

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

Family Division

No. 168 of 2006

BETWEEN:

MARIE-CLAIRE EVELYN

APPLICANT

AND

JEFFREY DAVID EVELYN

RESPONDENT

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

**2006: April 10,
June 07, 19, 27, 29
July 06, 13, 18, 20, 25, 27
August 30, 31
September 21
2007: February 22, 23
March 08, 15
2008: April 30
June 21**

Mrs. Beverley J. Walrond, Q.C. in association with Ms. Natasha J. Griffith for the Applicant/Wife.

Ms. Margot Greene, Q.C. for the Respondent/Husband.

DECISION

THE FACTUAL BACKGROUND

- [1] Marie-Claire Evelyn (“the Wife”), and Jeffrey David Evelyn (“the Husband”), were married on November 28, 1992. The Wife left the matrimonial home on March 14, 2006, and the parties agree that the marriage broke down prior to the Wife’s departure from the matrimonial home.
- [2] On leaving the matrimonial home, the Wife took with her the three female children of the marriage. All the children are minors, and they were born on August 21, 1992; February 13, 1995; and March 22, 1996 respectively. The eldest child is a few months away from her sixteenth birthday, and the second child has just become a teenager. The last child recently celebrated her twelfth birthday, and in September 2007 she embarked on a new phase of her education, namely secondary school.
- [3] On March 23, 2006 the Wife filed an urgent application seeking the following orders:-
- (a) that joint custody of the minor children do remain in the Wife and the Husband;

- (b) that the Wife be granted the care and control of the minor children;
- (c) that the Husband do have reasonable access to the said children or such access as may be set by the Court;
- (d) that the Husband do pay to the Wife a reasonable sum as and for the maintenance of the said three minor children together with all of the medical, dental, ophthalmic and pharmaceutical expenses of the said minor children, and all of their educational expenses inclusive of fees, petty fees, uniforms, books, extra-curricular expenses and extra lessons presently being undertaken by the said children and such other extra lessons and curricular expenses as shall be agreed between the parties;
- (e) that the Husband do pay to the Wife a reasonable sum for her maintenance including the sum of \$3200.00 as and towards the rental of the house presently occupied by the Wife and such other sum as to the Court may seem necessary and/or just, together with her medical, dental, ophthalmic and pharmaceutical expenses and the educational expenses associated with her course of education at the University of the

West Indies, Cave Hill, Saint Michael and until further order of the Court;

- (f) an injunction restraining the Husband from mortgaging, leasing, selling, charging or in any other way disposing of the properties at Rugby Plantation House, St. Thomas and the property situate at Blue Waters, Christ Church registered in the name of the Husband;
- (g) that provision be made for the legal fees of the Wife payable in respect of the Application;
- (h) that the Wife is entitled to keep and have use of the Mitsubishi Spacewagon Registration No. T451 presently used by her until further order of the Court; and
- (i) such further or other relief as to the Court may seem necessary and/or just.

[4] In an Affidavit filed on April 10, 2006, the Husband requested the following orders:-

- (a) that joint custody of the minor children remain with both the Husband and the Wife;
- (b) that care and control of the minor children be shared between the Husband and Wife until the Court otherwise determines

pending receipt of a report from a Court appointed psychologist;

- (c) that the minor children of the marriage reside alternate weeks with the Husband and the Wife and that discussions be held in advance for vacations;
- (d) that the sum of \$7,600.00 be paid by the Husband as and for the maintenance of the Wife (inclusive of the current rental of the Frere Pilgrim home) and the children together with all of the medical, dental, ophthalmic and educational expenses for the Wife and the children as set out in 1 (d) and (e) in the Wife's application;
- (e) that the Wife is entitled to keep and use the Mitsubishi Spacewagon T-451 and charge gas on the account of J.E. Security Systems & Services Inc. ("the Company") in the sum of \$450.00 per month; and
- (f) that the Wife and the Husband through their respective Attorneys-at-Law endeavour to reach a Family Arrangement or Agreement on their future relationship, the general welfare of the children of the marriage, the settlement and/or disposal of assets and provision of legal fees.

- [5] On April 10, 2006, the Court made a consent order:-
- (a) granting joint custody of the three minor children to the Wife and Husband;
 - (b) for the sum of \$7,600.00 to be paid by the Husband as and for the maintenance of the Wife (inclusive of the current rental of the Frere Pilgrim home) and the children together with all of the medical, dental, ophthalmic and educational expenses for the Wife and the children as set out at paragraphs 1(d) and (e) of the Wife's application filed on March 23, 2006; and
 - (c) permitting the Wife to keep and use the Mitsubishi Spacewagon T-451 and charge gas on the account of "the Company" in the sum of \$450.00 per month.
- [6] On April 19, 2006, the Court further ordered that interim care and control of the minor children be granted to the Wife, with liberal access to the Husband.
- [7] The Wife filed an Affidavit in Response on May 23, 2006. At paragraph 28 of that Affidavit she requested additional maintenance of \$1,450.00 to cover the Housekeeper's wages and her Employer's National Insurance Contribution towards payment of the said wages for the Housekeeper.

- [8] Additional lengthy Affidavits were also filed by the Parties: for the Husband on June 14, 2006, and on behalf of the Wife on June 23, 2006.

THE ISSUES

- [9] Two issues are now before the Court for determination-
- (1) the care and control of the children of the marriage; and
 - (2) a claim by the Wife for additional maintenance.

It was agreed that the question of costs would be reserved to a later date for the Court to hear further submissions from counsel for the parties.

CARE AND CONTROL

- [10] The Wife has asked for the care and control of the children of the marriage. On the other hand, the Husband is requesting that the parties have joint care and control of the children. His proposal is that the parties share joint physical custody of their children, with the children residing alternate weeks with each parent.
- [11] The parties relied on the expert evidence of clinical psychologists. The Wife relied on Dr. Norma Astwood, who has many years experience as a clinical psychologist both in the public service and in private practice. Dr. Astwood submitted a report dated 18 May 2006,

and a further statement dated 14 June, 2006. Dr Astwood did not meet with or interview either the Wife, the Husband or the children. Her report is general in nature because she had no knowledge of the parenting arrangements between the parties.

[12] Dr. Astwood's opinion may be summarized as follows:-

- (i) Effective communication and co-operation between parties is vital for shared residential custody to be successful, and parents who cannot co-operate or communicate effectively are poor candidates for joint residential custody.
- (ii) A father is a vital component in the raising of girl children. He affords intellectual stimulation, authoritative discipline and the prevention of promiscuity during adolescence.
- (iii) Joint physical custody does not mean a 50/50 sharing arrangement. Emphasis should be placed on the quality of time spent with a parent and not on the quantity of time spent with the parent. 25 per cent to 35 per cent of time spent with a parent was adequate once that parent was actively involved with the child.
- (iv) A 50/50 sharing of physical custody or a week on week off sharing of physical custody would be disruptive and unsettling

to the children because it would not provide the constancy, consistency and continuity that existed prior to the separation of the parents.

[13] The Husband relied on Mr. Albert Selby, a clinical psychologist of some 25 years experience, and sadly now deceased. Mr. Selby's report, dated 02 June, 2006, concluded that joint physical and legal custody would be beneficial for the children, and he suggested a timetable for physical custody. Mr. Sealy was also of the view that a week on week off joint physical custody arrangement was workable.

[14] Mr. Selby spoke highly about a 2002 article published in the Journal of Family Psychology by Robert Bauserman. This article is a statistical analysis of joint custody, and is entitled "Child Adjustment in Joint-Custody versus Sole-Custody Arrangements – A Meta – Analytic Review.". Mr. Selby described this article as "the most comprehensive statistical analysis of joint custody". Mr. Selby highlighted Bauserman's conclusion that children in joint custody arrangements had less behavioural problems and better school performance than children in sole custody arrangements.

[15] The Court has noted that Bauserman's analysis is fraught with difficulties for the following reasons:-

- (i) Bauserman's definition of joint custody embraced both legal and physical custody. And his review combined studies based on joint physical and joint legal custody arrangements.
- (ii) Bauserman admitted that "the findings for joint legal custody indicate that children do not actually need to be in joint physical custody to show better adjustment". This certainly undermines Mr. Selby's championing of joint physical custody as the preferred choice for this case.
- (iii) Since its publication in 2002, Bauserman's analysis has been subjected to severe criticisms by other researchers. Bauserman is accused of, inter alia, misrepresenting data, ignoring existing relevant studies, and extrapolating tenuous conclusions from those studies that he relied on. There are also studies that suggest that where there is conflict between parents, children were at considerable risk, and more emotionally troubled.

[16] Given the inherent difficulties and the heavy negative criticisms of the Bauserman study, the Court is reluctant to embrace Bauserman's analysis as a guidepost for this case.

[17] The Court has also noticed other flaws in Mr. Selby's report. Mr. Selby interacted with the Husband and only two of the children. He

never met with or spoke with the Wife. And he reviewed the Husband's first affidavit, but did not see the Wife's affidavit to which the Husband was responding. Regrettably, Mr. Selby did not have available to him sufficient information from either the Husband or the Wife that would have allowed him to conclude in his report either that the Husband was the primary care giver; or that the Wife's epilepsy and depression would compromise her parenting ability; or that the Wife had left the matrimonial home with the children, and without the Husband's knowledge.

[18] Despite the Court's cautious approach to Mr. Selby's report, the Court recognizes that there are two areas of similarity between the reports of Mr. Selby and Dr. Astwood. First, both expert witnesses agreed on the role of a father in the lives of female children. In Mr. Selby's words, the research suggests that "Girls without a father in their lives were two and a half times more times as likely to get pregnant, and much more prone to suicide." Therefore, the Court is mindful of the fact that whatever decision is made with respect to the care and control of the three girl children of the marriage, that decision must as far as practicable support the Husband's vital role in their development.

[19] Secondly, the two expert witnesses appear to share similar views with respect to the amount of time that a parent needed to spend with a child. Although advocating joint physical custody and a week on week off arrangement between the parties, Mr. Selby defined joint physical custody as one third time spent with one parent and two thirds of the time spent with the other parent. This definition of joint physical custody does not require a 50/50 sharing of time between parents. Therefore, if one used a 7 day week or 168 hours as an example, this translates into 56 hours with one parent, and 112 hours with the other parent to satisfy Mr. Selby's definition of joint physical custody.

[20] Dr. Astwood stated in her evidence that a 50/50 sharing of time between parents was not necessary. In her opinion 25 percent to 35 percent of time spent with a parent was adequate. This 25 to 35 percent is within the one third or minimum range that Mr. Selby referred to in his definition of joint physical custody. And again if one used the 7 day week as an example, Dr. Astwood's average of 25 to 35 percent would range from 42 hours to 58.8 hours per week for one parent, while the other parent would benefit from 109.2 to 126 hours of interaction with the children during the week.

[21] In the case of H & H-K (1990) FLC 77, 848 at page 77, 852, Kay J.

said that:-

“Normally, when the parties actually get to the combat stage and into Court, the Court has to wrestle with the problem and ultimately make a determination. For good, bad or other reasons, one party gets more time with the child than the other. I do not know that that is necessarily a desirable trait and there are some cases when shared parenting is the appropriate answer. Shared parenting does not necessarily involve equal time of both parents of the child.”

[22] Both expert witnesses expressed divergent opinions on the role of conflict in the determination of where care and control of the children of the marriage should be vested. Dr. Astwood opined that parents who cannot co-operate or communicate effectively were poor candidates for joint physical custody. In her view, effective communication and co-operation between parents was a prerequisite for successful shared residential custody.

[23] Mr. Selby agreed that joint custody with conflict can provide grave risks for children, and that when parents co-operate and minimize conflict, children do much better. But when referring specifically to a week on week off arrangement within the context of joint physical or residential custody, Mr. Selby stated that it was not totally true that a week on week off arrangement only works where the parents were not in conflict. Mr. Selby noted in his report that there was intense

parental conflict between the parties, but he held fast to his recommendation for the week on week off arrangement even though the parties could not cooperate “because children may do no better, but no worse”.

- [24] Dr. Astwood was not in favour of a 50/50 shared regime, which she described as disruptive, and unsettling and without the constancy, consistency and continuity that existed prior to the separation of the parents. There is support for Dr. Astwood’s views in the literature. In a 1992 publication by E.E. Maccoby and R.H. Mnookin entitled “Dividing The Child: Social And Legal Dilemmas of Custody”, these authors wrote that

“We are deeply concerned about the use of joint physical custody in cases where there is substantial parental conflict, and such conflict can create grave risks for children. We do not feel it good for children to feel caught in the middle of parental conflict, and in those cases where parents are involved in a bitter dispute we believe a presumption for joint custody would do harm ... We wish to note, however, that joint custody can work very well when parents are able to co-operate.” (p. 284-285).

- [25] In 2002, Trish Wilson in a critique of Robert Bauserman’s study, referred to other studies that indicated that children who were shuffled more frequently between parents were more exposed to and involved in parental conflict and aggression and were more often perceived by

both parents as being depressed, withdrawn, uncommunicative and/or aggressive. Wilson added that other researchers reported that

“The more contact children had with two warring parents, the more emotionally troubled the youngsters were and the more behavioural problems they had. These children were living in a constant state of anxiety and tension, constantly moving between two enemy camps.”

[26] In this case there is clear evidence of ongoing conflict between the Husband and the Wife. The Court has observed that between them there is a high degree of acrimony and simmering tensions that have at times spilled over to the children of the marriage. The Court has also urged the parties to put aside their differences and to open channels of healthy communication for the sake of their children.

[27] It is not disputed that the Husband broke into the Wife's home in order to retrieve Company property which he alleged that the Wife could use to blackmail him. The children became involved in this incident and begged the Wife not to prosecute the Husband. The Husband also displayed uncompromising and volatile behaviour towards the Wife when she allowed the eldest daughter to attend a family dinner with relatives who were visiting from overseas, during time allocated to the Husband. His extreme reaction to his loss of time was witnessed by the other two children. There is undisputed

evidence that the Wife incurs expenditure on behalf of the children without consulting the Husband. She has also allowed one of the minor daughters to sign for meals at a Hotel where the Company pays a membership fee.

[28] In the face of the Court the parties have accused each other of irrational behaviour. And while these accusations form no part of the affidavit or oral evidence before the Court, what they do demonstrate is the inability of the parties to interact without conflict.

[29] While the relationship between the parties leaves a lot to be desired, there is no doubt about the love and commitment that each parent has for the three children of the marriage. However, the Court cannot ignore the fact that their decision making about their children is undermined by a matrix of conflict, emotional trauma, and ineffective communication. Thus, the Court is reluctantly drawn to the conclusion that this matrix does not support the vesting of care and control of the children in both parents. Their level of communication and co-operation does not inspire hope for a successful joint physical custody arrangement, with weekly exchanges between them.

[30] In the case of H and H-K, mentioned earlier, Fox J made an order for shared parenting, but accepted the rarity of such an order. Fox J. stated that:

“This case, in my view, presents one of those rare occasions when a shared parenting order is more appropriate than a sole custody. It presents it because of the geographic proximity of the homes of each of the parties. It presents it because of the wife’s mother being a focal point for both parties, particularly being friendly with the husband, and it present it because the child has already learnt in her tender years to accept such an arrangement and to function adequately under such an arrangement.’.

The Barbados High Court has also had occasion to vest custody of a four year old minor child in both parents. The child spent alternate months with each parent [See Corbin v Corbin (1964-67) 4 Barb.L.R 109.] However, Hanschell, C.J. (Ag.) was forced to observe at p. 110 of the judgment in that case, as follows:

“It was agreed by both sides that this child is highly strung and that the present arrangement whereby the child is passed back and forth between the parents at short intervals has been injurious to her health. She at one time suffered from a tense, nervous condition and had to be given sedatives to make her sleep at night.”

[31] Also in the case of H, DM and H, SA (2003) FLC 93-168, Ryan FM declined an application by a husband for shared residence of three children. The Federal Magistrate found that communication between

the husband and the wife was “difficult and too often ineffective”. Therefore, there was “a real possibility that the children will be overtaxed in a shared equal parenting regime.”.

[32] Ryan FM also mentioned some useful factors that a court should consider when an applicant is seeking a shared residential arrangement. These factors are:-

- (i) the capacity of the parties to communicate on matters relevant to the welfare of the child;
- (ii) the physical proximity of the two households;
- (iii) whether the homes are sufficiently proximate that the children can maintain their friendships in both homes;
- (iv) the prior history of caring for the children. Have the parties demonstrated that they can implement a 50/50 living arrangement without undermining the adjustment of the children?
- (v) whether the parties agree or disagree on matters relevant to the day to day lives of the children. For example, methods of discipline, attitudes to homework, health and dental care, diet and sleeping pattern;

- (vi) where they disagree on these matters the likelihood that they would be able to reach a reasonable compromise;
- (vii) do they share similar ambitions for the children? For example, religious adherence, cultural identity and extra-curricular activities;
- (viii) can they address on a continuing basis the practical considerations that arise when children live in two homes? If a child leaves necessary school work or equipment at the other home, will the parents readily rectify the problem?
- (ix) whether or not the parties respect the other party as a parent;
- (x) the wishes of the children and the factors that influence those wishes;
- (xi) where siblings live; and
- (xi) the ages of the children.

[33] Some of the above factors overlap, and may not be relevant to the facts of this case. With respect to those factors that are relevant, it was noted that the communication between the Husband and the Wife is far from ideal. The Husband has complained that the Wife makes decisions without involving him in any discussion or planning.

- [34] The incident involving the eldest child demonstrates the inability of the parties to reach a compromise on matters that will affect the children. Even the sharing of pictures and the maintaining of keepsake boxes for the children presented difficulties.
- [35] There was one occasion when the children missed school for one day because the uniforms were not at the home of the parent with whom the children were staying. On another occasion the Wife requested the green card from the Husband so that one of the children could receive her vaccinations for secondary school. The Wife did not get the card until a week or two after the initial request.
- [36] The children are involved in a range of extra-curricular activities including karate, dog training, art, lessons, riding and polo. But the Husband has complained that the Wife had not consulted with him about recent expenditures for these activities.
- [37] The Husband lives in St. Thomas and the Wife lives in Christ Church. They do not live next door to each other or in the same parish. By international standards the parties do not live very far from each other. But given the realities of traffic congestion in Barbados, especially at rush hour, accessibility to each home in emergency situations may be delayed.

- [38] Although there are communication challenges between the parties, each one has complimented the other on their parenting skills during the marriage. However the Husband is of the view that the Wife's medical problems will compromise her ability to have care and control of the children. This aspect of the case will be discussed later.
- [39] Bearing in mind the difficulties that exist between the parties, joint care and control may translate into two sets of clothing, school books, toiletries and other necessities for each of the three children. This would be a most expensive undertaking given the standard of living to which they are accustomed.
- [40] Two of the children in this case are already teenagers, and the youngest child is on the brink of her teen years. These children are not babies or toddlers. They do not have the luxury of childhood years in which to adapt to the rigorous and challenging routines that come with joint physical custody. These challenges would include moving between two separate homes, and the disruptions of a week on week off living arrangement, all in the midst of on-going parental conflict.
- [41] Section 43(1)(b) of the Family Law Act, Cap 214 provides that:-

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

union ... the court shall not make an order under this part contrary to the wishes of a child who has attained the age of 16 years.”.

The law allows the Court to be guided by the wishes of a child who has reached the age of 16 years. No child in this case has reached the age of 16 years, but the eldest child will reach that milestone on August 21, 2008.

[42] The Court also conducted individual interviews with all three children on March 15, 2007, and one year later on March 19, 2008. These interviews were conducted without the assistance of a trained counselor or other relevant professional, and the information gathered by the Court is not admissible as evidence in this matter. However, as each child reaches the age of 16 she will be able to make choices about her residence and access to the non-resident parent. The Court urges the parties to begin this process gradually with the eldest child.

[43] When the relevant factors as outlined above by Ryan F.M are considered, this Court reaffirms the conclusion that the available evidence in this case does not support joint physical custody of the children of the marriage.

[44] The Court is also of the view that joint physical custody and a 50/50 shared parenting arrangement are not essential for either parent to

have adequate time sharing with the children. More importantly, adequate access is possible for the parent who is not awarded care and control of the children.

[45] Where then should care and control of the children be vested? In arriving at a resolution of this issue the Court should be guided by two considerations. The first consideration is found in Section 43 (1) (a) of the Family Law Act Cap 214, and it is that –

“In proceedings in respect of the guardianship or custody of, or access to, children of a marriage or union ... the court shall have regard to the welfare of the child as the first and paramount consideration.”

[46] The other consideration is that there is no presumption that care and control automatically rests in a mother. It has been customary for courts to grant care and control to the mother with liberal or other prescribed access to the father. In this case the Husband has requested joint physical custody primarily because he does not wish to be relegated to the role of a weekend father.

[47] Each party has acknowledged the other to be a good parent, but each claims to be the primary care giver to the children. Whoever is granted care and control will have all three children because it is not in the interest of the children to be separated, and neither the Husband nor the Wife has made such a proposal.

[48] The Husband has acknowledged in his evidence that the Wife had more time with the children. When she was employed by the Company she left work at 2 p.m. He conceded that his job is very time consuming, and that after the Wife stopped working she would have had yet more time with the children.

[49] This Court in no way wishes to minimise the Husband's active role as a father, but the Court finds from the evidence of both parties that the Wife was the primary care giver. She took the children to school most days and picked them up, and this included ferrying them to their extra-curricular activities. She chose their school; she prepared their lunch boxes; volunteered at various school activities; set up their medical appointments; purchased uniforms and clothing. All this may be described as the day to day organisational skill that help to make her the primary care giver.

[50] The Husband expressed concerns about his Wife's health challenges with epilepsy and depression. The Court finds that these episodes have not compromised and should not compromise the Wife's ability to cope with the children if she was awarded care and control. In this regard the Court was guided by the medical reports submitted on behalf of the Wife. And there was no medical or other evidence

submitted by the Husband that challenged the reliability of the Wife's medical reports.

[51] The Court awards care and control of the children to the Wife as their primary care giver. The Court is satisfied that there are no health challenges that would undermine her role. In addition, while accepting the fundamental role that the Husband must continue to play in the lives of the children, the Court is of the view that each child is a girl at a very emotional and vulnerable stage of development, who will be needing the presence, guidance, care and trust of a familiar adult female. It is the Wife who is best suited to fill this role. The Court is also cognisant of the fact that this is the interim arrangement into which the children have settled, and there is no evidence that it has been detrimental to the children. In this regard the status quo with respect to their care and control will remain.

CLAIM FOR ADDITIONAL MAINTENANCE

[52] The Wife has made a claim for additional maintenance to cover the cost of the household helper with whom the children were familiar. The evidence indicates that this helper was paid by the Company prior to the separation. After the separation and the consent order for maintenance, it appears that the Company discontinued payment of

the housekeeper's wages. These wages were not included in the Wife's initial maintenance application as it was assumed that the Company would continue to pay the housekeeper. The Husband did not inform the Wife that the Company would no longer be responsible for the housekeeper's wages.

[53] The evidence also indicates that the Wife is no longer receiving her salary from the Company, and her only source of income is the agreed maintenance. Had she been in receipt of her separate salary, plus the agreed maintenance, it would have been difficult to sustain her application for additional maintenance to cover the housekeeper.

[54] It was argued for the Husband that the Wife should seek employment to cover her additional expenses as she is a trained Cordon Bleu chef. However, full time employment could compromise her university programme which was undertaken during the marriage with the Husband's full knowledge, and not as a hobby, but as a tool for retraining.


[55] Because of the abrupt disengagement of the Housekeeper by the Company, and the Husband's evidence that he has made the Wife's salary a component of her maintenance, the Court grants her the additional maintenance to cover the reasonable costs of the

Housekeeper, inclusive of the National Insurance contribution payable by the employer.

- [56] This additional maintenance will only be payable for a period of two (2) years, during which time the Wife should be in a position to undertake some level of employment to assist with her maintenance. It is not anticipated that this payment for two (2) years should be unduly harsh on the Husband, as the evidence revealed an additional source of income, namely, the horse account, that was not included in his Statement of Financial Circumstances.

DISPOSAL

- [57] For the reasons stated in the judgment, the following orders are made:
- (i) that care and control of the three minor children of the marriage be granted to the Wife; and
 - (ii) that the Husband pay additional monthly maintenance to the Wife in the sum of \$1,450.00 to cover the costs of a housekeeper, together with the NIS contribution payable by the Wife as employer, with effect from the 28th day of June, 2008 for a period of two years.


Sonia Richards
High Court Judge