



[2013] JMSC Civ 164

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2010HCV01525

BETWEEN            KERRY-ANN CHAMBERS            CLAIMANT  
AND                    CECIL RICARDO MACK            DEFENDANT

Mr. Gordon Steer instructed by Chambers Bunny & Steer for the Claimant

Ms. Marlene Uter instructed by Alton E. Morgan & Co. for the Defendant

Heard: October 4, 2012 and November 1, 2013

Custody – Mother’s Application for Sole Custody - Welfare of the Child in  
the Widest Sense - Children Physical Well-being - Health Issues - Father’s  
Impugned Conduct - Maintenance – Ability to Pay

**Campbell QC, J**

**Claimant’s Application**

[1] Before the Court, is the claimant's application for custody, care and control of two children JKM, a male child, born on the 20<sup>th</sup> day of July 2008 and a girl PMM, born on the 2<sup>nd</sup> September 2009, with access as suggested or ordered by the Court.

An application for an increase in the maintenance from \$26,000.00 to \$50,000.00 plus one-half medical, dental, optical and school expenses reasonably incurred on behalf of the said children.

The defendant's application for joint custody with care and control to the claimant, and for the interim sum to be made final.

[2] Her affidavit in support of her application, recounted in some detail a disputed encounter between the parties in which it was alleged that the defendant flew into a violent rage and punched her in the head and held her hair and flung her on the wall and pulled her by the hair. She said her sister assisted her in removing that same day and the parties have not lived together since. That they cannot agree about most things concerning the children as it has to go "his way" or no other way.

[3] That since leaving the defendant, she has received the sum of Six Thousand Dollars (\$6,000.00) in October 2009 and Fifteen Thousand Dollars (\$15,000.00) in January 2010. She needs meaningful assistance from the defendant. He is a Flooring Contractor and earns an average of Two Hundred and Fifty Thousand Dollars (\$250,000.00) per month. She presently "takes home," the sum of One Hundred and Forty Thousand Dollars (\$140,000.00) plus travelling allowance per month, and monthly expenses for herself and children amount to \$251,450.00.

### **Defendant's Response**

[4] The defendant in his affidavit in response, dated 22<sup>nd</sup> September 2010 denied the claimant's allegations of physical abuse. He says that he had asked the claimant to pool funds with him to invest in a company with the understanding that she would receive shares in her name to reflect her investment. That she started crying and became boisterous and began screaming and shouting and he asked her to stop screaming. That he held her and put his hand over her mouth in an attempt to calm her down. That her sister and brother came for her and he told her sister what happened. Her brother started to accuse him of abusing his sister. The claimant left with their daughter and her sister and brother taking some items of clothing with her. Their son joined her about two days later.

[5] The defendant's complains that her attitude is that he is not to question her about decisions regarding the children. He is concerned about the lack of communication

regarding health and welfare issues of the children and there have been instances when the children have been ill while in her care and it was only when he called or visited that he would become aware of the issues. He asserts that there exists an excellent relationship between him and his children and it is in the children's best interest for them to interact with him regularly.

[6] That as a self-employed contractor, his income depends on the jobs that he gets and in recent times he has not been getting jobs as regularly as before and his income has consequently fallen drastically. Since January 2010, he has been doing part-time sales with Durastone Jamaica Limited, to subsidize his income. That he earns on average \$120,000.00 per month and he is presently having difficulties meeting his expenses, which he lists at \$138,500.00 per month.

### **Interim Order**

[7] On the 30<sup>th</sup> September 2010, Ms. Justice Nicole Simmons, ordered with the consent of the parties that the:

- (1) Status quo remain,
- (2) The defendant do pay by way of maintenance, the sum of Twenty-Six Thousand Dollars (\$26,000.00) per month and in addition one-half (1/2) of all medical, dental, optical and school expenses reasonably incurred on behalf of the said children, commencing on the 18<sup>th</sup> October 2010 and on the 18<sup>th</sup> day of each succeeding month until further order.

### **Defendant's Application**

[8] On the 3 February 2012, the defendant filed a Notice for Court Orders, seeking that joint custody of the relevant children be granted to the claimant and the defendant, with care and control to the claimant and regular and reasonable access to the defendant.

The grounds on which the defendant is seeking the orders are:

- (a) That joint custody is in the best interest of the children.
- (b) That the defendant is integrally involved in the children's life and contributes significantly to their care, upbringing and development.

- (c) That the defendant pays a significant portion of the expenses of the children by way of direct contribution to their needs and welfare.
- (d) That the defendant's presence and involvement in the children's life is in their best interest.

[9] In his affidavit in support of his application dated 3rd February 2012, he states that the children are in his care and control and he has access to them every other weekend Friday to Sunday. That he is a self employed Flooring Contractor and he can earn an average of \$140,000.00 per month but his earnings are not consistent and with the decline in the construction sector his earnings are not significant. That his total estimated monthly expenses are \$154,500.00. He says that notwithstanding his financial situation, he does his best to take care of his children and is committed to their development and well-being.

#### **Children's Health Issue**

[10] He testifies that JKM previously suffered severe pulmonary problems but in 2011, he took him to a specialist to be treated and since then he has been experiencing improved health and a better quality of life. He has also been having less frequent pulmonary attacks. The child also has had other health complications including a rare condition called Constitutional Growth Delay and in 2009, he was diagnosed with meningitis which was successfully treated. That PMM's health concerns have been much more severe. In May 2010, she was diagnosed with Glumcrula Nephritis, a kidney disorder, among other health issues.

[11] He testifies that he is concerned that the claimant is not as vigilant as she should be in respect of the children's general health and he is usually the one who observes their health problems and usually the one to rush them to seek medical attention. He complains that most times it is when he visits or spends time with the children that he realizes that they are unwell and in need of urgent medical attention. He asserts that the children's health concerns require constant monitoring, management and quick and efficient responses.

## **Background**

[12] Kerry-Ann Chambers, Civil Servant, 39 years old, holds a Bachelor of Science in Urban Planning, Master of Science in Aerial Survey and a Diploma in Construction from the University of Technology (U Tech). She works at the Parish Council in St. Mary. She testified that she met the defendant in 1999 and shortly after they started a visiting relationship until September 2001, when they started living together. They lived firstly, at 13 Meadowland Drive, at a house belonging to the defendant's father. Their first child, JKM was born in July 2008. She later, moved to an apartment in Long Mountain, where the second child PMM was born. They paid a rental of \$77,000.00 per month. She contributed \$35,000.00 to the rental. She left the home, two months after the birth of the baby.

[13] The applicant states that inclusive of travelling, she "takes home" \$240,000.00 per month after the statutory deductions. She denies that she has always earned more than the defendant. She admits that the defendant is more "hands on," with the children's health issues. He, in the opinion of the applicant "has lived up to his obligations in regard to the educational requirements of the children." He was unemployed from 2005 to 2009, due to, what the defendant describes as depression, following the theft of his motor vehicle, with vital private information. He feared that the information it contained would cause the thieves to target him. Consequently, he was afraid to leave the house and had to seek psychiatric treatment. She was employed during the period of his unemployment.

[14] Before he had been incapacitated, the defendant had worked as a Floor Contractor. He testified that he last earned an income in February 2013. He said his average monthly income between January and the time of trial would be \$50-60,000.00 per month. His petrol bill for his 1996 Toyota motorcar is \$9,000.00 per month. He had projected earnings of \$140,000.00. He pays \$10,000.00 for electricity. His living expenses have gone down. Then there were the expenses for the children. He says he is assisted by his relatives. In respect of the Court Order for school, for payment of \$26,000.00 per month, his last payment was in April 2012. He says he has contributed

to the children's school fees, books and other materials. He admitted that he has not paid any maintenance in respect of the Order, since April 2012.

[15] Ms. Chambers testified to episodes of violence, involving the defendant, which started before his illness. She made a report to the police after one such episode. Nonetheless, she maintains that he enjoys an "excellent relationship" with the children. He disciplines the older boy. He spends a lot of time with the children. He utilizes the "every other weekend," that the court has ordered that he is entitled to have the children with him. His sister and aunt help in the supervising of the children on those occasions.

[16] The defendant occupies a large one-bedroom apartment with a King size bed with furnishings that open into a Queen size bed. His son during his visits sometimes sleeps on the bed with him. He claims to have borrowed \$162,000.00, from his Aunt Dahlia, to meet arrears that accumulated on his Court Order payments for a period of six months, from June to December 2011. Next payment that he made was in April 2012. He says he spends significant sums on the children by way of, purchasing clothing items, medical bills, entertainment, and school fees. He transports the children from school and accommodated them every other weekend.

## **Analysis**

### **Joint Custody**

[17] In an application to the court for custody and the right of access, by either parent, the first and paramount consideration is the welfare of the children. The conduct and wishes of the parents are also factors to be considered. The court is entitled to make such order as it may think fit. Neither mother nor father is presumed in law to have a superior claim. See Section 7(1) and 18, **Children (Guardianship and Custody Act)**.

[18] The authorities indicate that welfare is a much wider concept than "creature comforts." In **Dennis Forsythe v Idealin Jones** SCCA No. 409 of 1999 delivered on the 6th April 2001, Harrison J.A. particularized some of the factors that are included

under the rubric of “welfare.” At page 7, of the judgment, he underscored the principle enunciated by Lindley, LJ in re **Mc Garth** (1893) 1 Ch. 143:

*“The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of the child is not 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.”*

And at page 8:

*“A court which is considering the custody of the child, mindful that its welfare is of paramount importance must consider the child’s happiness, its moral and religious upbringing, the social and educational influences, its psychological and physical well being and its physical and material surroundings, all of which go towards its true welfare. These considerations, although the primary ones, must also be considered along with the conduct of the parents, as influencing factors in the life of the child, and its welfare.”*

[19] Welfare of the child is not the equal of any other consideration. It is the chief consideration. To the welfare of the child, all other considerations should be subordinated. The learned authors of, **The Law Relating to Children**, Professor H K Bevan, speaking of the relative importance, the factors other than those relevant to welfare, says:

*“The extent to which they are must, as Megarry J, has made clear, (Re F (an infant) [1969] 2 Ch.238, at 241), depend on judicial discretion and cannot be determined according to any formula. Problems invariably arise with regard to the weight to be attached to the claims and the conduct of the parties.”*

The learned author continues at page 26:

*“Even where the unimpeachable conduct of a parent is taken into account as a separate matter, the justice of his claims may be so outweighed by considerations*

*concerning the child's welfare that the court will entrust custody, care and control to the parent whose conduct is impugned."*

[20] In **Allen v Allen** [1948] 2 ALL ER 413 (CA), the parties were divorced, the wife having committed adultery. The judge, in deciding to make the order, regarded the moral welfare of the child as of paramount importance and took the view that the wife, having once committed adultery, was likely to do so again, and that, as the husband was re-married to a wife against whose moral character no charge could be made, he was more fit to have the care of the child. There was little to choose between the accommodations offered by the parties, but it was undisputed that the child was happy with her mother and making good progress at school, and there was medical evidence to the effect, that the child's health would suffer if she were separated from her mother. On an appeal by the wife against the order, the Court of Appeal held that the judge had not applied the proper test, the welfare, of the child, both moral and physical, being the paramount consideration, and, therefore, the appeal must be allowed. I find that the father's concern for the children's health issues are vital to their welfare and outweigh the acrimonious relationship that exist between the parties.

[21] Both children have serious health concerns, JKM suffered severe pulmonary problems. He also had a rare condition called Constitutional Growth Delay. In 2009, he was diagnosed with meningitis. PMM was diagnosed with Glumerula Nephritis, a kidney disorder. In May 2010, she was diagnosed with Salomenna. The defendant's contention that, these health concerns require constant monitoring, management and quick and efficient response has not been challenged by the claimant. The father has enumerated occasions when it was his monitoring that led to medical attention being sought in respect of the children. I accept that because he is self-employed, he is better able to respond to such medical emergencies that may arise with the children. His relationship with the children is described as excellent by the claimant. The mother has raised no complaints about his conduct with the children, other than he is a firm disciplinarian.

[22] The claimant's first affidavit dated 15<sup>th</sup> March 2010 did not frankly and fully disclose the children's health issues. Its sole medical disclosure is limited to a medical



item in a list of monthly expenses incurred in the upkeep of the children in the amount of \$3,000.00. The claimant's first affidavit is primarily concerned with the conduct of the defendant towards her, particularly an allegation of physical abuse and his lack of financial support since she has left the home with the children. Both affidavits of the defendant have several references to the state of the children's health and challenges, the mother's "obvious casualness and lack of urgent response to the health and welfare issues of the children." He has also alleged that when he suggests that she becomes more proactive and communicative, she becomes defensive and difficult to deal with.

[23] The court has not been provided with any medical reports. However, the defendant exhibits, to his first affidavit some nine receipts in relation to doctor's visit made by JKM. The claimant has not challenged the seriousness of the illness of the children, or the contention of the defendant as to the casual nature of her response to these illnesses. The psychological and physical well being of the children are important factors for the consideration of the court. The health of the children impinges on their happiness and affects their educational and social performance. The evidence shows clearly that the father is more in tune with the children's medical history. This is perhaps due to the demands of the mother's job, and the location of her workplace. She commutes from Kingston to St. Mary, and leaves home at 7:00 a.m., to return at night. This distance does not permit the urgent response that some medical emergencies require. I find that the defendant is more abreast of the children's medical state and plays an integral role in monitoring and managing their medical issues.

[24] Mr. Steer has submitted that there can never be a majority in a committee of two. That joint custody can only work if the parties are civilised enough to communicate. Both have expressed their inability to communicate with the other, and blame the other party. Nonetheless, there is no evidence of major divergence between the parties, on the question of the moral, educational or religious upbringing of the children. Although the lack of communication is described as all encompassing, there is agreement, in areas concerned with the general welfare of the children. The issues complained of by the defendant, were in relation to the tardiness in communicating outcomes of joint decisions taken, such as admission in St. Peter and Paul Preparatory School. The

children are being brought up as Roman Catholics, the faith of their father. That would have come about by way of an agreement, between the parties, she being Protestant. The parties have managed to agree the school of attendance. They have agreed the taking to school and the collecting from school. The father's decision in respect of choice of medical specialist has not been challenged. The mother has applied that the father's access every other weekend be made a final order. There is agreement that the father be contacted when either of the children becomes ill. The father helps out, when the mother is running late for work by transporting the children. Neither party has stated any unhappiness with any of their fundamental decisions.

[25] Ms. Chambers in her second affidavit has indicated that she anticipates a transfer to Portmore, which will be geographically closer to the children, whilst she is at work. She has not, however, indicated her availability to respond urgently to a medical emergency given her status in the Parish Council. It is clear that the defendant enjoys an excellent relationship with his children, and at present is crucial to the monitoring of the children's health.

[26] The defendant's participation in a joint custody of his children would be recognition of the defendant's responsibility and his concern for the children. I am commended to this approach by a decision **Caffell v Caffell** [1984] FLR 169, of the Court of Appeal, in England. The mother applied for custody in circumstances where she had, left the marriage to go and live with another man. The court granted custody to the father and care and control to the mother. The judge found that the relations between the parties were acrimonious and caused difficulties over access. The mother appealed the order granting custody to the father. The court held, that, in many cases joint custody of a child should only be ordered if there was a reasonable prospect that the parents would co-operate. But such an order might be equally appropriate to recognise the responsibility and concern of the parent who did not have the day-to-day control of the child. The application for sole custody to the claimant is refused. (I would grant joint custody to the claimant and the defendant).

[27] The claimant had requested that the defendant be made to pay the sum of Fifty Thousand (\$50,000.00), plus one-half medical, dental, optical and school expenses reasonably incurred on behalf of the said children. However, in her affidavit filed 2<sup>nd</sup> October 2012, at paragraph 15:

*"In 2010 I had made a list of expenses which is less than what I currently pay and at that time it came to some Two Hundred and Fifty-One Thousand Dollars (\$251,000.00) per month. I am now seeking the sum of Seventy-Five Thousand Dollars (\$75,000.00) per month as I need the assistance."*

However, Counsel in his oral submission maintained that what was being sought was a sum of \$ 50,000.00 per month. The second affidavit of the claimant although it seeks an increase over the sum originally requested provides no further evidence of the defendant's means or his ability to satisfy the award.

[28] **The Children (Guardianship and Custody) Act**, at Section 7 (3), provides:

*"Where the Court under subsection (1) makes an order giving the custody of the child to the mother, then, whether or not the mother, is then residing with the father the Court may further order that the father shall pay to the mother towards the maintenance of the child such weekly or other periodical sum as the Court, having regard to the means of the father, may think reasonable."*

[29] The Fixed Date Claim Form, claims "determination by the court of questions under the **Children (Guardianship and Custody) Act and the Maintenance Act 2005**, concerning the parties' children. The **Maintenance Act** obliges both parents to provide for the maintenance of the child. Section 2, provides, *inter alia*:

*"Every man is hereby required to maintain his own children ..."*

Section 3, provides, *inter alia*:

*"Every widow and unmarried woman is hereby required to maintain her own children, and every"*

*woman having any children which any man under the provisions of the next preceding section is primarily bound to maintain is hereby required to maintain such children in the event of such man failing to perform his obligation ....”*

I am of the view, however, that the **Maintenance Act** provides a useful guide for dealing with the quantum of maintenance under the provisions of the **Children (Guardianship and Custody) Act**.

### **The Father's Means**

[30] The defendant is a Floor Contractor, trained in building construction at U Tech. The defendant suffered what he called a depression following the robbery of his motor vehicle. As a result of his depression, he was unemployed between 2005 and 2009, according to the evidence of the claimant. The claimant contends that prior to his illness; he earned more than she did. The claimant challenged his frankness as to what he earns, it was suggested that his affidavits revealed differing amounts as his earnings. In September 2010, his disclosed income was \$120,000.00. He earned \$140,000.00 in February 2012, since then his monthly income had been “cut in two.” At trial his testimony was that, he had averaged between \$60,000.00 to \$70,000.00 per month for the year; however, he testified that he then had no income. Of the Consent Order made on the 29<sup>th</sup> September 2012, for the payment of \$26,000.00, according to the defendant, he borrowed \$162,000.00 to clear the arrears for the period June to December 2011. His next payments were made in January and April. There were therefore arrears for the intervening months to the trial.

[31] He testifies that he spends significantly on the children's medical bills, clothing items, school fees, they are with him every other weekend, and he picks them up from school. He keeps clothing for the children at his home. He says that he is unable to pay the sum of \$50,000.00 per month for the upkeep of his children. He has catalogued his expenses at \$154,000 00 per month of which he says the children's upkeep inclusive of the Maintenance Order, is \$57,000.00 per month. In her lists of expenses incurred on behalf of the children, there is identified an amount of \$55,000.00 (diapers, food, helper, clothing, miscellaneous) as being directly referable to the maintenance of the children.

As I have pointed out there is no itemization of the reason for the increase that has led to the application for maintenance of \$70,000.00 per month. The expenditure incurred on behalf of the children, by the parties are not unequal. The expenditures claimed on behalf of children by both parents are unchallenged. The father is involved in transporting the children.

[32] The onus is on the defendant to make full and frank disclosure of his means. The court has to be satisfied that the Order for Maintenance it makes is not unreasonable having regard to the means of the father. The defendant admitted that he did not have a web address, and was not listed in the yellow pages of the telephone directory. The defendant says that he solicits projects through his relationships with architects, and he has made the rounds seeking jobs. The claimant submitted that the defendant has the potential to earn more than what he presently earns, and that the court should take that into consideration.

[33] The claimant relied on **Mc Ewan v Mc Ewan** [1972] 2 All ER 708, on an appeal from the justices' decision, that, he had not made a genuine effort to obtain and retain work, and that it would be wrong for them to ignore his earning potential. The Court of Appeal, held that when assessing whether or not the sum to be paid is, "reasonable in all the circumstances of the case," the justices were entitled to take into account, not only the husband actual earnings, but also his potential earning capacity. Accordingly, the justices being satisfied that the husband, although unemployed, had ample earning capacity, were justified in dismissing the application.

[34] In **Mc Ewan**, the justices had found that the husband was not speaking the truth and preferred the wife's evidence. There is no evidence adduced before me, to contradict the defendant's evidence that he has been making the rounds seeking employment, and has been relying on his relationships within the industry for employment. In **Mc Ewan**, the justices had drawn a "permissible inference" that there was no shortage of work, in the husband's area. Such an inference would be impermissible in the present circumstances of the Jamaican business environment. The justices had felt that the husband being a retired police officer, who was fit and in receipt of a pension, would be in a "substantially better position than most unemployed

men of his age.” I have no basis on which I could say that the defendant’s position is more favourable than, the hundreds, if not thousands of graduates from tertiary institutions who are unemployed in this country. I find that there is no evidence adduced that the defendant has the means at this time to pay maintenance in the sum of \$50,000.00. He has admitted that he has spent significant sums other than the maintenance order. He has admitted spending on entertainment and clothing for the children. I am mindful to vary the Interim Order to cause him to pay the sum of \$35,000.00 per month.

[35] I make the following Orders:

- a. That joint custody of the children JKM and PMM, born on the 20<sup>th</sup> day of July 2008 and 2<sup>nd</sup> September 2009 respectively, be granted to the applicant and the respondent with care and control of the said children, granted to the mother.
- b. That the father is granted continued access to the said children, every other weekend, Friday to Sunday and other times as can be agreed.
- c. That the defendant do pay by way of maintenance the sum of Thirty-Five Thousand Dollars (\$35,000.00) per month and in addition one-half of all medical, dental, optical and school expenses necessarily incurred on behalf of the said children, commencing on the 18<sup>th</sup> day of each succeeding month. The first payout is to commence in November 2013.