

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. 2007 M 00756

IN CHAMBERS

BETWEEN SEYMOUR GEORGE RICHARDS PETITIONER

AND SANDRA MAE RICHARDS RESPONDENT

Miss Deborah Dowding instructed by Chambers Bunny and Steer for
Petitioner/ Applicant

Respondent not appearing or represented

**Children – Custody - Without Notice Application for custody, care and control of child
– Child removed from the jurisdiction by Respondent without Applicant's consent -
Child in a foreign country at the time of the application – Child a citizen of both
Jamaica and the foreign country – Respondent seeking order for custody of the child in
the foreign jurisdiction – Whether present application may be properly granted -
Whether Respondent may be ordered to return child to the jurisdiction**

August 25 and September 2, 2008

BROOKS, J.

Serious divisive issues have arisen between Mr. Seymour Richards and
his wife Sandra and Mr. Richards has filed a petition for divorce, in this court.
Unfortunately, their two minor children have been caught up in their dispute.
According to Mr. Richards, he returned home one day to discover that his wife
and children had left the matrimonial home. He says that he had no previous
knowledge of the move and had not consented thereto. He subsequently
discovered that they had gone to the United States of America.

Mr. Richards eventually went to the United States and visited with the children. The older child, A, was turned over to him and he returned with her to Jamaica. He now applies for an order that he be granted custody, care and control of both children pending the determination of the petition, which of course would involve a resolution of the issues relating to the children.

The application has been made without notice to Mrs. Richards and she was not represented at the hearing thereof. The questions for the determination of the court are, firstly, whether the court has jurisdiction to grant the order for custody of the younger child B, while she is outside of the jurisdiction and secondly, whether it is appropriate to order Mrs. Richards, who is also outside of the jurisdiction, to return the child to the jurisdiction of the court.

Whether the court has jurisdiction to grant the order for custody

Section 23 (1) of the Matrimonial Causes Act stipulates, among other things, that the court may make such order as it thinks just for the custody, maintenance and education of any relevant child, in any proceedings for dissolution of marriage. By that section, the court may also, if it thinks fit, direct proceedings to be taken for placing the child under the protection of the court.

Whereas this provision poses no difficulty in respect of A, further considerations apply in the case of B. There is authority for the court to make

an order for custody of a child despite the child being outside of the jurisdiction at the time. In *Harold Morrison v Noelia Seow* SCCA 107/2001 (delivered March 13, 2003) the Court of Appeal ruled that this court had the jurisdiction to hear an application for maintenance and custody, despite the fact that the child was living outside of the jurisdiction at the time. In that case the applicant was the child's mother with whom the child resided. In his judgment Harrison J.A. (as he then was) stated at page 9:

“The [mother] had the right to make her said application [for maintenance and custody] in the Supreme Court, she being a Jamaican. Furthermore, it is anticipated that a child the subject of a custody order may well at times be out of the jurisdiction. In some circumstances a court would countenance the child being out of Jamaica or permit the child to be out of Jamaica.”

It is true that, in the instant case, the court is not being asked to countenance the child's absence from the jurisdiction, but the principle applies even in circumstances such as those in the instant case. In *Harben v Harben* [1957] 1 All E.R. 379 Sachs, J. in considering a case where the children's father had kidnapped them and taken them out of that court's jurisdiction, opined at page 383 I -384 A:

“Whatever then might in due course prove to be the appropriate order as regards the custody and care and control of these children, on the evidence before me there is nothing that should deflect the court from its normal practice of restoring, so far as it can, the position to what it was before the husband kidnapped these children. When one is dealing with a person or persons of the resources of this particular husband...it makes no difference whether the children happen to be in a different country from their mother...”

Sachs, J. recognized the case of *Hope v Hope* (2) (1854) 4 De G. M. & G. 328, 43 E.R. 534, as “the leading authority on the inherent jurisdiction of the High Court to deal with the custody of any child who is a British subject...” In the latter case, Cranworth, L.C. explained the basis for the jurisdiction, (page 344-345) thus:

“The jurisdiction of this Court, which is entrusted to the holder of the Great Seal as the representative of the Crown, with regard to the custody of infants rests upon this ground, that it is the interest of the State and of the Sovereign that children should be properly brought up and educated; and according to the principle of our law, the Sovereign as *parens patriae*, is bound to look to the maintenance and education (as far as it has the means of judging) of all his subjects....”

After confirming that the court’s jurisdiction applied equally to subjects born abroad and those born within the country, the Lord Chancellor went on to say:

“But a more difficult point has been raised, namely, putting aside the question as to the place of birth, how can the jurisdiction be exercised in the case of an infant who at the time the jurisdiction is asked is not within the jurisdiction of the Court? This is a more plausible objection than the one based on the mere place of birth, but it is not of a material nature, as bearing upon the existence of the jurisdiction. **It may be that the child is placed under such circumstances that the jurisdiction of the Court cannot be exercised over it because no order I might issue could be enforced; but in that case there is not a want of jurisdiction, but a want of the power of enforcing it....Therefore, it is putting the matter on a wrong footing to say, because the child is out of the jurisdiction, that the Court has no jurisdiction.**” (Emphasis supplied)

Applying this learning to the instant case, it is clear that B, being the offspring of Jamaicans (according to the divorce petition), is a citizen of this country (Section 3C (b) of the Constitution of Jamaica) and therefore subject to

the inherent jurisdiction of this court, despite the fact that she was born in the United States and currently resides there. The court may, therefore, make an order for her custody despite those latter factors.

I should also note, for completeness (bearing in mind the reference in *Hope* to the Court of Chancery), that section 49 of the Judicature (Supreme Court) Act stipulates that:

“With respect to the law to be administered by the Supreme Court, the following provisions shall apply, that is to say-

- ...
- (i) In questions relating to the custody and education of infants the rules of equity shall prevail”

while section 20 of the Children (Guardianship and Custody) Act states that nothing contained in that Act, restricts or affects, “the jurisdiction of the Supreme Court to appoint or remove guardians”.

Whether it is appropriate to order Mrs. Richards, who is also outside of the jurisdiction, to return the child to the jurisdiction of the court

Having established that the court does have the jurisdiction to make an award of custody, the second question, which was referred to by Lord Cranworth as being “more plausible”, is whether the court should make an order that Mrs. Richards should return B to the jurisdiction.

The essential issue is whether the court should make an order which may not be capable of being enforced, thus making it an empty threat. The issue was discussed in the cases of *Harben* and *Hope* mentioned above, as well as in

the cases of *Re Liddell's Settlement Trusts, Liddell v Liddell* [1936] 1 All E.R. 239 and *Re D (a minor)* [1992] 1 All ER 892. The cases make it clear that whether the court exercises its jurisdiction to make an order for the return of the child to its jurisdiction is dependent on the circumstances of the particular case. Sachs, J. did however opine that the circumstances would "have to be really exceptional before an order is made". In both the *Liddell* and *Harben* cases the court took the view that it would not assume that its order would be disobeyed.

In all the deliberations however it must be remembered that the paramount consideration is the welfare of the child. In *Thompson v Thompson* (1993) 30 J.L.R. 414 the Court of Appeal ruled that even in cases where the issue of a conflict of laws arose, with the principle of *forum non conveniens* being a live issue, the "welfare of the children is the first and paramount consideration". (Per Carey J.A. at page 419 E).

What then are the circumstances in this case?

- a. B is a Jamaican citizen and is ordinarily domiciled here;
- b. She was born in the United States and is therefore also likely to be a citizen of that country;

- c. She is not yet four years old, but was attending an infant school in Jamaica prior to being removed from the jurisdiction in March of 2008;
- d. Mrs. Richards has, on July 16, 2008, filed an application for an order for custody of the children in the Family Court of the State of New York County of Bronx;
- e. According to Mr. Richards, Mrs. Richards does not have citizenship or residency status in the United States of America;
- f. Mrs. Richards did submit to the jurisdiction of this court when she filed an acknowledgement of service, albeit prior to leaving the island. At that time she indicated that she would have been applying for custody of and maintenance for, the children;
- g. There is no evidence that Mrs. Richards has any property which may be attached in the event of disobedience of an order for her to return Serena to Jamaica;
- h. Mr. Richards has a household helper to assist him with caring for the girls;
- i. The siblings are currently separated.

The information about B's situation in the United States is sketchy. Mr. Richards says that the children were being moved from place to place there,

though he gave no details. He also indicated that he wanted B to return to the island, and that he wished her returned so that she may be placed in school.

I am of the view that the evidence provided does not indicate that B is in any harmful situation. She is not yet four years old, and though there is no presumption that younger children are better cared for by their mothers (*Buckeridge v Shaw* RMCA 5/98 (delivered July 30 1999)), I would be loath to disturb an existing situation, where a child of that age has spent almost six months exclusively with her mother. I am mindful that that situation has come about as a result of, on Mr. Richards' evidence, a wrongful taking of the child out of the jurisdiction, but I bear in mind the words of Goldstein, J. in *In the Marriage of Kress* (1976) 2 Fam. LR 11,330 at p 11,339 where he is reported by the learned authors of *Family Law in Australia*, 6th Ed. at paragraph 6.133, as having said:

“...whatever the wrongs of the taking of a child from a parent by stealth and the keeping of such child's whereabouts secret, it is not the court's function to punish the taking parent when deciding the issue of the custody of the child. **The welfare of the child is the paramount consideration of the court.**” (Emphasis supplied)

That reasoning is consistent with our Children (Guardianship and Custody) Act, as well as the decision of our Court of Appeal in *Thompson*, cited above.

Additionally, Mrs. Richard's absence from the island troubles me in the context of the order sought. This court cannot be seen to act in vain. Although it will not assume that the order, if made, will not be obeyed, it cannot ignore the fact that a competing application for custody has been made in a foreign jurisdiction. There is no evidence that there is any method of enforcing compliance in the event of disobedience.

Finally, if in fact Mrs. Richards has no legal status for an indefinite stay in the United States, then she may well be returning to this island in short order. At that time, an order which would be capable of being given effect, could be considered and granted if the court were convinced of its desirability.

Based on all the above, I am not convinced that the circumstances in this case, although materially similar to those in *Liddell* and in *Re D (a minor)* cited above, would justify the making of an order requiring Mrs. Richards to return B to the jurisdiction. The application in respect of B must be refused.

Conclusion

Although the court has the jurisdiction to make an order for the custody of a child who is at the time of the application, outside of the jurisdiction, such an order is only made in exceptional circumstances, and is warranted by what is in the best interest of the child.

It is of great significance to the court that this female child who is not yet four years old, has spent the past six months in the sole custody of her mother. The bond which would have been created in that time could not be broken without some severe impact on the child. It would be best that it be not broken at this time. It is also considered that the circumstances of this case where the child is also a citizen of the United States of America and where an application had been made for an order for custody of the child in that country, coupled with the fact that there was no real way of enforcing the order of this court if made, militate against the making of an order for the mother to return the child to this country. The circumstances described in the instant case are not so exceptional as to warrant the exercise of the court's discretion in favour of a grant of an order in respect of the child who is abroad.

The order is therefore as follows:

1. Custody, care and control of the older child of the marriage is hereby granted to the petitioner Seymour George Richards until the granting of the decree absolute herein or until further order of the Court;
2. The application by the said Seymour George Richards for custody of the younger child of the marriage is refused.