IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E.230/97

BETWEEN	DENNIS FORSYTHE	PLAINTIFF
A N D	IDEALIN JONES	RESPONDENT

Dennis Forsythe instructed by Forsythe & Forsythe for the Applicant.

Judith Cooper instructed by Chambers Bunny & Steer for the Respondent.

Heard: 12th October, 1998,
8th January, 1999 and
6th April, 1999

Pitter J,

The Applicant is the father of a boy child born out of wedlock to the Respondent on the 24th March 1995. He is an attorney at law and a professional sociologist. At the time of the filing of his application, he was a divorcee but has since been married.

The Respondent is Sales Representative and currently works with a company. She occupies a two-bedroom house with its usual amentities along with her fiance', a Chemical Engineer and her two young daughters.

This suit found its genesis in the Kingston Family Court where on the application of the Applicant for custody of the said child, that Court on the 26th November, 1996 ordered that custody, care and control be granted to the Respondent/mother whilst the Applicant was granted access. The access order was varied on the 25th February, 1997 and again on the 9th June, 1997 with custody remaining in the Respondent.

The Litany of Court actions was followed up by Originating Summons in the Supreme Court dated 2nd July 1997 with the Applicant seeking amongst other reliefs custody of the said child. In his affidavit the Applicant states that it was out of frustration with the Family Court that he had made this application. He treated with scorn, disdain and derision the orders, and the judges who made them, both in the Family Court and in the Supreme Court. The Family Court

Judges were treated as being inexperienced, indecisive - the Court being devoid of trained personnel and governed by entrenched biases etc.

On the 7th August 1997 on an exparte hearing, in the Supreme Court an Interim Injunction was made in favour of the Applicant, granting to him custody of the child. This Order was however, set aside on a hearing on the 27th August 1997, on the grounds that the Applicant had not disclosed to the Court that there was a subsisting order in the Family Court.

Not to be daunted, the Applicant by way of Injunction dated 23rd October, 1997 applied for Interim Custody. This application was dismissed on the 3rd November, 1997. On the Originating Summons coming up for hearing on the 26th January, 1998, the matter was adjourned sine die for the parties to seek counselling over a six months period. The Originating Summons was subsequently amended on the 12th August, 1998 applying for "Custody, Care and Control of the child Brian Forsythe born on the 24th March, 1995."

It is this summons that is now before me.

The Applicant, ill-advised as it was, conducted his own application.

The main thrust of the Applicant's evidence in support of his applciation is that the Respondent has failed miserably in the care and control of the child and as a consequence the child suffered throughout and continues to suffer. That the child now suffers from acute or morbid depression, which is most evident when he is to return to the Respondent after his fortnightly visit with the Applicant. In his affidavit he deponed that the child's health declined rapidly soon after birth owing to environmental conditions, giving a history of particular illnesses. Medical certificates were exhibited to support his contention that it was neglect and lack of care that brought about these illnesses.

The earliest medical report is that of Dr. Eve Palamino-Lue who saw the child on the 16th August, 1996 with no abnormality. However, on the return from a visit to the Applicant, he was again

seen by Dr. Palamino Lue who noted "a slightly swollen penis with the glans penis retracted and sore". On the 25th August, 1996, the lesions had healed completely.

On the 18th January, 1997 the Applicant took him to Dr. B. Maragh who found him to be an "ill-looking child, very lethargic, and withdrawn, with multiple healing abrasions to the left side of his face. He also had a mild respiratory tract infection with purulent nasal discharge and an hyperaemic throat, his abdomen quite protuberant. He was treated and sent home.

On the 17th March, 1997, Dr. Maragh again saw him with a history of cough/cold/fever. He was diagnosed as having an upper respiratory track infection and was treated and sent home, with the observation that there should be no permanent sequelae from his illness and it was expected that the would recover within one week. He was seen by Dr. Ray Johnson on the 11th March, 1997 who certified that he had been seeing Brian since June 1996 and has treated him for upper respiratory tract infection and that the had no history of bronchial asthma and has never been treated by him for this.

On the 18th March, 1997, Dr. C. Scott, Consultant Paediatrician at the Bustamante Hospital for children, diagnosed him with bronchial asthma, he was nebulised and treated with good effect.

On the 13th August, 1998, a month after the filing of this suit, Dr, Palamino-Lue did a full medical evaluation of Brian, the report is reproduced and reads as follows:

> "August 13, 1997
> TO WHOM IT MAY CONCERN
> RE: BRIAN FORSYTHE
>
> This child has been my patient since 6/4/95 when he attended at 10 days of age for neo-natal evaluation of mild jaundice. He has attended regularly since then for well baby visits and incidental sick visits. The child is fully immunised for age and his psycho-motor development is natural for his age.
> He has a history of recurrent ear infections, allergic rhinitis and enlarged adenoids in the first year of his life. This has resolved

> satisfactory as the child grew and is no longer a problem.
>
> At each visit the child is given a full medical evaluation of his growth, mutritional status, emotional health and physical health. At no time have I ever had reason to believe that this child has been improperly cared for. His dietary history is satisfactory. His growth and development is normal.
> I have never found any evidence of physical or emotional abuse at any visit.
> The child appears to be healty and very attached to his mother. There is no clinical evidence of malnutrition or other dietary deficiency."

Finally, Brian was examined by Dr. Paul Robinson on the 3rd October, 1998 who gave him a clear bill of health with an assessment of "good state of mental and physical health."

All these medical reports indicate that Brian began receiving medical care from an early age and the illnesses from which he suffered were not associated with physical abuse or lack of parental care, but rather in the natural process of growth. He has made steady progression from his first medical treatment up to the 13th August, 1997 when he was given a clear bill of health. A subsequent evaluation in October 1998 confirms him to be a healthy child, both physically and emotionally.

In the conduct of the case for the Applicant, the Applicant made reference to the affidavit of Laren Peart. This was not countenanced as the affidavit was incomplete - it was neither signed nor sworn to. Reference was also made to the affidavit evidence of Dorrett Forsythe the present wife of the applicant. She is a secretary and owns her own house and land and motor car. She depones that she is the mother of two children ages 24 and 17 respectively and speaks to the illnesses of Brian to which the Applicant complains. Her affidavit dated 28th September, 1988 refers to the continuing illness of the child suggesting that he needs serious medical care and attention. She describes the respondent as unloving towards Brian with the result that he is very unhappy away from the Applicant, he being most attached to

him. She also observes that Brian is unsually detached from the Respondent and showed no sadness at leaving his mother the Respondent as there did not seem to be a story bond between them.

The Applicant referred to the affidavit of his mother Melvina Forsythe dated 1st October, 1998 which speaks adversely to the health of Brian. She admits that asthma runs through the family and that her son the Applicant is able, capable and willing to be a good father to the child. I find her affidavit to contain a great deal of hear-say and over-all, biased in favour of the Applicant. The same can be said of the affidavit evidence of Dorrett Forsythe.

In so far as the evidence relates to the health of the child, I find that the medical evidence does not support the Applicant contention that the Respondent failed miserably in the custody, care and control of the child and as a consequence the child suffered throughout and continues to suffer. On the contrary, I find the medical evidence supportive of the Respondent that the child is receiving proper care and that the illnesses suffered by the child was the natural process of growth. I also find that Brian does not suffer from any morbid depression - but is healthy both physically and psychologically.

The medical and physical grounds upon which the Applicant relies, fails.

Another ground upon which the Applicant relies is that the Respondent in relative terms is emotionally and mentally unable to discharge the role of guiding the child to a healthy maturity as a boy and that it is his view that the Respondent is in need of psychiatric help. Incidentally, the Respondent is also of the view that the Applicant needs psychiatric help. Both assertions are not supported by any evidence - This ground also fails.

The Applicant also contends that the Respondent is unemployed and without a career, and in no position to take care of the child. The uncontraverted evidence of the Respondent is that she is a Sales Representative, employed to Clear Alternative Chemicals.-

This ground also fails.

The Applicant submits that the Respondent is not a fit and proper person for the upbringing of the child Brian, although he is not saying she is not a fit mother. I find this rather strange as she is also the mother of Brian.

The Applicant further urges the Court to grant him custod of the child Brian on the basis that he has

(i) professions which by their very nature ensure certain standards.

(ii) the educational background and experience and a passion for education providing a suitable role-model for the child.

(iii) owns a modern and spacious house with suitable outdoor and green areas for the child to play.

(iv) an extended family and loving and caring relatives who are ready to assist by providing a healthy field of interaction for the childs development as opposed to his present confinement and isolation living with the Respondent.

The Respondent opposes the application and depones that the acrimonious relationship existing between the Applicant and herself began from the moment she told him of her pregnancy for him whereupon he became furious and declared that he had high blood pressure and too old to manage a child. She declares that she feels no hate for the Applicant and that she is completely indifferent towards him.

She further depones that the Applicant is an unreprentant drug addict and regardless of his education or surroundings he is not a fit or proper person to have care and control of a young child. That he is unstable and abusive. She denies that the child lacked proper parental care and referred to the medical evidence adduced. Her evidence is that the child has lived with her all his life and is happy, healthy, and well adjusted. She too contends that when the child is in the company of the Applicant he is depressed and and morbid and afraid, on the other hand he is happy being with her.

That he shares a friendly relationship with the Respondents' finance' herself and her two daughters. That her fiance' is a Chemical Engine who she intends to marry soon and who has accepted Brian as part of her family. That she lives in a 2 bedroom house with the usual amenities.

The Applicant was cross-examined and admitted that he suffers from high blood-pressure which he says is abating, that he recently underwent surgery for quadruple heart by-pass from which he is recovering. He admits that he has been convicted for dangerous drugs, ganja-related, that he smokes ganja and continues to do so even now albeit he is aware that smoking ganja is illegal. He says he smokes ganja for health and spiritual reasons.

It is the further contention of the Applicant that Brian is educationally retarded and is missing the opportunity to go to a good school and be exposed to other children of good background. It is the Respondent's evidence that Brian now attends the Kinder Campus School in Spanish Town where he is exposed to music, swimming, computer and other academic pursuits and that arrangements are in place to transfer him to the St. Jago or Hydell Preparatory School in September 1999. The Applicant admits that his present school, arrangements are satisfactory.

This applciation falls under The Children (Guardianship and Custody) Act. S.7.

> 7 (1) The Court may, upon the application of the father or mother of a child, make such order as it may think fit regarding the custody of such child and the right of access thereto of either parent, having regard to the welfare of the child, and to the conduct of the parents, and to the wishes as well of the mother as to the father, and may alter, vary or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this Act; and in every case may make such order respectively costs as it may think just.
>
> ...(5) Any order so made may, on application either of the father or mother of the child, be varied or discharged by a subsequent order.

Section 18 of the Act sets out the principles upon which the custody of children are to be decided.

> S.18 - "Where in any proceedings before any Court the custody or upbringing of a child or the administration of any property belonging to or held on trust for a child, or the application of income thereof, is in question, the Court in deciding that question, shall regard the welfare of the child as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father"

The scope and meaning of the words ".... shall regard the welfare of the infant as the first and paramount consideration" In S.1 of the UK Act which is similar to S.18 of the Jamaica Act, except that the word "child" appears instead of "infant", was considered in the care of JVC (8) by Lord McDermott where he said at pages 820 & 821.

> "Reading these words in their ordinary significance, and relating them to the various classes of proceedings which the section has already mentioned, it seems to me that they must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I cannot think they connote a process whereby, when all the relevant facts, relationship, claims and wishes of parents, risks choices and other circumstances are taken into account and weighed, the course to be followed would be that which is most in the interest of the child's welfare as that term has now to be understood. That the first consideration because it is of first importance and the paramount consideration because it rules on or determines the course to be followed."

Having considered the claim of the Applicant in respect of the child's health and education and fitness of the Respondent, I now turn to the question of accommodation, the social and the financial standing of the parties. The Applicant's occupation i.e. Attorney at law and sociologist puts him ahead of

the Respondent's. He occupies a modern spacious house with suitabl outdoor and green area for the child to play as compared with the Respondent whose house is a modest one of two bedrooms. I accept that the Applicant's home may be a more suitable home for the child and that he has the financial resources to take proper care of the child. I also accept that both parties love Brian and wish to have his custody, and find further that from birth, the Respondent has seen to his proper schooling and upbringing, though she has not got the financial resources as those of the Applicant.

In the case of Re McGarth (infants) 10, Lindly J had to decide whether it was a case of balancing the wealth of the father as against the relative poverty of the mother. He had this to say and which I adopt:-

> "The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of the child is not to be measured by money only. Nor by physical comforts 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. The Court has to consider, therefore, the whole of the circumstances of the case, the position of the parent, the position of the child, the age of the child, the religion of the child so far as it can be said to have any religion, and the happiness of the child. Again it cannot be merely that because the parent is poor and the person who seeks to have the possession of the child as against the parent is rich , that without regard to any other consideration, to the natural rights and feelings of the parent, or the feelings and views that have been introduced into the heart and mind of the child, the child ought to be taken away from its parent merely because its pecuniary position will thereby be bettered. No wise man would entertain such suggestions as these.

In the case of Stanley Clarke v Madge Carey (1971) 18WIR70 Smith J.A. on this same subject reinforced the above principles and observed the following which I adopt as my own:-

> "It would be very unfortunate indeed if the idea was put out in Jamaica that a well-to-do father can take away and deprive the mother of an illegitimate child of the custody of her child merely

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> "It would be very unfortunate indeed if the idea was put out in Jamaica that a well-to-do father can take away and deprive the mother of an illegitimate child of the custody of her child merely

> because he is financially better off than she is and able better to provide for the child's welfare. A child's physical comfort is, however, an important consideration when deciding what is in the child's best interest. A child can be made comfortable in a poor home though he might be more comfortable in a rich one. And if the comfortable poor home is his mother's (in the case of illegitimate child) it would he difficult if not impossible, to justify an order removing him to a rich home. But if he is in a comfortable rich home from which it is sought to remove him, care has to be taken to see that his general welfare is not prejudiced by such removal".

The evidence in the case as presented by the Respondent is that Brian has been living with her from birth and has been a happy child. He is settled well in a proper school and his school report attest to this. I find that although the Applicant is financially better off than the Respondent, and owns a large home, Brian is comfortable living with his mother and has the love and care of the Respondent as well as that of her finance'. It would be difficult, if not impossible to justify an order moving him from his current home where he has the company of his two sisters to the home of the Applicant, rich through he may be.

Of paramount importance is the fact too that the Applicant is a drug addict. He admits to the continuous use of ganja for health and spiritual reasons. What moral authority would he have to tell Brian that it is wrong to use ganja when he himself is a constant user of it? It is very likely that if the child should live with him, he too might succumb to its use which would not be in his best interest or welfare.

Having given close scrutiny to the evidence in this case and applying the principles enunciated in the above cases and bearing in mind the dominant matter for the consideration of the Court is the welfare of the child, I come to the conclusion that it is in the child's best interest to remain with the Respondent. The status quo aught not to be altered. The Applicant has not on the evidence proven that the removal of the child into his care and custody would be in the best interest and welfare of the child. I find no merit in the

Application. The summons is dismissed with costs to the Respondent to be agreed or taxed.

I have also considered the cases of Lord v Lord (1981) S.C. Edwards v Edwards RMCA 1/90; 3 (BD) & S (DJ) Infants (1977) 1 AER and Smith v Orrijco (1989) CA.

Having pronounced on the matter before me, this applciation would have been dismissed from the outset, had the point been taken in limine, that there was a subsisting Custody Order made in the Family Court on the 26th November 1996 in favour of the Respondent. There is no evidence that this Order was appealed from and I regard the subsequent filing of the Originating Summons in the Supreme Court to be an abuse of the process of the Court. This abuse is further compounded by the several applications for Interim Orders and the filing of a multiplicity of affidavits by the Applicant.

In any event either way, the application is dismissed with Costs to the Respondent.

The application by the Respondent to vary the Maintenance Order by way of affidavit is dismissed, for reason that the application should be made by Summons.

Leave to appeal is refused.