



[2025] JMSC Civ. 145

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
FAMILY DIVISION
CLAIM NO. SU2023FD04404**

IN THE MATTER OF THE LEGAL GUARDIANSHIP OF CHILD D.C.R.

IN CHAMBERS

Ms. Samantha Hewie of Counsel for the Claimant.

Ms. Karlene Afflick of Counsel for the Defendant.

**FAMILY LAW- CUSTODY CARE AND CONTROL- SECTION 3 CHILDREN
GUARDIANSHIP & CUSTODY ACT- WHETHER PATERNAL GRANDMOTHER
SHOULD BE GIVEN CUSTODY OF CHILD AFTER DEATH OF FATHER OF CHILD.**

Dates Heard – 13th – 15th day of October, 2025, 8th, 12th and 16th December, 2025

A. MARTIN- SWABY AG.

[1] **DCR**, the relevant child in this matter, is now nine (9) years of age. On the 17th June, 2023, his father MCR died as a result of injuries he received in a motor vehicle accident which occurred on or about November, 2022. Prior to the motor vehicle accident, **DCR** resided primarily with his father and his paternal great grandmother in Above Rocks, Saint Catherine. However, he would visit the Defendant, his mother, in Saint Elizabeth.

[2] After his father's death, a decision was taken exclusively by his paternal family members to relocate **DCR** to Kingston to live with the Claimant, his paternal grandmother and her husband. Six (6) months after the death of **DCR's**

father, the Claimant filed this claim before this court seeking orders that she be appointed as **DCR**'s legal guardian.

- [3]** The Defendant has filed a Defence and Counterclaim seeking orders for full care and custody of the relevant child and further that the Claimant be allowed access at particular periods throughout the year until the child attains the age of majority.
- [4]** The trial of this matter was conducted on diverse dates between the 13th October, 2025 to the 15th October, 2025. Written Submissions were filed in advance of the trial date which afforded an opportunity for the Court to consider the matter in a timely manner and for that the Court is grateful to counsel for their industry in this regard.
- [5]** Having considered the evidence in this case, I am firmly of the view that the Defendant mother should retain her statutory position as legal guardian of the relevant child. Therefore, she should be awarded the custody, care and control of the relevant child in this matter. It is in the child's best interest to be allowed to benefit from the guardianship of his surviving parent in circumstances where there is nothing to suggest that his mother is incapable of securing his welfare and facilitating his healthy development as a child.

Hurricane Melissa -

- [6]** The peculiar nature of this case is that almost two (2) weeks after the evidence was completed in this matter, hurricane Melissa delivered a severe blow to infrastructure within the Parish of Saint Elizabeth. Unfortunately, this is the Parish where the Defendant mother resides.
- [7]** I have carefully considered this as against the best interest of the relevant child who stands to be relocated to Saint Elizabeth as a direct consequence of a court

order granting legal guardianship to his mother together with physical custody, care and control.

[8] I am firmly of the view that CW should not be deprived of her statutory position due to circumstances beyond her control which is the hurricane which gravely impacted the parish in which she resides. If that were the case, then several parents who reside in such parish would now be in peril of losing their legal authority to raise their children due to an act of God over which they have had no control.

[9] That being said, I have also considered whether it would be in the best interest of a grade five (5) primary school student who is performing very well academically and is settled at a primary school in the Corporate area, to relocate to a parish ravaged by a recent Category five (5) Hurricane at this time. I consider that the National PEP exams are administered in grade five (5).

[10] Based on the above peculiarities, on the 12th day of December, 2025, I thought it best to solicit the views of the Defendant mother as regards the potential impact of relocating the relevant child at this time. From those discussions in court, the Defendant mother has consented to the relevant child remaining with the Claimant paternal grandmother until he completes his primary education after which the child is to be relocated to her home Parish of Saint Elizabeth.

[11] I wish to briefly outline the evidence in this case and the principles applied in arriving at my decision.

The Claimant's Case.

[12] The Claimant is fifty-three (53) years of age. She buys and sells clothing items. She primarily plies her trade in Old Harbour Bay and Claremont on Thursdays through to Sundays where she earns between Forty Thousand Dollars (\$40,000.00) to Seventy Thousand Dollars (\$70,000.00) per day.

- [13]** The Claimant's case is that the relevant child was primarily in the care and control of his father prior to the latter's death. In her Affidavit, she stated that the father had primary care and control since the relevant child was three (3) years old. However, in cross examination she stated that the relevant child resided with the father since he was one (1) year old and then in re-examination, she stated that the father took him when he was six (6) years old.
- [14]** She stated that the child went to live with his father after the Defendant called her one (1) day indicating that she could no longer care for the child and she wanted the father to come for the child. The Claimant's evidence is that she told the Defendant that they would take care of the child, and she could see the child whenever she desired so to do.
- [15]** In terms of where the relevant child resided, her evidence is that when the father had primary custody and control, both parties (father and relevant child) resided in High Gate Above Rocks, in the Parish of Saint Catherine along with the paternal great grandmother until father MCR met in a motor vehicle accident on or about November, 2022. After the accident, the latter was paralysed and was unable to speak. She cared for him at her home in Cassia Park whilst the relevant child remained in Above Rocks with his paternal great grandmother. After the father's death, the relevant child was relocated to the Claimant's home as the great grandmother could no longer care for him. Therefore, the relevant child resided with the Claimant for approximately six (6) months prior to the filing of the Fixed Date Claim Form.
- [16]** The Claimant asserts that the Defendant is unable to take care of the relevant child. Her reasons are that the Defendant works at a wholesale and resides in a one-bedroom dwelling with her spouse and her two (2) other children. Further, that the relevant child reported several things to her when he was three (3) years of

age which demonstrate that the Defendant is unfit to be granted custody of the relevant child. These reports consisted of the following;

1. *He is made to sleep on the floor with his sister whilst his mother, the spouse and baby share a bed when he is with mother.*
2. *He is severely beaten by mother's new spouse and or mother.*
3. *He is mistreated, as he often returns with cuts and bruises which are usually unmonitored or attended to.*
4. *He is not given the food and or snacks we send for him to eat.*
5. *He is extremely afraid of his mother's spouse and usually cries at the sound of his name and refuses to call or speak with his mother for fear of his mother's spouse being around; and*
6. *He is uncomfortable at his mother's house and does not share a true bond with his mother.*

[17] In cross examination, the Claimant was asked what if any evidence she had which demonstrated that the relevant child was beaten by his stepfather. This is the question and the answer given;

Q. What evidence is there that he was beaten?

A. He came home with a chop on his feet. I don't know if it's beaten but you can look. He also said that his step father pinch him up.

[18] Further in cross examination, it was suggested that there was never any evidence of any ill-treatment of the relevant child by the Defendant's spouse. The Claimant agreed that the relevant child had no sign of abuse on him. The Claimant went further to state that as regards the chop on his feet, the relevant child indicated that his step-father had taken him to the bush on a bicycle and the bicycle had cut his foot on the side. The Claimant agreed with this suggestion.

[19] The Claimant states that the relevant child has his own bedroom at her premises as her son and daughter who previously occupied the other bedroom have since

moved out of the premises. She also shares that her husband and her adult children assist in caring for the relevant child whenever she is away from home. That **DCR** travels to school on a taxi and her husband is responsible for taking him home from school.

[20] She denied that she has kept the relevant child away from the Defendant. She stated that one (1) week after MCR's funeral, the Defendant called her and stated that she was coming for her child and hung up the telephone. Since that call and up to the time of filing the claim, she had not heard from the Defendant and all attempts by her and family members to reach the Defendant proved futile.

[21] The paternal step-grandfather of the relevant child also gave evidence in support of the Claimant's case. In summary, his evidence is that he, along with MCR and the latter's brother went to the Defendant's house in Braes River, Saint Elizabeth on or about the year 2020 for the child. Since then, the child had resided with MCR up to the time of the motor vehicle accident and then with his paternal grandmother. He accepted that he has never seen any bruises or injuries on **DCR**'s body to support the assertion that **DCR** was being abused whilst in the custody of his mother. He states that the Claimant and the Defendant had a very good relationship up to the time of MCR's death.

[22] He states that **DCR** was not kept away from the Defendant and that she had never expressed that she wanted **DCR** to be returned to her whilst MCR was ill.

Defendant's Case -

[23] The Defendant's case is that **DCR** resided with her in Braes River, Saint Elizabeth until his father had taken him during the summer of the year 2020. This was during the Covid pandemic. She states that the agreement between the parties was that he would spend the summer holidays with his father. However, his father refused to return the child as agreed. At the material time in the year 2020, MCR had

expressed much disquiet with the fact that the Defendant was pregnant and engaged in another relationship. She states that at that time, and due to the Covid pandemic, **DCR** was attending online classes at Braes River Basic School. It was her belief that **DCR** was still attending the online classes whilst he was residing with his father.

[24] She states that during the period July 2020 to October 2022, she was unable to visit **DCR** in Saint Catherine. However, she regularly communicated with him via telephone. At the beginning of the school year in 2022, she learnt that **DCR** was registered at the Saint Mary All-Age School in the parish of Saint Mary.

[25] Shortly thereafter, she was informed that MCR met in an accident and that he was seriously injured. She stated that her understanding was that after the motor vehicle accident, **DCR** remained in Above Rocks with his paternal great grandmother and visited the Claimant on weekends. Her case is that she was not consulted or made aware that **DCR** was relocated to the Claimant's home after MCR's death. Further, that she learnt of **DCR** being registered at Half Way Tree Primary School in September 2023. She was not consulted about this decision either. She expressed that the relationship between herself and the Claimant deteriorated after MCR's passing.

[26] She also indicates that she did not know where the Claimant lived in Kingston as she had never visited the premises and was never advised of the address. Her case is that she is currently employed as a cashier and resides in a five (5) bedroom premises. She asserts that she is capable of taking care of her child.

[27] Counsel suggested that she was neither consistent or reliable in terms of her care for **DCR**. Counsel suggested that she knew that **DCR** was transferred to the Half Way Tree Primary School. It was suggested that between the year 2020 – 2023,

she did nothing to have her child in her custody. She denied this as she stated that she spoke to the police about this.

- [28] She indicated that she did not recall having the relevant child between July through to August in the year 2022. Counsel showed her paragraph 6(c) of her Defence and Counterclaim. That paragraph reads as follows;

“Based on the allegation raised, I declare as follows:

c. that after MCR took DCR with him to Saint Mary in July 2020, the next time I had an opportunity to spend time with DCR was between July to August of 2022. I have not seen or had physical contact with the child from August 2022 to February, 2024”

- [29] When confronted with this paragraph, the Defendant indicated that she did not remember having **DCR** that summer.

- [30] The Defendant stated that the Claimant has barred her from communicating with the relevant child. She was then directed to paragraph 6(e) of her defence and counterclaim which reads as follows:

“Based on the allegation raised, I declare as follows;

e. that it is less than truthful to say the child is afraid of me. DCR and I share a loving relationship and the Claimant has never objected to the child communicating with me by telephone in the presence of an adult.”

- [31] When confronted with the above statement, the Defendant denied authorship.

- [32] She accepted that she has not contributed towards the relevant child’s school fees or medical expenses since the death of MCR. She also agreed that she had not seen him after the death of his father until this matter was brought before the court. However, she explained that after MCR’s death, there was a breakdown in the relationship between the parties. As such, she stayed away.

- [33] The Defendant called two witnesses. However, nothing turned on their testimony save and except they both believe that the Defendant is a fit and proper person to be granted custody of the relevant child.

The Social Inquiry Report & Interview with Relevant child –

- [34] The Child Protection & Family Services Agency prepared a detailed Social Enquiry Report in this matter. This report is dated the 09th June, 2024. Both parties indicated on record that this document could be received as an agreed document pursuant to section 31CA Evidence Amendment Act 2015. It must be noted that neither party elected to ask questions of the maker of this document.
- [35] The social worker indicated at page sixteen (16) of this Report that based on the investigations conducted, both parties are capable of meeting the needs of **DCR**.
- [36] The social worker indicated that the relevant child expressed that he wished to remain with his grandmother and visit his mother and siblings on weekends and holidays.
- [37] In light of the fact that the report was prepared in excess of one (1) year prior to the trial of this matter, I also conducted a brief interview with the relevant child in the presence of the Court Clerk. After this interview, I conveyed to the parties the views expressed by **DCR**.
- [38] During that interview, I observed that **DCR** is a well-nourished and cared for little gentleman. He expressed that he loves his grandmother and his mother. However, he stated that at this time, he wants to live with his mother. He states that at his mother's house, he plays football and cricket with his cousin and his best friend **JT** who is in the 7th grade and is twelve (12) years old. At his grandmother's house, he likes to play with his one-year-old baby niece.

[39] I will state that the determination in this case was not based on the expressed wishes of the relevant child either to the social worker or to the Court. However, I consider them in so far as it suggests that the child is not averse to residing with his mother in Saint Elizabeth.

Law & Analysis –

[40] In my consideration of this matter, I bear in mind that The Children (Guardianship and Custody) Act (the Act) creates a statutory framework which governs matters concerning the guardianship and custody of children. The first substantive provision within the legislation addresses guardianship in circumstances where a parent dies. This specific issue is addressed immediately below the interpretation provision within the text of the statute. In fact, in analysing the approach of the framers of the statute, sections 3 – 5 approach the death of a parent from the perspective of who is seized of the right/privilege to function as guardian of a child on the death of either parent, the power of each parent to appoint testamentary guardians and finally the powers of guardians so appointed.

[41] These provisions are directly applicable to the case at bar. For that reason, I wish to specifically outline section 3. This provision is titled “Rights of surviving parent as to custody”. Having so couched the title of the provision, it sets out the following;

“(1) On the death of the father of a child, the mother, if surviving, shall, subject to the provisions of this Act, be the guardian of the child, either alone or jointly with any guardian appointed by the father. When no guardian has been appointed by the father or if the guardian or guardians appointed by the father is or are dead or refuses to act, the Court may if it thinks fit appoint a guardian to act jointly with the mother.

(2) On the death of the mother of a child, the father, if surviving, shall, subject to the provisions of this Act, be guardian of the child, either alone or jointly with any guardian appointed by the mother. When no guardian

has been appointed by the mother or if the guardian or guardians appointed by the mother is or are dead or refuses or refuse to act, the Court may if it thinks fit appoint a guardian to act jointly with the father.”

- [42] The import of the above provision is that on the death of a parent, the surviving parent automatically becomes the guardian of the child of their union. However, the statute recognizes the testamentary appointment of a guardian by the parent prior to death. Additionally, section 3 includes a statutory power given to the Court to appoint a guardian to act jointly with the surviving parent. What is also evident is that the right of the surviving parent to function as guardian is subject to the provisions of the legislation as a whole.
- [43] For this reason, I bear in mind section 18 of the statute in so far as it states that the overarching principle which guides the court in matters treating with the custody or upbringing of a child is the welfare of the child. This remains the first and paramount consideration in matters of this nature.
- [44] In analysing sections 3 – 5 of the statute, I formed the view that by the operation of the statute, the Defendant is the guardian of **DCR** and has been since the death of MCR.
- [45] That being said, I bear in mind that section 8 of the Act stipulates that the Supreme Court is given the jurisdiction to remove any guardian appointed by virtue of the legislation. Therefore, notwithstanding the fact that the Defendant is designated as guardian of **DCR**, this Court has the jurisdiction to remove her and to substitute another guardian in her place. The provision reads as follows;

“8.- (1) The Court may, in its discretion, on being satisfied that it is for the welfare of the child, remove from his office any testamentary guardian, or any guardian appointed or acting by virtue of this Act and may also,

if the Court shall deem it to be for the welfare of the child, appoint another guardian in place of the guardian so removed.

(2) In this section the expression "Court" means the Supreme Court.

[46] In addition to section 8, I have considered section 20 of the Act which preserves the inherent jurisdiction of the Court to grant orders for custody and guardianship whether the parents of the minor child are dead or alive. Section 20 reads as follows;

"Nothing in this Act contained shall restrict or affect the jurisdiction of the Supreme Court to appoint or remove guardians."

[47] The issue in the case at bar is whether the Defendant should be removed as the designated guardian of the relevant child and whether the Claimant should be granted custody, care and control of the relevant child.

[48] The peculiar facts of the case at bar is that the Defendant's case is that she had never authorized the Claimant to function as a guardian or custodian of the relevant child. In fact, her evidence is that prior to the father's death, the understanding between the parents was that the child would reside with her "the Defendant" and spend holidays with the father. However, the father kept the child beyond the period of agreement and enrolled the child in school in Saint Mary. Her case is that when the child visited her, she did not disturb the status quo as the child was already attending another school. However, after MCR died, there was a breakdown in the relationship with the Claimant and she did not know where the child was living and with whom.

[49] The Claimant's version of events differs in so far as she states that it was the Defendant who in essence abandoned the child and therefore relinquished her duty as a guardian of the child prior to MCR's death and further that she is not fit and proper to care for the relevant child.

[50] In the case at bar, I find on a balance of probabilities that on or about the summer 2020, the Defendant did call the Claimant and asked that MCR come for the child as she could not support the child at that time. I accept that MCR and his step father went for the child and the child remained with MCR and his grandmother in Above Rocks, Saint Catherine until the accident. During that period summer 2020 and November 2022, I also find that the Defendant did not do anything to interfere with the living arrangement as the child would be returned to the father at the conclusion of each visit.

[51] However, there is no evidence that she abandoned her child. In fact, the Claimant stated that after MCR died, the Defendant called her and told her that she wanted her child. It was this conversation that saw the relationship between the parties taking a turn for the worst. I accept that the relationship deteriorated to the point that the Defendant stopped communicating with the Claimant and that this also caused a breakdown with the Defendant's communication with the relevant child who was six (6) years old at the time. I accept that it would be very difficult for a mother to sustain a meaningful relationship with her six-year-old child whilst the latter is in the care of a person with whom the mother shares an acrimonious relationship. Therefore, I do not find that she abandoned the child but rather that her relationship with the relevant child was a direct casualty of the strained relationship between mother and grandmother.

[52] Given the peculiar circumstances of this matter, I have considered the facts and the decision in **Re Thain** [1926] Ch. 676 to be quite useful. In the latter, the question which confronted the Court was the custody of a female child who was seven (7) years of age. The father's wife died soon after the child's birth and the father accepted an offer of his wife's sister and husband to take charge of the infant and raise her with their children. This arrangement commenced in the year 1919. However, in the year 1925, the father was in an entirely different position. Having remarried and improved his position in life and obtained a suitable home, he asked for the return of his daughter. This request was refused. Eve J at first instance

awarded custody to the father. On appeal, the Court of Appeal affirmed Eve J's decision holding that the determination regarding custody care and control consisted of the exercise of a Judge's discretion and that the learned Judge at first instance applied the correct principles in arriving at his decision in the matter.

- [53] The House of Lords in **J and Another v C** [1970] AC 668 examined the position taken by Eve J in **Re Thain** and affirmed his reasoning. Lord Macdermott in the former extracted an important aspect of Eve J's decision at p.684 where he stated as follows;

"As I said at the commencement of my judgment, I am satisfied that the child will be as happy and well cared for in one home as the other, and in as much as the rule laid down for my guidance in the exercise of this responsible jurisdiction does not state that the welfare of the infant is to be the sole consideration but the paramount consideration, it necessarily contemplates the existence of other conditions, and amongst these the wishes of an unimpeachable parent undoubtedly stands first. It is my duty therefore to order the delivery up of this child to her father..."

- [54] Lord Macdermott reasoned that the above statement did not suggest that Eve J placed the wishes of the father above the welfare of the child. Lord MacDermott stated as follows;

"He was not putting the wishes of the father above the welfare of the child. Having found that the child would be as happy and well cared for in one home as the other, he must have been satisfied that her welfare would be best provided for by respecting the wishes of the unimpeachable father and giving her custody to him. This was the view taken by the Court of Appeal and the view which has generally been accepted."

- [55] In applying the principles to the case at bar, I approach this matter bearing in mind that the welfare of **DCR** is the paramount consideration. The relevant factors to be

weighed in this case consist of the fact that **DCR** has experienced several challenges in his relatively short life thus far. After the break down in the relationship between his parents, he resided with his mother in Saint Elizabeth. During the Covid pandemic, he resided with his father who became injured and subsequently died. The evidence also suggests that whilst his father was injured, **DCR** continued to reside with his paternal great grandmother who has also subsequently died. Consequently, I find that he has suffered significant losses during his tender years and this would amount to much instability in his life. Therefore, he has moved from Braes River Infant and Primary to Above Rocks Primary and then to his current school all within the space of approximately five (5) years.

[56] Having lost his father at a tender age, I must also consider whether stripping his mother of her right to custody care and control of **DCR** would also deprive him of his right to be placed in the custody and under the control of a surviving parent who wishes to exercise care and control of him. To order otherwise would result in **DCR** having lost the opportunity of being raised by either parent; one through death and the other through an order of the Court. For this reason, I must approach this matter cautiously. I form the view that I should only make an order adverse to the mother of the child where it would not be in his best interest to be under her guardianship and care.

[57] Nothing has been put before me to suggest that the Defendant is not a fit and proper parent. In examining the evidence, I accept that the child resided with his father during the period 2020 to 2022 and that the Defendant allowed him to remain under his father's care. I also accept that she had not played an active role in the relevant child's life after the death of his father. However, I accept her explanation regarding the acrimonious relationship shared between herself and the Claimant resulted in her staying away from the Claimant and by extension and most unfortunately also the relevant child. The evidence is that after MCR's death, the relationship between the parties deteriorated. That evidence is unchallenged

in this case. The question is whether that makes her an unfit guardian for the relevant child.

[58] I do not believe that the Defendant is unfit to function as guardian of the relevant child. I have borne in mind the inconsistencies and discrepancies which were highlighted in cross examination regarding statements made in her Defence and Counterclaim which were at variance with her testimony in court. However, these are not material as they do not go to the central issue in this case.

[59] I rely heavily on the Social Inquiry Report, prepared by the Child Protection and Family Services Agency, an independent agency whose mandate is the welfare of children. They have visited the home of the Defendant and have found it be suitable. They have also visited the schools attended by the Defendant's other children and conducted investigations. I have observed both the Defendant and the Claimant. They both love and care for **DCR** and so does his paternal grandfather. The relevant child is quite fortunate to have had the care of both grandparents. That being said, the three (3) parties are capable and fit and proper.

[60] However, the evidence is unchallenged that after the death of MCR, there was no agreement for the child to reside with the Claimant. In fact, there was a breakdown in the relationship between the Claimant and Defendant shortly after MCR's death. I must say that even if the Defendant had consented to **DCR** being raised by the Claimant after the death of MCR, if I follow **Re Thain**, the court must take into consideration any changes in the position of the parties at the time of trial. Therefore, even if I were to go as far back as the summer of the year 2020 and find that the Defendant did call the Claimant and explained that she could not take care of the child and that subsequent to this conversation MCR and his father collected the child, I must bear in mind the Defendant's current position and circumstances as outlined in the evidence in this case. She is now capable of caring for **DCR**. In the year 2020, particularly in June/July 2020, the Court takes

note that the country was experiencing the hardships of the Sars Covid pandemic. The evidence in this case is that the Defendant is now employed and has a steady income and also has the support of her family in caring for **DCR** and her other children.

Orders in relation to the Claim and Counterclaim;

1. The order sought in the Fixed Date Claim Form filed on the 19th day of December, 2023 is refused.
2. The Defendant **CW** is the legal guardian of the relevant child **DCR** until he attains the age of eighteen (18) years.
3. By consent and with the agreement of the parties, the relevant child is to reside with the Claimant **KR** until June 2027 when he completes his primary education at the primary school where is presently enrolled. During this period, liberal access is to be granted to the Defendant **CW**.
4. Liberty to Apply.
5. Each party is to bear their own costs.
6. Attorney-at-Law on record for the Claimant **KR** is to prepare, file and serve this order.

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A. Martin-Swaby
Puisne Judge