to 6 April 2018 he first ordered all arrears to be paid by 13 April 2018. However, later in the proceedings "the Order as to Maintenance was Discharged and all arrears remitted w.e.f. 6 April 2018". This was in accordance with the magistrate's power to so do under **section 123** of the **Magistrate's Courts Act**.
5. On the issue of custody, the minor was brought to the court and "when asked indicated he wished to live with his father even though he had no difficulty living with either parent".

> The magistrate stated further: "On this election, the subject child would live with his father."

[15] These additional facts did not form part of the magistrate's notes, but were found in the parties' written submissions. Their accuracy was not disputed by either side. It is apparent that the relationship between the appellant and the respondent ended when **JDL** was 3 years of age. The appellant at that time left the respondent's home, but **JDL** remained there under the care and control of the respondent. On or around **JDL's** eleventh year, the appellant with the consent of the respondent brought **JDL** to reside with her. It was subsequent to this event that she filed the Form 1 application for maintenance mentioned at **para [4]** above.

[16] This circumstance was clearly of particular relevance and significance to the parties and, we surmise, may have been at the heart of this conflict.

ISSUES ARISING

[17] The appeal raises two issues which are linked. First, did the magistrate fall into error by failing to conduct an inquiry as to whether the appellant was a fit and proper person to have custody of the minor child. Second, did the magistrate in the conduct of this matter pay regard to or give due consideration to what is in the best interests of this minor child. In our opinion, these two issues address the grounds of appeal articulated.

DISCUSSION

The Appellate Function

[18] We start by briefly reminding ourselves of the appellate function and approach in the hearing of appeals generally and specifically, this magisterial appeal.

[19] As a general rule, an appeal court will accord a large measure of respect to the lower court's decision, but is primarily concerned with a review of that decision. It will generally not interfere with the lower court's decision as long as the lower court has not committed an obvious mistake of fact, or an error of principle, or followed a seriously defective procedure. Stated differently, an appeal court on review may interfere with a lower court's decision only if it reaches the conclusion that it was wrong in substance or in process.

[20] On the issue of process *Brooke LJ* in the English Court of Appeal stated in **Tanfern Ltd v Cameron – Macdonald and another [2000] 1 WLR 1311** at paragraph 11:

> "… it must be noted that the appeal court only has power to interfere if the procedural or other irregularity which it has detected in the proceedings in the lower court was a serious one, and this irregularity caused the decision of the lower court to be an unjust decision."

Applications made by a single parent under the Maintenance Act

[21] The stated intention of the **Status of Children Act Cap.220 (Status of Children Act)** (and status of children legislation generally) was to equate the legal rights of children born out of wedlock with rights of those born in wedlock. In other words, it was meant to eliminate the old common law discriminations against 'illegitimate' children and accord such children the same/or identical rights, privileges and obligations as other classes of children. In its preamble, it is stated to be "An Act to reform the law relating to children by providing for their equal status."

[22] The reality does not bear this out as the laws of Barbados have continued in some measure to maintain the distinctions in status. The **Family Law Act Cap 214 (Family Law Act)** passed in 1981 accords 'children of the marriage' the same legal status as children born of a "union other than marriage". "Matrimonial cause" defined in **section 2** of that **Act** includes:

> "(k) proceedings between the parties to a union other than a marriage in respect of
> (i) the maintenance of one of the parties;
> (ii) the custody, guardianship or maintenance of, or access to a child of such a union;
> (iii) the approval by the court…
> (iv) an order or injunction in circumstances arising out of their relationship."

[23] "Union other than marriage" or "union" is defined in the definition section of **Part V section 39** of the **Family Law Act** as "the relationship that is established when a man and a woman who, not being married to each other, have cohabited continuously for a period of 5 years or more".

[24] This effectively excludes, *inter alia,* children of single parents, persons living together for less than 5 years and persons caring for children in informal care arrangements from obtaining relief from the High Court or Magistrate's Court under the **Family Law Act**. Separate statutory provision has been made for this category of child.

[25] This certainly raises the spectre that the law, despite the **Status of Children Act**, which had the intended legal and social effect of removing stigma from children born outside of marriage has, to some extent, perpetuated the old discriminations. History has shown that the **Status of Children Act** has had the effect of 'equalising' children primarily for the purpose of inheritance or succession.

[26] Thus, applications such as in this case, are made under a separate regime to be found in the **Maintenance Act** as it relates to matters in the magistrate's court and in the **Minors Act, Cap 215 (the Minors Act)** as it relates to matters in the High Court.

[27] The **Minors Act**, in dealing with applications made in the High Court legislated what is variously known as the Welfare, Paramountcy or Best Interest Principle, a principle in equity which advocates that the welfare of the minor is of first and paramount consideration in any proceedings involving a minor and in proceedings for custody. At **section 8** it sets out this principle in the following terms:

> " Where, in any proceeding before the Court, the custody or upbringing of a minor or the administration of any property belonging to or held on trust for a minor, or the application of the income thereof, is in question, the Court, in deciding that question, shall regard the welfare of the minor 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."

[28] This provision statutorily abrogated the common law position by seemingly equalising the rights of mother and father in this context. At common law, parental rights and duties as it related to the out-of-wedlock child were traditionally vested in the mother: see **R v Nash In re Carey, An Infant [1883] 10 QBD 454**; **Re Carroll [1931] 1 KB 317**. This was distinguishable from the father's right to a 'legitimate' child which was superior to that of the mother at common law.

[29] In this regard, **sections 7** and **9** of the **Minors Act** are also relevant as they similarly appear to reinforce the statutory intention of equalisation. Thus, **Section 7** provides:

> "The Court may, upon the application of any parent of a minor, make such order as it may think proper regarding the custody of such minor and the right of access thereto of either parent, having regard to the welfare of the minor and to the conduct of the parents and to the wishes as well of the mother as of the father.."

[30] **Section 9** provides:

> "The mother of a minor shall have the like powers to apply to the Court in respect of any matter affecting the minor as are possessed by the father."

[31] The question now posed, in particular by the submission of counsel for the respondent, is whether the Welfare, Paramountcy or Best Interest Principle is applicable in the Magistrate's Courts and whether it is the same principle or test as that to be found in the **Maintenance Act**, specifically at **section 20**.

[32] It is our view that this principle to be found in the **Family Law Act**, and the **Minors Act** is the same as that to be found in the **Maintenance Act**. In other words, whether it be an application pursuant to the **Family Law Act**, the **Minors Act**, the inherent jurisdiction of the Court or the **Maintenance Act**, in a determination of who should have custody, care and control of a

minor, or custody and guardianship of a minor the statutory principle applicable is that of the welfare of the child being the first and paramount consideration.

[33] In 1981 parliament passed the **Maintenance Act** which came into effect in March 1984. It purported in its preamble to "provide for the maintenance of certain children born out of wedlock and for related matters". In **section 2** of the **Act**, its definition section, it made clear that "child" does not include a child of a marriage or union other than a marriage." As mentioned above, such children are provided for in the **Family Law Act**. In a 2014 amendment of the **Maintenance Act** "an adopted child" was added to the class of excluded children.

[34] This Amendment had the intent, *inter alia*, of making the **Maintenance Act** gender neutral. In short, it allowed fathers to apply for maintenance and to be granted custody of a child. It also makes father and mother equally liable to maintain the child.

[35] It can be said that the **Maintenance Act** statutorily implemented the Welfare, Paramountcy or Best Interest Principle in the magistrate's courts at **section 20(2)** of the **Act** where it provides as follows:

> "Where the magistrate is satisfied, either at the time of making a maintenance order or at any time thereafter, that the mother is not a fit and proper person to have custody of the child, the magistrate may, if in all the circumstances he considers it to be

> in the interest of the child, by order appoint the father, or some person other than the mother, to have legal custody of the child, if such person is willing."

[36] This section does two critical things: one, it authorises a magistrate to grant custody to a father or other person should he or she find that the mother is not a fit and proper person. Second, it places at the forefront of every order made concerning a child, the interest of the child as opposed to parental rights and duties, but still manages to imply the old common law approach of the superior rights of the mother of an out-of-wedlock child, now trumped by the consideration of whether she is "a fit and proper person". In other words, it assumes the right of the out-of-wedlock mother to be the primary custodian and guardian of her minor child. Once found or declared to be the father, such person is liable to the payment of maintenance and under **section 6(4)** of the **Maintenance (Amendment) Act**, **2014-13** the magistrate may "… where he considers it necessary in the best interest of the child, in addition to the order for maintenance, make an order for that parent to have access and visitation of the child."

[37] These provisions certainly raise the question as to whether under the law, the out-of-wedlock mother and father have been equalised to the same extent as the mother and father in a marriage and union under the **Family Law Act**.

[38] In practical terms, however, it is not of great moment in a determination of what is in the best interest of the child. Stated differently, a determination of what is in the best interest of a child has substantially eroded the earlier presumptions in favour of the position of a mother of an out-of-wedlock or ex-nuptial child. The learned author of the text **Family Law**, **Fifth Edition**, **Thomson Reuters 2007** Anthony Dickey, argues from the perspective of the Australian legislation that these provisions are interpreted to mean that there is no discrimination against fathers of ex-nuptial children. He states at page 336:

> "It was once true to say that an assumption in favour of contact by a child with its parent did not apply to the father of an ex-nuptial child: *Re G (an Infant) [1956]1W.L.R.911* esp. at *917*. This is no longer the case. The courts have held that the father of an ex-nuptial child should be treated no differently from the father of a child born in wedlock: *S. v O. (1977) 3 Fam. L.R.(Eng,) 15 at 17-18*. The circumstances of a particular case may naturally lead a court to regard the father of an ex-nuptial child as in effect a stranger to the child, or as a person with whom contact should not be allowed. In theory, however, no differentiation is now made by the courts between the father of a child born in marriage and the father of a child born out of marriage."

[39] This is largely the reality in this jurisdiction although the ambiguity created by the various Acts mentioned above is not lost.

[40] In the **Maintenance (Amendment) Act, 2014-13**, the role of a magistrate and the scope of his or her jurisdiction in the conduct of these applications

for maintenance were addressed in a new **section 6** under the title "Application for maintenance". Specifically, a new **subsection 4** provides as follows:

> "On hearing an application under this Act for the maintenance of a child the magistrate shall enquire into the details for the guardianship and custody of the child, as well as the arrangements for access and visitation by the parent who does not have guardianship and custody of the child; and the magistrate may, where he considers it necessary in the best interest of the child, in addition to the order for maintenance, make an order for that parent to have access and visitation of the child."

[41] This new addition underscores the shortcomings of the **Maintenance Act**. But more importantly, it suggests an apparent recognition of the philosophy that it is in the best interest of a child to know and be cared for by both parents and to spend time with both parents, and for that matter other people who may be significant to their care, welfare and development, on a regular basis. Or stated differently, recognition of the belief that contact between a parent and his or her child ordinarily promotes the welfare of the child.

[42] These new provisions do no more that reinforce the approach of the courts in the Commonwealth Caribbean in their interpretation of what is meant by the Welfare, Paramountcy or Best Interest Principle that the welfare of the child shall be the first and paramount consideration and by implication, not the enforcement of parental rights. This is a paradigm shift in the common law

buttressed by the philosophy that the courts must further or promote the cause of the child and not that of the parent(s), but must still respect the rights and wishes of the parent(s).

[43] By and large Barbados and the rest of the Commonwealth Caribbean have on this issue followed the English law. It is noted however, that the **Barbados Family Law Act** is modeled on the Australian legislation, but there is still reliance on English authority in the interpretation of several aspects of family and child law. The Welfare, Paramountcy or Best Interest Principle is one such example of the continued relevance of some English authority.

[44] In the Commonwealth Caribbean and in the Commonwealth generally and particularly in Australia, the English case of **J v C and Others [1970] AC 668** is the unchallenged *locus classicus*. The dicta of Lord MacDermott in the House of Lords in this case has become iconic, as he gave meaning to the term "first and paramount consideration" as follows:

> "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, risk, 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 is of first importance and the paramount consideration because it rules on or determines the course to be followed."

[45] It is clear from this that paramount does not mean only one consideration and so, other considerations can also be taken into account provided they have some relevance to the best interest or welfare of the child.

[46] Some relevant practical considerations are explored by the learned author Anthony Dickey in his text **Family Law, Fifth Edition**, chapter 21 entitled "Considerations for Parenting Orders". A few of these discussed are: the ability of the person seeking the order to look after the child, his or her intentions in respect of the day-to-day upbringing of the child, his or her economic and personal circumstances, the views of the child and the relationship of the child with this person or any child or other adult with whom he or she is living. This is not an exhaustive list but is dependent on the particular facts and circumstances of each case.

[47] There should be no presumptions here, as such is inconsistent with a determination of what is in the best interest of a particular child.

[48] In the case of **Smithen-Ward v Ward, No. 589 of 2011 HC Barbados (Unreported) (Smithen-Ward),** cited and relied on by the parties, the judge explored at paragraphs [40] to [52] some of the factors/considerations to be taken into account in making the determination of what is in the best

interest of a particular child or children. At paragraph [41] it was noted that the case law reveals that the court pays regard to the physical, mental, material, moral, social, educational, medical and religious well being of the child. In so doing, it may look at the wishes of a child old enough to be considered, the wishes of a parent, the conduct of the parents generally and specifically their conduct towards each other and the child, material standards and advantages which the child reasonably expects (future prospects of the child), preserving the *status quo* in the child's life; the happiness of the child, the position or attitude of new partners towards the minor child, to name a few.

[49] Counsel for the appellant usefully drew this Court's attention to the UK Children Act 1989 which at section 1(3) provides a 'checklist' of seven criteria that the court should pay regard to in making or discharging an order relating to a child/minor. These are as follows:

> "(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
> (b) his physical, emotional and educational needs;
> (c) the likely effect on him of any change in his circumstances;
> (d) his age, sex, background and any characteristics of his which the court considers relevant;
> (e) any harm which he has suffered or is at risk of suffering;
> (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;

> (g) the range of powers available to the court under this Act in the proceedings in question."

[50] These are all eminently practical and reasonable considerations which can and should be adopted by our courts, provided of course, that it is always remembered that each case must be determined on its own facts and by extension, given its own considerations.

The Parties' Submissions

[51] It was the submission of counsel for the appellant that the trial magistrate erred in that he failed to pay due regard to the welfare of the child and to the above outlined considerations in arriving at his decision to award custody to the respondent. He submitted that the magistrate should have used a similar checklist as that espoused in **Smithen-Ward** and the UK Children Act or that espoused by Lindley LJ in the **In re McGrath (Infants) [1893] 1 Ch. 143**, so that appropriate measures could have been put in place to determine the total well-being of the child in this case.

[52] **In Re McGrath** Lindley LJ stated:

> "… The dominant matter for the consideration of the court is the welfare of the child. But the welfare of the 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."

[53] Counsel submitted at para [17] of his written submissions filed 14 March 2019:

> "Such measures, though, not exhaustive may include: interviewing both parents to determine their capacity to provide for the child's physical, moral, religious and emotional and material well-being; assessing any place of residence and/or living conditions that a child may be brought into; maintaining the family unit to which the child was accustomed and preserving the *status quo* of the said child. It is my further submission that a Probation Officer interviewing the said child within the precincts of the court ought not to be considered satisfactory in determining the welfare of the child; it requires a more thorough investigation in order to arrive at any plausible conclusion."

[54] In addition, counsel argued that the magistrate should have given consideration to the fact that the minor child had resided with the appellant and his maternal grandmother without incident or questionable or inappropriate conduct on the part of the appellant; and failed to consider the conduct of the respondent in failing to pay maintenance for the said child while in the custody of the appellant. Specifically, counsel submitted that the magistrate failed to address the appellant's fitness or lack thereof in determining whether the child should be removed from her custody, nor did he examine the respondent's fitness in determining that he was better suited to be granted custody.

[55] In summary, counsel argued that the magistrate failed to consider the appellant's fitness to have custody of her minor son before removing him

from her custody, nor did he pay regard to the respondent's fitness in determining that he was better suited to be granted custody.

[56] Counsel for the respondent made the following submissions. In spite of the fact that counsel for the respondent took issue with counsel for the appellant's references to the **Minors Act** and the **Family Law Act**, and the case of **Smithen -Ward**, she unreservedly agreed that in matters involving custody, guardianship and care and control, the standard is "in the best interest of the child" and that "the paramount consideration is the welfare of the child": paragraph 26 of counsel's written submissions.

[57] On the issue of the statutory intent of the **Maintenance Act** and the **Maintenance (Amendment Act) 2014**, counsel submitted that although the "**Amendment Act** was to provide for changing realities, **section 20(1), (2)** and **(3)** of the **Maintenance Act** are not amended to reflect that the composition of the single parent family is now varied. These **sections** presume primary care and control to the mother and that the mother must not be a fit and proper person in order for care and control to be ordered to the father of the child.": paragraph 31 of counsel's written submissions.

[58] At paragraph [33] counsel stated further:

> "The Amendment Act therefore does not go far enough in ensuring that the rights of the mother and the father of a child are on a level playing field and section 20(1), (2) and (3) are in

> direct conflict with the stated principles in the Amendment Act."

[59] On the issue of whether the magistrate gave adequate consideration to the fitness of the parties, counsel eschewed the fact that unlike other jurisdictions, Barbados has set out no guidelines in **section 20** of the **Maintenance Act**. Counsel then adopted the approach of the High Court in **Smithen-Ward** in making this determination, but disagreed with the appellant's conclusion on the application of these principles to the facts of this case.

[60] Counsel submitted that it is not every case or circumstance that will require "a more thorough investigation in order to arrive at any plausible conclusions." We do agree with this. The legislation grants discretionary powers to the magistrate. Generally, counsel submitted that the magistrate made **JDL's** welfare the paramount consideration and made the appropriate order when he ordered that **JDL** should return to live with his father and that this Court had no reason to disturb this order.

COURT'S ANALYSIS AND FINDINGS

[61] We are of the opinion that the magistrate followed the wrong process in the conduct of this matter. There is no right of election in an 11 year old child. The magistrate was required as a first step to have regard to the welfare of the minor as the first and paramount consideration.

[62] This was an application for maintenance by a single mother who at the time of such application had the custody care and control of her minor child; that was the '*status quo'*

[63] On a consideration of changing the *status quo*, that is, removing the child from the care and custody of his mother, the magistrate was obliged to look at all the considerations mentioned above insofar as they were relevant to the particular circumstances of the case before him, but at the top of that list was an inquiry and/or an investigation of the circumstances of the mother to determine whether as required by the **Act** she was a fit and proper person to have the custody of the child.

[64] A fundamental corollary to this exercise, if consideration was being given to a change of the *status quo*, was an examination and/or investigation of the circumstances of the father to determine whether he too is a fit and proper person to have the care and custody of this minor child. Or, in other situations, the investigation of the living circumstances of some other third party who may have or be interested in the custody of the minor.

[65] Typically, such matters are investigated by the trained officers attached to the Family Services Division of the Welfare Department or in some circumstances the Child Care Board. Such officers are normally directed to investigate the living circumstances of the parties and either orally report to

the court in the presence of the parties or alternatively provide a report and recommendation to the court on the related custody issues. Such recommendation may or may not be accepted by the court as is the case with expert testimony, but more often than not is accepted. Such a report or reporting differs from a Means Report under **section 25** of the **Act**.

[66] We make here a distinction between inquiry and investigation. The resources of the Welfare Department and Child Care Board are not limitless. At present, increasing demands have strained them mercilessly. The magistracy also, has to manage its time efficiently in the context of all the matters coming before it. But expediency cannot trump the important role the magistracy plays in the practice of family and child law. It is not in every case that an investigation by these professional bodies will be necessary. There will be many cases where an inquiry by the magistrate alone will suffice. The process in each case must be determined on the circumstances of the case.

[67] It appears on the face of the record that this matter was determined solely on the "election" of 11 year old **JDL**. This was a fundamental error as, already stated, there is no such law of election by a child and the magistrate erred in law by allowing the minor to exercise such an election. While the views and wishes of the more mature child are an important factor, they are just one of

the considerations to be taken into account by a court in determining the welfare or best interest of a particular child. Such views or wishes are not necessarily determinative of the case.

[68] As expressed by Anthony Dickey at page 320 of the above-mentioned text:

> "The significance of a child's views and wishes and the weight to be given to them, naturally depend upon the age and maturity of the child, and the strength, duration and basis of the views: *H. v W. [1995] F.L.C. 92-598 at 81, 947-81, 948*. The views and wishes of a very young child might, for example, indicate simply the child's current, transitory preference. Alternatively, they might indicate the child's psychological or emotional dependence on a particular person. The views and wishes of an older child might represent on the one hand little more than a preference, or on the other a mature and considered opinion. But even in the case of the considered views and wishes of a mature child, the weight to be given to them will depend upon their basis and their reasonableness: see in the marriage of *R F.L.C. 92-820*."

[69] An 11 year old child cannot without more be considered sufficiently mature to justify a court's consideration of his wishes as paramount or in his best interest or welfare. Under **section 43(1)** of the **Family Law Act**, the age 16 is considered by that legislation to be the age of maturity of a child. It is significant that this provision in the **Family Law Act** does not give a mature child a right of election, but rather enjoins the court to refrain from making a custody order contrary to the wishes of a child who has attained the age of 16 years "unless the court is satisfied that, having regard to special

circumstances, it is necessary to do so": see **JJ v SW Civil Appeal No. 4 of 2018, CA Barbados [unreported].**

[70] This provision, that is **section 43 (1)** of the **Family Law Act**, makes it clear that it is ultimately a matter for the exercise of judicial discretion and not the sole determination or election of the child.

[71] In **Haloute v Adamira No. 233 of 1989**, **High Court Barbados (Unreported)** the issue of the custody of a 14 year old child of a non-marriage union where the parties had separated had to be determined by the court. The court was of the view that the boy was mature enough to be heard on the issue and took his wishes into account.

[72] The magistrate's failure to conduct an inquiry and/or investigation as to whether the appellant was a fit and proper person to have custody of the minor child and make a determination as to whether it was in the best interest of the minor to be placed in her custody, constituted a fundamentally serious procedural irregularity. It rendered the order given wrong in principle and in law. It caused an unjust decision in the lower court: **Tanfern Ltd v Cameron-MacDonald [supra]**.

WHAT ORDERS CAN THE COURT OF APPEAL MAKE?

[73] The powers and orders that can be issued by the Court of Appeal are generally provided for in the **Interpretation Act Cap. 1** at **section 24** and

the **Supreme Court of Judicature Act Cap. 117A (Cap. 117A)** under **Part V sections 52 to 63** under the rubric "Jurisdiction and Powers of Court of Appeal".

[74] **Section 59** of **Cap. 117A** is the source of this Court's power to hear appeals from the Magistrate's Courts. It provides the legislative framework for magisterial appeals and provides as follows:

> "Subject to rules of court, the provisions of the *Magistrate's Jurisdiction and Procedure Act* regulating appeals apply in respect of appeals under that *Act* or under any other enactment to which the procedure in respect of appeals under that *Act* is applied."

[75] Under **section 61** and onwards of **Cap. 117A**, this Court may make any order necessary for the determination of an appeal.

[76] The **Magistrate's Courts Act**, however, deals specifically with appeals from those courts under **Part XII** of the **Act** from **sections 238** to **265**. The powers of the Court of Appeal as it relates to the type of orders that can be given are to be found at **section 260 (2)** which provides as follows:

> "(2) In giving judgment, the Court of Appeal may
> (a) …
> (b) …
> (c) refer the case back to the magistrate with directions to re-hear the same or otherwise to deal with the same as the Court may think just and thereafter either to return the case to the Court for further hearing and determination or to determine the same, as the court may think fit, or refer the case back as mentioned in

section 258; and in every such case paragraph (c) of section 258, applies; or

(d) make such other order for disposing of the case as justice may require.

(3) The Court of Appeal may, so far as may be necessary for doing complete justice between the parties, review any order made by the magistrate".

DISPOSAL

[77] In view of the premises, this Court in accordance with **section 260(2) (c)** of the **Magistrate's Courts Act** discharges the orders made on 6 April 2018. This matter is referred to the magistrate to conduct a re-hearing (1) as to whether the appellant is a fit and proper person to have custody of the minor **JDL**; (2) to determine whether it is in the best interest of the minor **JDL** to be placed in the appellant's custody; and (3) to make such further consequential orders, inclusive of visitation and access and maintenance, as may be necessary.

[78] No order is made as to costs.

Chief Justice

Justice of Appeal **Justice of Appeal (Acting)**