



[2019] JMSC Civ 16

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN CIVIL DIVISION**

**CLAIM NO. 2011 HCV 07146**

<b>BETWEEN</b>	<b>T H</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>T F</b>	<b>1<sup>st</sup> DEFENDANT</b>
<b>AND</b>	<b>E P</b>	<b>2<sup>nd</sup> DEFENDANT</b>

**IN CHAMBERS**

Mr. Richard Small Q.C. Mr. John Clarke for the Claimant

Mrs. Valrie Neita-Robertson Q.C. for the 1<sup>st</sup> Defendant

Mr. Seymour Stewart for the 2<sup>nd</sup> Defendant

Mrs. Debbi-Ann Livingston-Edwards Representing the Office of the Children's Advocate

**HEARD:** September 19 and 20, October 16 and 17, 2018 and February 8, 2019.

**J. PUSEY J (Ag.)**

**INTRODUCTION**

To protect the privacy of the individuals in this matter, throughout this judgement the parties will be referred to by the initials of their first and last names - The claimant TH, the 1<sup>st</sup> defendant TF, the 2<sup>nd</sup> defendant EP and the child KP.

## BACKGROUND

[1] By Fixed Date Claim Form filed November 16, 2011 and Notice of Application for Court Orders filed December 7, 2011 the claimant seeks the following Orders:

1. An Order for TH to have legal custody, care and control of KP born on the 3<sup>rd</sup> day of November 2010.
2. There be such further and other relief as this Honourable Court deem fit.

The following Orders, inter alia were made by Brooks J (as he then was) pursuant to the Notice on the 21<sup>st</sup> December 2011:

- The Claimant TH shall have custody, care and control of the child KP until further order of the court,
- The mother of the child Miss TF shall have residential access to the said child from Monday December 26, 2011 at 10:00 a.m. to Saturday December 31, 2011 at 6:00 p.m. and thereafter visitational access every Saturday until further order of the court,
- The residential access shall take place at the home of Jermaine (the 1<sup>st</sup> defendant's brother) at Apartment 17, Building P, Brooke Avenue, Duhaney Park, Kingston 20.

[2] He also ordered that a Social Enquiry Report be done regarding the proposed arrangement of each of the party and that the father of the child, ..... was to be served with the documents in the matter.

[3] These Orders were made with only the claimant's application and supporting affidavit before the court.

[4] Thereafter a number of applications were made to the court all concerned with variation of the visitation order culminating with a Notice of Application for Court Orders filed by the claimant on the 1<sup>st</sup> March 2018 seeking inter alia permission to take the child to Barbados, as she now works and resides there. In the interim the child is left in the care of the claimant's mother. On the hearing of this

application Wolfe-Reece J (Actg.) ordered that the application for custody be heard and determined.

- [5] The 1<sup>st</sup> defendant's mother was employed to the claimant as a domestic helper. The 1<sup>st</sup> defendant, on occasions, went with her mother to work. Her mother subsequently died. Thereafter, the claimant employed the 1<sup>st</sup> defendant for a short period as a helper. They developed a friendship, and the 1<sup>st</sup> defendant, who was seventeen years old at the time of her mother's death, was counselled, encouraged and financially assisted by the claimant.
- [6] The evidence is that the claimant told the 1<sup>st</sup> defendant that she was unable to conceive a child of her own and jokingly said the 1<sup>st</sup> defendant may have to have a child for her. Subsequently the claimant became pregnant and moved to St. Mary with her paramour. The claimant's version of how her interest in the child manifested itself is that while the mother was pregnant she jokingly suggested that she would give the child to the claimant when it was born. The mother of the child remained in touch with the claimant and visited her from time to time.
- [7] After the birth of the child, the 1<sup>st</sup> defendant took the child with her on visits to the claimant. Her relationship with her paramour deteriorated and she returned to Kingston and was living with different siblings and experienced a period of instability.
- [8] During this period, the claimant offered to assist the 1<sup>st</sup> defendant and take the child until the 1<sup>st</sup> defendant was in a better position to care for herself and the child. The claimant reduced the arrangement to writing and had the 1<sup>st</sup> defendant sign it. No arrangement was made for any sums for maintenance of the child. The child was nine months old at the time. Three months later the claimant filed this application for custody of the child. The Orders of Brooks J (as he then was), aforementioned, were made when the child was about a year old.

[9] The father when served with the documents for custody at the instance of the court, raised concerns about paternity of the child and a DNA test ruled him out and it was later confirmed that EP, the 2<sup>nd</sup> defendant, was the biological father of the child. EP was served with the court documents and became a party to the proceedings. On the 31<sup>st</sup> July 2018 by way of Notice of Application for Court Orders, EP applied for joint custody of the child with its natural mother.

[10] In the circumstances of this matter, on the 15<sup>th</sup> June, 2012 the court made an order for the child's interest to be represented by the Children's Advocate, who was served with the documents.

## ISSUE

[11] The issue in this matter is whether custody, care and control of the child should be granted to the claimant against the wishes of the parents.

## THE LAW

[12] The legislation governing custody of children in Jamaica is the Children (Guardianship and Custody) Act, Section 7(1) of which says,

*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 of 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 respecting costs as it may think just.*

[13] Section 7(1) expressly grants to either parent the right to apply for custody of their child. However, in the matter at bar, the applicant is a stranger. The

defendants raised the issue as to whether the court has jurisdiction to entertain such an application from this claimant. The Children's Advocate, in supporting the contention that the court has jurisdiction to hear the matter, cited the decision of Brooks JA in **B v C and the Children's Advocate** [2016] JMCA Civ 48 where the court had to decide,

*...whether the Supreme Court of Judicature has the jurisdiction to make an order for guardianship,*

where the applicants were the grandparents of the child and not the parents.

- [14] The court found that the filing of the application for guardianship rendered the child a ward of the court. The court's equitable jurisdiction gave it the duty to protect those who cannot protect themselves as *parens patriae*, - 'parent of his or her country.' The court therefore had inherent jurisdiction to hear the matter in its role of *parens patriae*.
- [15] The House of Lords in 1969 grappled with the issue in relation to the English Guardianship of Infants Act 1925 in **J. and Another v C. and Others** [1969] 1 ALL ER 788, where the natural parents of a boy were seeking custody against foster parents. Lord Quest analyzed the law prior to and after the passage of the Guardianship of Infants Act 1925, which has a section similar to section 7 of the Jamaican legislation. He considered among other cases the Irish case of **Re O'Hara**, 1900 2 I.R. 232, **Re McGrath (Infants)** 1893 1 Ch.143, **R v Gyngall** [1893] 2 QB 232, **Re Thain** [1926] Ch.676 and **Re Flynn** [1848] 64 ER 205 and held that section 1 of the Act mandates that the welfare of the child is the paramount consideration in applications for custody and the latter part of the section did not limit the application of the statute to disputes between the natural parents only. The court therefore has jurisdiction to hear and determine such matters.

- [16] Section 18 of the Children (Guardianship and Custody) Act outlines the matters to be considered by a court in determining the issue of the custody of a child. It states inter alia;

*Where in any proceedings before any court the custody or upbringing of a child.....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. (Emphasis mine).*

- [17] The emphasis placed on *the welfare of the child* behoves the court to consider what the welfare of the child encompasses. In **Re McGrath (infants) Supra**, Lindley, L.J. commenting on the issue said,

*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 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. **Emphasis mine***

- [18] In **R v Gyngall Supra** Lord Esher M.R. expressed his view on the matter in these words,

*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 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 be thereby bettered.*

[19] The court is to look to all factors that impact the welfare of the child in making its decision.

#### **THE CLAIMANT'S CASE**

[20] The claimant was a Lecturer/Consultant in gender affairs at the University of the West Indies, Mona at the inception of this matter and is currently the Head of the Women and Development Unit of the University of the West Indies, Open Campus, Cave Hill, Barbados.

[21] The affidavit and viva voce evidence of the claimant reveals that she cares for the child significantly. She observed the child with her mother and has formed the view that the mother is unable to properly care for the child. When the child came to reside with her she cried a lot and was emotionally disturbed. She attributes this to 'negative interaction' with the natural mother, who is rough with the child and who, is unable to provide the requisite emotional and psychological support and stimulation to the child.

[22] She engaged the services of the Child Development Agency (CDA) and other behavioural specialist and based on their analysis and reports it was concluded that the welfare of the child is best protected if she is separated from her mother or that contact between mother and child should be supervised and non-residential. The best interest of the child is for her to be in the custody, care and control of the claimant.

- [23] The mother of the child was also the subject of psychological analysis to see if she was capable of caring for the child. She was diagnosed as mildly retarded by the specialists and unfit to care for the child without supervision and support from non-challenged adults.
- [24] The mother of the child suffers from Hydrocephalus and has a shunt medically implanted which drains fluid from her brain but is otherwise healthy. She attended the School of Hope in St. Andrew, for challenged persons.
- [25] The claimant denies seeking to exclude the parents of the child from her life and offers explanations for occasions when the access orders of Brooks J and subsequent variations were disobeyed. She complained that the visits with the natural mother are emotionally distressing for the child and will result in permanent psychological damage and she has to ensure the child's welfare is protected by, on occasion limiting the visits or the length of the visits. The child was also enrolled in extra curricula activities on the weekends when access is to be allowed, as those were the available times. She argued strongly that all her actions were motivated by the need to protect the welfare of the child and that the mother does not understand the damage being done to the child by access.
- [26] The name of the child on her birth certificate had to be altered, as DNA analysis determined the true paternity of the child. In the interim, before it was determined who the father of the child was, the claimant explained that she did not know what the child's name was and so the child was allowed to assume her surname, even at school. In addition the spelling and middle names of the child were altered as, according to the claimant, the child likes the assumed names. In addition the child was allowed to call the claimant 'mommy T' and it was explained to her that she has two mommies. This was done to enhance the welfare of the child and its right to a name - it also fostered belonging, as everyone in the claimant's family has that surname.

- [27] Granting the wishes of the child to be called by another name is a reflection of the parenting style of the claimant. The voice and wishes of the child, she maintains, are to be respected and given force to. The child voiced a desire to not engage in residential and non-residential access and kissing her mother or bonding with her mother or calling her 'mommy'. The claimant said she sought to support these wishes of the child.
- [28] The claimant gave evidence that she solely financed the care of the child and was unemployed for a while and only got a job in Barbados. She calculates the cost of the maintenance of the child to be J\$70,000.00 per month and asks the court to determine whether the mother or father of the child is in a position to support the child.
- [29] The claimant is an Ifa Devotee and a Christian and was raised as a Rastafarian. Ifa Devotees practice veneration of ancestors and rituals involving images and altars. The claimant stated that she respects the religion of the natural parents and will take the child to Christian churches because she also believes in Christianity. However, the parents object to the Ifa Devotee religious practices and the child seems indifferent to it.
- [30] In the custody of the claimant the child is being educated. Her early childhood training was at a home school organization and in preparatory school she participates in swimming and gymnastics, which she has good potential in. The claimant says she involves the parents in the attendance to school functions and tournaments that the child participates in.

### **THE MOTHER'S CASE**

- [31] The mother maintains that she was involved in a relationship briefly with the father of the child and ended it because she became involved with another person, with whom she was living and believed the child to be have been

fathered by this man. However, the DNA evidence disclosed that EP is the father and he assumed responsibility for the child.

- [32] The evidence discloses that after the death of her mother, when she was 17 years old, the defendant was assisted by the claimant who purchased glasses for her and employed her for a short while as her helper. The claimant gave her good counselling and cautioned her about getting pregnant. The claimant also confided in her, her inability to conceive a child of her own and suggested that she bears a child for her. When she became pregnant, the claimant assisted her and invited her to a 'gathering' of Ifa Devotees and offered to wash her pregnant stomach to protect the infant, which she refused to do. There was also a conversation of a personal, sexual nature between the claimant and herself which resulted in the mother being uncomfortable and so she became aggressive toward the claimant and gave her the 'cold shoulder'.
- [33] After the child was born she visited the claimant and the claimant pressured her to give her the child, especially after the relationship with her paramour ended and she was on her own. The mother's evidence is that the pressure was so significant that she feigned an epileptic fit and was taken to the hospital, where the doctor admonished her not to fake illness.
- [34] She said the claimant presented her with a document one morning regarding taking the child and came back hours later and caused her to sign it. She said the lady she was staying with, told her not to sign it as she did not trust the claimant, but the pressure from the claimant caused her to sign it without the advice of family members or a lawyer. Her intention was for the claimant to keep the child until she was in a better position to do so herself.
- [35] During the time that the claimant had the child she did a parenting course at Abilities Foundation and successfully sat three subjects in the CXC. She also has participated in training with HEART Trust NTA in Food and Nutrition and wants to be Sui Chef. She gained employment with the Jamaica Defence Force

as a cashier and at the National Biscuits Company and currently is self employed, vending. She has offered boarding to a first form student, temporarily, at her home to help meet her financial needs.

**[36]** In addition she is now the mother of a 2 year old boy and is married. Her husband now resides overseas and she will join him in due course.

**[37]** The Orders of Brooks J and subsequent variations of it, is a source of great concern and distress for the mother of the child. She gave evidence that it is her view that the claimant has repeatedly breached the court's Orders and have sought to exclude her and the child's father from the child's life. She has descended into tears after being denied access on numerous occasions and was chased by the claimant out of her home. She has been made to stand at the gate calling without anyone answering her. She complains that on occasion the dogs have been let out to prevent her entering the premises. She says the claimant has shortened her visits and has taken the child from her arms and interrupted her access to the child on numerous occasions. The evidence is that for up to a month she has been denied access. The claimant has arranged for the child to go to extra curricula activities on access days and visits to the country. She also complained that the claimant changed her address more than once and did not inform her.

**[38]** In relation to the care of the child, she complains that on occasion the child's teeth were covered with food and she had to teach her how to brush her teeth. She said the child has a body odour which was so pronounced, that a passenger on public transportation got up from beside them because of it. She says the child's clothing was dirty and torn and she spoke to the claimant about it. Clothing provided by her for the child is not utilized by the claimant, but worn by the claimant's niece. She said she brought snacks for the child and the claimant told her to throw it in the garbage because it was broken up and the child does not need those things. She complained of being videotaped (which the claimant admits) during her visit and confined to a small area in the claimant's house on

visits and not allowed to see the child's room. The claimant gave evidence that she felt the defendant had pilfered from her, therefore she limited her movements in the house and recorded her, at the instance of her advisers at CDA and to rebut her lying about the visits and she stopped it when she realised the defendant was uncomfortable with it. As it turned out the recording was given to an expert for assessment of the mother and child interaction.

- [39]** The mother complained that when the child is in residential access with her, the claimant calls repeatedly and it upsets the child. She gave evidence that she objected to the claimant telling the child to call her mommy as it confuses the child.
- [40]** The evidence discloses that the child confided in her about various things during her time with the claimant and asked her not to tell the claimant. She was reluctant to detail these things in court as the claimant was present and the child is still in her care and she did not wish to breach her confidence.
- [41]** When the child is in residential access with her the child plays with her sibling and acts like a big sister with him. When she is with her father, she plays with her siblings there and is very happy. She takes her to church with her and they have "girl times".
- [42]** She refers to a report from her doctor, Dr. Franz Pencil, who has been managing her condition for many years and who she consulted during her pregnancy as to whether she could carry the child to term, as the claimant had encouraged her to terminate the pregnancy. The doctor is of the view that she is fit to care for her child, despite her medical condition.
- [43]** She objects to the exposure of her child to the religious practices of Ifa Devotee and complains that the claimant would not allow her, on an occasion, to take the child to church because she was of the view that the child was too young.

[44] Regarding the education of the child, she is not allowed to be involved in the child's school activities and speaks to only one occasion when she was told of a gymnastic tournament. When she attended, the child was concealed from her by the mother of the claimant and there was some confusion about the address where the tournament was being held. The child was registered in the tournament with the claimant's surname.

### **THE FATHER'S CASE**

[45] The father of the child was not present at the early stages of the trial. He was marooned in the United States of America by a hurricane. His counsel was present throughout and consented to the trial proceeding in his absence.

[46] By Notice of Application for Court Orders, the father of the child has applied for joint custody of the child along with the mother. He was unaware of the child's existence at birth and gave evidence that if he was, the child would not be with the claimant. He is the father of two other children, who he cares for and has a stable and secure environment in which to rear the child. He objects to the child being exposed to the religious practices of Ifa Devotees and feels the claimant is decidedly seeking to exclude him from the child's life by refusing to give him access, even when she was informed ahead of time. He turned up for the child and the claimant, on one occasion, took the child away in her car and refused to answer his calls.

[47] In his affidavit filed with the Notice, he says the mother of the child is a caring and loving mother, capable of raising his child.

[48] However, in oral evidence at the trial, he shared a different view. He said he had learned from his brother, who lives overseas and who had been contacted by someone during the trial, that the mother of the child was a member of a disabilities foundation and is therefore unfit to rear the child. He, however, opted not to take the child himself but has entered into discussions, during the trial, with

the claimant to give the child to her and has agreed for the child to go to Barbados to live with the claimant, effectively severing ties with the birth mother.

## THE REPORTS

[49] A number of reports were submitted to assist the court in its deliberations. Some of these reports were not requested by the court but are appendages to affidavits. The reports are from professionals and provide great assistance to the court in its deliberation.

### MRS. CORETTA BROWN-JOHNSON'S REPORT

[50] In December 2011 Mrs. Coretta Brown-Johnson, a Clinical Behavioural Specialist and Psychologist prepared a report at the instance of the Abilities Foundation. The report was requested to get an independent view of the 1<sup>st</sup> defendant's psychological state and by default provide insight into her capability to care for her infant child. It is part of the programme at Abilities Foundation.

The finding of the learned psychologist was summarised by her as follows:-

*TF is progressing well. Her cognitive ability is estimated to be within the mid-average functioning range, but there are some significant strengths and relative weaknesses that render a global score invalid for evaluating her cognitive profile.*

*TF is an engaging youngster who possesses many strengths. She is eager and motivated to learn and can persist when she is challenged to master something. She exhibits strengths in her oral language skills and in her verbal learning ability. She demonstrated appropriate receptive and expressive language skills and her vocabulary skills are well developed. Auditory processing skills are adequately developed and she did very well in following a sequence of oral directions. **She can be deemed a well***

***adjusted adult with manageable challenges, which can be overcome with adequate support and continued intervention. (emphasis mine)***

*.....Her ability to process information fluently is highly developed. There are no pervasive concerns in this area which should warrant deeper investigations.*

#### OVERALL IMPRESSION

*There is minor cause for concern about her emotional management support. ....*

*Of significance is the fact that levels of support was interrupted because of the death of her mother which was minimally mentioned in interviews.*

*TF also functions from a very high platform of ethics and values clearly taught to her directly and indirectly through her process of socialization.*

[51] The report concluded that TF is coping well but registered concerns about her continued coping if the present stressful situation is not handled with humanity and care.

[52] Among the recommendations made were for steps to be taken to improve her parenting skills and,

*that the relationship with child and biological mother not be severed until clear determination by the courts.... **Research evidence has shown that anyone with the challenges TF currently has can lead a relatively normal and independent life with adequate support and structures in place. (Emphasis mine)***

#### DR. KAI MORGAN'S REPORT

[53] This report, signed by Dr. Kai Morgan, a Clinical Psychologist, Lecturer and Supervisor attached to the University Hospital of the West Indies, was provided

at the instance of the claimant, on the 24<sup>th</sup> August 2011. Dr. Morgan supervised the report prepared by Ms. Joelle Buckley, a Masters student in Clinical Psychology, who conducted the evaluation of the child and mother.

- [54] During the evaluation exercises for this report, TF asked about the reason for the test and about adoption of her child, on more than one occasion. She appeared, in the opinion of the report, to be suspicious of the claimant and the administrator of the tests.
- [55] During the evaluation exercises, she declared herself unable to do various tasks such as maths and said, 'she caant bother'. She commenced some tasks without looking at the instructions and at times appeared bored and said she was tired, although she co-operated with the exercise. She was guarded when asked about her family, mother and childhood and did not wish to divulge much information, but was friendly and appeared comfortable throughout the exercise. The administrator therefore was unable to get all the information she needed to complete her background personal information, as she avoided questions about her family. She answered all other questions asked of her and did tasks she claimed she was not good at, with minimal encouragement.
- [56] The tests reveal that her "global intellectual functioning appears to be within the Extremely Low range for her peers." Her verbal reasoning and verbal fluency was extremely low. To quote from the report,

*...overall she demonstrated poorly developed skills in expressive vocabulary and conceptualization of verbal information. Similarly, TF achieved low scores on tasks requiring verbal logical abstract reasoning and a task measuring general knowledge and intellectual curiosity. This level of performance continued even with a task measuring her ability to use real world experiences to solve problems.*

[57] In all other areas tested she was found to perform at an extremely low level and displayed a low level of confidence in herself. The report states,

*Though TF appears to have a low level of cognitive ability, it seems that an overall lack of confidence in herself and her abilities is an even greater obstacle for her.*

[58] TF, according to the report, performed at her best on perceptual reasoning skills but did better on some, than on others, leading to an assessment that her visual alertness and recognition and identification are poor and suggests that there is an impairment of her contact with reality but her adaptive function is strong enough for her to plan and organize at an acceptable level.

[59] TF was assessed to perform at a Grade 2 level academically and in spelling at Grade 3 level.

[60] In addition to the clinical tests conducted to inform this report, there was an interview with the claimant, who was described in the report, as TF's 'informal guardian'. The claimant informed that TF communicated poorly, does not use a dictionary to find word meanings, does not use the index of a book while studying and cannot address an envelope and

*...is overly dependent, frequently withdraws emotionally, exhibits extreme anxiety, has poor eye contact, exhibits excessive unhappiness, has temper tantrums, lies or steals and is too physically aggressive.*

She also said she does not respond to conversation cues and did not keep appointments made by her, despite their importance.

[61] The clinical exercises, coupled with the interview with the claimant, led the expert to conclude that TF suffers from Mild Mental Retardation and is incapable of providing the emotional support and care needed by an infant. The report therefore recommended that,

*care of her child must be primarily provided by someone else as she possesses the capacity to give improper and / or neglectful care.*

[62] The child was also the subject of two reports obtained by the claimant at the instance of her, then, attorney.

#### **DR. CLAUDETTE CRAWFORD-BROWN'S REPORT**

[63] This report was done on the 20<sup>th</sup> November 2011 when the child was eleven months old and appended to an affidavit sworn to by the claimant by Dr. Crawford-Brown, a Clinical Social Worker, Child and Adolescent Therapist.

[64] The report was requested as the claimant was concerned about the child biting her and others and suffered emotional shut downs when she returned from visits with her birth mother, sometimes even into the next day. The methodology utilized in the assessment involved observation of the child with the claimant and the birthmother and video tapes of the child with the natural mother (the video tapes, according to the evidence, were done without the approval of the 1<sup>st</sup> defendant).

[65] The result of Dr. Crawford-Brown's assessment was that the interaction between the birth mother and the child was not conducive to the building of emotional stability and she recommended that access should cease. She also recommended that the claimant should consider adopting the child.

#### **PROFESSOR SAMMS-VAUGHAN'S REPORT**

[66] Another report was prepared by Professor Maureen Samms-Vaughan, a Developmental and Behavioural Paediatrician, in September 2013 at the instance of the claimant. The child was then in the care of the claimant for almost three years and residential access had been ordered by the court. The report was to evaluate the effect of residential access on the child.

- [67] Professor Samms-Vaughan was given the November 20, 2011 report done by Dr. Crawford-Brown as well as the report prepared by Miss Buckley and signed by Dr. Kai Morgan.
- [68] Professor Samms-Vaughan commented on the way the clinical exercise to determine the mother's intellectual capacity (the Vineland Adaptive Behaviour Scales) was conducted in Dr. Morgan's report. The background information on the 1<sup>st</sup> defendant given on the scale, was done by the claimant. Professor Samms-Vaughan felt the information should have been supplied by a family member. She wrote,

*The Vineland Adaptive Behaviour Scale for the assessment of adaptive function is an integral part of the determination of intellectual disability. **The Vineland Scales are not administered to persons with intellectual disability** as they are likely to overstate their competences; the scales are typically completed **by a relative, caregiver or someone who knows the person well**. In this situation, it was completed by (the claimant). Ideally, it would have been better to have had a relative complete the scale. (Emphasis mine)*

- [69] Professor Samms-Vaughan, after conducting her clinical tests, observations and interview with the claimant, concluded that the child was at risk of and showed signs of impairment of secure attachment development. She stated that secure attachment development begins at age 9 months to a year. Before that age, children are comfortable with almost anyone but become more discriminatory at that age and develop attachment to their primary care giver. She found that the child had developed attachments to the claimant since they have been together and recommended that until the child was four years old, residential access should cease. The long term effects, she said, of the interruption of her secure attachment with the claimant put the child at risk. She said,

*Failure to form a secure attachment or loss of an attachment figure in the early years of life is associated with impaired development and internalizing (anxiety, depression) and externalising behaviour problem (e.g. aggression, defiance) in the immediate and long term.*

### **MRS. KEISHA RODRIQUES-MILLS' REPORT**

- [70] At the instance of the court Mrs. Rodriguez-Mills carried out investigations regarding this matter in September 2018, including home visits, under the auspices of the OCA. She holds a Masters Degree in Social Policy and is an experienced Probation Officer and Director of the Investigations Unit of OCA. Her investigations revealed adequate physical accommodation for the child by both parties. She found that the claimant lives in middle class circumstances (uptown) but the mother of the child lives in less luxurious accommodation in a community that is safe, with working class people residing there. The mother's apartment was clean, neat and had all the amenities for living.
- [71] Mrs. Rodriguez-Mills interfaced with the child who wrote a letter to the judge indicating that she wants to remain in the care and control of the claimant. The child asked the Investigator not to tell either parent what she had written. The investigator is satisfied that she was not coached to produce this letter but is being questioned about who she wants to live with.
- [72] The Investigator found the child to be intelligent beyond her chronological age and well aware of the custody application. She is unable to say whether the child was prompted to give particular responses. At the first interview the child was 'bubblely' and spoke freely but appeared serious and less talkative on the occasion that she wrote the letter. The child signed the letter 'Kali Marie Heron', a name given to her by the claimant. This in the opinion of the interviewer manifests that that name has been reinforced in the child and is not necessary even if the child is not residing with her birth parents.

- [73] The Investigator in cross examination was of the view that the whole satiation has placed the child in a stressful state and will have long term impact on her. Her childhood is being disturbed and she detected a sense of guilt in the child, as she was being made to choose. The child opined that she loves both mothers and was conflicted. The Interviewer felt that the writing of the letter was inconsistent with her feelings of guilt and opines that it could be that she was being pressured, although she denied it. She felt that the child would not impose pressure on herself, but is too aware of what is happening and does not like it.
- [74] The Interviewer observed the child with her birth mother and reports that she observed no strain or unnatural association. The interaction was a normal mother/daughter relationship, there is no evidence of fear by the child of the mother – it was free and not forced. She also observed the mother with her son in the home and observed that he was obedient and cared for and the mother was involved with him.

#### **MRS. JUSTINE EAST-CAMPBELL'S REPORT**

- [75] Mrs. East-Campbell added her signature to a Psycho-educational Evaluation of the child dated August 29, 2018. She along with Ms. Alexandria Johnson, a M.Sc. Clinical Psychology intern carried out the examination of the child. The report was supervised by Dr. Kai Morgan, who according to the evidence, made no real input into the content of the report, but read and ensured it was logical and properly presented.
- [76] The purpose of the assessment was to ascertain the effect of the entire situation on the child emotionally, psychologically and educationally. The defendant in cross-examination emphasized that Mrs. East-Campbell is not a child psychologist by training and suggests that the court note this factor in assessing her report.

- [77] The report explained all the various tests administered and concluded that the child displays symptoms of **reactive attachment disorder** but not the full spectrum of the disorder, because she is able to form attachment to her primary caregiver, the claimant. This is not unusual as the child does not see her father or mother as her primary caregiver and spends limited time with them.
- [78] The report also revealed changes in her performance in school since this matter had been brought back to court and with the departure of the claimant to Barbados. She seems preoccupied with the court matter and not as focussed as she is used to, on her school work. It was also similar to other reports, in that, it found the child to be intelligent and articulate and very capable of expressing her views. The report also reveals that her intelligence can mask her being manipulated.
- [79] In cross-examination Mrs. East-Campbell also alluded to the fact that the separation of the child from her birth mother at approximately 8 months old emotionally impacted her ability to form close attachment and trust with others.
- [80] An interesting aspect of the evidence from Mrs. East-Campbell is her agreement with counsel for the 1<sup>st</sup> defendant that the child displays symptoms of “parental alienation” and its effect on the short and long term emotional development of the child. Parental alienation is a phenomenon very prevalent in custody cases, says Mrs. East-Campbell. It involves the programming of a child by one parent to denigrate the other parent to interfere with the child’s relationship with that parent. She also agrees that it is an indication of a parent’s inability to focus on the needs of the child and instead focus on their needs. Parental Alienation impacts negatively on the child. Unfortunately Mrs. East-Campbell, while able to articulate the concept, says she is not familiar with how to assess it. She, however, indicate that with love, therapy and understanding a child showing symptoms of parental alienation can transform quickly and develop appropriate attachment to the rejected parent.

## THE CLAIMANTS SUBMISSIONS

- [81] The claimant submits that the Orders of Brooks J made on the 22<sup>nd</sup> December 2011 should be made final, as the learned judge had before him all the material that this court now has before it. The learned judge considered all the relevant legal principles and applied them. The child has remained with the claimant for seven years and it is in her best interest that she retains the bonds of affection as well as educational opportunities and psychological bonds. Neither parent sought to disturb the Order in the seven years and get the orders they are now seeking.
- [82] Counsel, Mr. Small QC, argued further that experts have examined the child and agreed that the child should be kept in the custody of the claimant and the child herself has demonstrated that she wishes to remain with the claimant. Counsel argued that a child's wishes should not be automatically accepted by the court but both the court and the parents should have a hard look before they dismiss the stated wishes of the child. The child, he argues, is intelligent and independent and articulates her wishes above the level expected of a child of her age.
- [83] Counsel argued that the Canadian case of **Karen King v George Low and Barbara Jean Low** [1985] 1 S.C.R. 87 deals with issues similar to those considered by Brooks J. In that case a mother gave up her child at birth for adoption and three months later sought to rescind that offer. The court held that the birth mother was *unmindful of her parental duties* when she gave the child up for adoption, and further the child's existing parental bonds was to the adoptive parents and outweighed the benefits of the child maintaining the blood ties to his natural mother. Counsel urged that the court must choose the course which will best provide for the healthy growth, development and education of the child so that she will be equipped to face the problems of life as a mature adult. He argued that Brooks J had to consider whether the mother of this child was 'unmindful of her parental duties' when she surrendered the child to the claimant.

The court should therefore follow the decision **Karen King v George Low and Barbara Jean Low Supra**.

- [84] Counsel turned to the issue of the jurisdiction of the court to hear this application filed by a stranger. As mentioned above, this court is satisfied that it has jurisdiction to hear this application.
- [85] Relying on section 2(2) of the Child Care and Protection Act which sets out the factors a court should take into consideration when dealing with the best interest of a child, counsel emphasized that the delay in making a decision in this matter has, to the knowledge of the parents, worked in favour of the claimant retaining custody of the child and it should not be disturbed. It should be noted that section 2 begins by saying “*where there is reference in **this Act** to the **best interest of child...**” and is not the same as the standard adumbrated in section 18 of the Children (Guardianship and Custody) Act that first and paramount consideration must be given to **the welfare of the child**, which is a broader principle.*
- [86] Turning to the parents, Counsel referred to section 14 of the Children (Guardianship and Custody) Act that provides,

*Where the parent has –*

- (a) abandoned or deserted his child; or*
- (b) allowed his child to be brought up by another person at the person’s expense for such a length of time and under such circumstances as to satisfy the Court that the parent was unmindful of his parental duties;*

*The Court shall not make an order for the delivery of the child to the parent, unless the parent has satisfied the Court that, having regard to the welfare of the child, he or she is a fit person to have the custody of the child,*

to support his contention that the court should satisfy itself that the parents are fit persons to have the custody of the child.

- [87] Counsel argued that the affidavits and evidence of the parents do not disclose any settled plan for the education and development of the child and that the father considers the home of the mother unsuitable for the child, as it is located in a volatile area. He points to the provision, in Barbados of private school education and a suitable home for the child as well as the emotional support the child will continue to have from the claimant.
- [88] In relation to the religious practices of the claimant, to which there is objection by the parents, counsel argued that the objections made are wholly insubstantial and flimsy and demonstrate a lack of understanding, by the parents, about the religion.
- [89] It was argued by counsel that based on the evidence and the application made, the claimant does not wish to sever the ties between the parents and the child, as access is provided. If the child was to return to its parents, he argues, a 'weaning period' and psychological intervention will be required. He posits that continuity of care is in the best interest of the child and the experts have recommended it. The court should therefore uphold the Interim Orders.

#### **FIRST AND SECOND DEFENDANTS' SUBMISSION**

- [90] Although represented by separate attorneys, one comprehensive written submission was presented for both defendants by counsel for the 1<sup>st</sup> defendant.
- [91] Counsel urged that it was not conceded that the claimant has locus standi to bring this matter before the court but as the court has intervened in its role as *parens patriae* it must be guided by what is in the best interest of the child. Counsel asserted that the court's inherent jurisdiction to appoint a guardian for a child whose parents are alive, to person(s) who are not the biological parents, lies with the Supreme Court and it is only in extreme circumstances that the court will exercise that discretion. It is an equitable jurisdiction and the citing Phillip Petit's, Equity and the Law of Trust 6<sup>th</sup> Edition, counsel urged, that when this

special jurisdiction is invoked the principles of equity “that he who comes to equity must come with clean hands” and “acquiescence and delay defeats equity” must be taken into account. Counsel argued that the delay in prosecuting this matter has inured to the benefit of the claimant and her disobedience of court orders related to access, shows that she has not come with clean hands. The court should therefore refuse her application.

- [92] Counsel argued that parents have certain rights including the right to possess the child, have access to the child, the right to determine the education, religious upbringing, discipline, medical treatment and naming of the child. She urged that the affidavits filed by the mother demonstrate that the claimant has obstructed the parent’s access to the child, demonstrating an unwillingness to recognise those rights. She has scheduled out of town activities and extra curricula activities at the times appointed by the court for access. In addition the parents are not properly privy to the schools and school activities that their child participates in.
- [93] Counsel urged the court to recognize that there is no evidence before the court that demonstrate that the parents are incapable of caring for their child and the assertions made that the mother is impecunious and has no support must now be revisited, as she has subsequently married and is the mother of a two plus year old child. She is adequately maintained by her husband. Neither is it reported that the living conditions of the mother is unsuitable for her child.
- [94] Turning to the issue of the welfare/best interest of the child, counsel argued that the welfare of a child, as stated by Brooks JA in **B v C and the Office of the Children’s Advocate** *Supra* is not to be measured by physical comforts alone. Several factors are to be given consideration including continuity of care, quality of relationship between child and other party, the effect of maintaining the relationship, the religious and spiritual views and the effect of delay in arriving at a decision.

- [95] Counsel argued that the interest of the natural parents in the welfare of the child can be seen from their opposition to this application and actions regarding access and maintaining connection with their child. The relationship that they are able to build with the child is interfered with by the problems associated with getting access from the claimant. The 1<sup>st</sup> defendant has not played a sporadic role in the child's life but has cooperated with the claimant and insisted on access in these trying circumstances.
- [96] An aspect of parenting, argued counsel, is the transmission of religious values, to provide direction and help shape the child's moral compass. The religious views of the claimant are alien and disapproved of by both defendants. This has been ignored by the claimant who has taught and enforced Yoruba prayers at meals and bedtime, shaping the child according to her wishes, to the exclusion of the wishes of the parents. Counsel cited the case of **Shelle v Westbrooke** Jac. 266 (1821) where custody was denied because the appellant, the mother, professed religious views contrary to Christian principles into which the child was born and against the wishes of the father.
- [97] The court was asked to be mindful of the delays in coming to a decision in this matter. The argument that is urged by the claimant that the parents had the right and power to move the court to finalize this matter must not ignore the fact that for a considerable period the file was lost in the Supreme Court and at times no dates or a judge was available to deal with the matter. These factors cannot be attributed to the defendants. Counsel argued that the claimant's delay in prosecuting this matter demonstrates that the welfare of the child was not paramount in her mind, but rather her selfish desire to keep the child predominated. The longer she had the child, the better her chances of the court awarding her custody care and control and it was her relocation to Barbados that caused her to return to the court.
- [98] During the years that the claimant had the child, counsel argued, she deliberately sought to keep the child away from the parents and the affidavit of the mother

shows the tearful distress caused when the claimant kept the child from her. Counsel asked the court to note that despite the difficulties in accessing the child, the mother persisted and shared with the father the times she had with the child.

- [99]** In relation to the alienation of the child from its parents, counsel referred to the action by the claimant to change the child's name. She asked the court to accept that this was not done because the child liked the name and everyone else in the household has that surname, but was a veiled reflection of the claimant's intent of never returning the child to her parents. In that vein she posited that if the original arrangement was to help the mother when she was in difficulties raising the child, why did she seek to reduce the arrangement to writing and within months seek permanent custody?
- [100]** The claimant argued that the child has voiced her desire to remain with her and has written a letter to the judge to that effect. Counsel urged the court to be careful in acting on that assertion, as the child may be influenced by the material provisions and standard of living of the claimant. The child's expression, she urged, should not automatically be accepted.
- [101]** Commenting on the reports from various psychologists, counsels asked the court to tread carefully in its reliance on these reports. She pointed to the acknowledged relationship, in cross-examination, between the claimant and Dr. Kai Morgan and Dr. East-Campbell. While Dr. Morgan has not acknowledged this friendship, counsel urged that her assessment is questionable. In relation to Mrs. East-Campbell counsel noted that she has only 4 years of experience and is not a child psychologist and the fact that she read Dr. Morgan's report before concluding her own report, taints the assessment. Counsel urged the court to refer to the report of Mrs. Coretta Brown-Johnson, Psychologist and Clinical Behavioural Specialist and Mrs. Keisha Rodriguez-Mills and compare these two reports with the other reports. Counsel opined that the arguments advanced by the claimant about the child's current bonds and wishes must be viewed in the context of the independent report by the child that her mother is unable to

provide the material things that Ms. Heron provides. This, counsel argues, simply means that emotional ties and bonding with her mother is not an issue.

[102] Counsel further urged, that the fact that the child's pecuniary position would be better with the claimant, must be view against the background of

- Her religious well being
- The claimant's actions to alienate the child from the parents
- The subtle labelling of the parents as "unworthy"
- The lifelong effect of damage to the child from 'parental alienation'
- The conduct of the claimant in advancing her interest over that of the child
- The claimant's attitude of entitlement, referring to letting the child be collected at Half-way-tree and her comment that custody does not involve transportation, reflecting that the interest of the child is not paramount
- The sudden change in position of the father of the child after contact with the claimant during the trial and his sudden support for her having custody of the child. The "kind of character traits that would be demonstrated by such complicity is an alarm bell that we would ask the court to examine carefully." She asked the court to recognise that while the claimant in the initial stages of the matter was able to impeach the mother of the child by reference to her disability, when the father came alone she is unable to impeach his right to custody- he is unimpeachable.
- The serious defect in moral character of either the claimant or the 2<sup>nd</sup> defendant would disqualify either of them from exercising custody, care and control over the child
- The 1<sup>st</sup> defendant's assertion of the claimant's unnatural familiarity with her when she was younger and the discomfort she experienced with these advances. This was never denied by the claimant, counsel urged. The parents do not support the child being exposed to this lifestyle
- The court should also be mindful that the psych-edu report that alleges that the child describes Tiffany as 'mean' and 'horrible' is not supported by the interviewer from the OCA or the videos presented by Tiffany.

[103] Finally she argued, supported by dictum from **R v Gyngall** *Supra*, that there is no material before the court that suggests that the educational growth of the child would be stymied by her living with her mother and is unable to attend the high end school she is now exposed to.

## **THE OFFICE OF THE CHILDREN'S ADVOCATE**

**[104]** By court Order dated the June 15, 2012 the Office of the Children's Advocate was invited into the matter to represent the interest of the child and they furnished the court with written legal submissions and called two specialist, whose reports have been referred to earlier.

**[105]** The legal opinion concluded that this application is for guardianship only with the court exercising its equitable jurisdiction as *paren patriae*, as the child is a ward of the court by virtue of the application. Section 7 of the Children (Guardianship and Custody) Act only provides for parents to apply for custody.

**[106]** In the opinion of the Advocate the issues for the court's determination are;

- Whether the child has a right to be in the custody, care and control of her biological parent(s),
- Whether the court can appoint the applicant as legal guardian of the child against the expressed wishes of the living parents, and
- Whether the wishes of the child should be taken into account in determining who is awarded custody and/or guardianship.

**[107]** The Advocate referred to section 13(3)(k) of the Charter of Fundamental Rights and Freedoms, that guarantees protection for a child as a minor or as part of a family, society and the State. This is enshrined in section 2(3)(b) and (c) of the Child Care and Protection Act. Further Article 2 of the United Nations Convention for the Rights of the Child, to which Jamaica is a signatory, guarantees that states must take legislative steps to protect these rights of the child. She argues that these provisions acknowledge that the social structure of family life and preference for a family to retain care of its child as a feature of the child's right to care and protection, however, the child has no distinct right to be in the protection of its biological parents but rather a right to be protected, whether by parents or guardian.

- [108] In relation to whether the court should appoint a stranger as guardian against the express wishes of the biological parent, the Advocate argued that the parents right can be displaced if it is to protect the welfare of the child and the court must be careful to act only if necessary. She cited **R v Gynall** *supra* to support the proposition.
- [109] She also referred to section 14 of the Children (Guardianship and Custody) Act which provides for the parent's right to custody to be superseded if they desert the child and allow it to be brought up at the expense of a stranger. The Advocate also made reference to **B & C & The Children's Advocate** *Supra* for the proposition that parents are usually given priority and only in 'unusual circumstance' is someone else to be preferred over the parents.
- [110] Turning to the wishes of the child, the Advocate argued that the child's right to participate is now recognised under the United Nations Convention on the Right of the Child and the Child Care and Protection Act which codified the Convention. The child must be adjudged to be of sufficient age and maturity to be able to form her own views and understand and appreciate the consequences of the decision she is making. Counsel argued that at the age of 7 years, the child is susceptible to suggestion and manipulation and the court should be mindful of this in assessing what weight it gives to her wishes.
- [111] The Advocate spoke to the paramountcy of the welfare of the child principle in section 18 of the Children (Guardianship and Custody) Act and also pointed to section 2 (a) – (h) of the Child Care and Protection Acts and encouraged the court to look at the factors therein as a guide in its deliberations.
- [112] Further counsel examined the evidence regarding the continuity of care, the quality of the relationship between the child and the parties, the child's religious and spiritual views and the effect of the delay in making this decision on the child and concluded that the best interest of the child would not be served by a disruption in the current state of affairs.

## ANALYSIS AND CONCLUSION

- [113] A significant amount of information in affidavits, viva voce evidence, reports and submissions have been put before the court to assist with the determination of the issues in this matter. I will only refer to the portions of this information that assist me in arriving at my conclusions. By not referring to other portions, is not to diminish their significance or ignore them. I have read and considered all that has been presented.
- [114] I am also grateful to counsel on both sides in this matter and to the Office of the Children's Advocate for their well researched and insightful submissions to assist these deliberations.
- [115] Section 18 of the Children (Guardianship and Custody) Act stipulates that the welfare of the child is the first and paramount consideration in custody applications. Pronouncements in case law outlined above, provide guidance as to factors that should inform the assessment of the welfare of the child.
- [116] The role of parenting is to prepare a child to function as an adult and face the challenges of life appropriately. The guardian of a child imparts values, attitudes, life skills and appropriate patterns of behaviour to the child. It is for this reason that any examination of a child's welfare must, as stated by Lindley L.J. in **Re McGrath Supra** be "**widely examined**" and should not be limited to the material things of life. In addition, to prepare an adult to manage life, the psychological and emotional wellbeing of the child must be nurtured to ensure a stable, well adjusted human being. It is an awesome responsibility which the law recognised when it mandated **the welfare of the child** as the **paramount and first consideration**.
- [117] What are the circumstances then that impact whether this application by the claimant should be granted?

**[118]** There is no dispute that the written arrangement entered into by the claimant and the 1<sup>st</sup> defendant in 2011 for the claimant to keep the defendant's child, was never intended to be permanent. The defendant had recently lost her mother with whom she resided at age 17 years, had become involved with a gentleman and got pregnant. The relationship with the father deteriorated and at the time of the arrangement, the 1<sup>st</sup> defendant was vulnerable, unemployed and on her own with an infant child to care for. Her situation was not ideal for the rearing of a child. The claimant's willingness to assist her by taking the child cannot be faulted. However, the issue as to whether this arrangement is to be made permanent requires the analysis of the factual basis of this application and the circumstances of the parties to determine what is best for the welfare of the child.

**[119]** Any assessment of these circumstances cannot ignore that in relation to physical accommodation, zeal for the education of the child, love of the child and physical care, there is no material difference between the claimant and the mother's position. The report of Mrs. Rodriguez-Mills is supportive of this conclusion. There is no evidence that at any time whatsoever, the health and physical welfare of the child was endangered. In fact in this regard, the major difference between the parties is their level of income and educational attainment. As both Lindley L.J. and Brooks JA have stated, differences related to material things is not a basis for the award of custody of a child or, to be complete, to deny custody of a child.

**[120]** I wish therefore to focus on the psychological and emotional development of the child which, to my mind, is most instructive in this application.

**[121]** The basis of the claimant's application is her belief that the mother of the child cannot properly care for her because she lacks the mental capacity to ensure the child's safety and provide the requisite stimulation to advance the intellectual and other behavioural development of the child as she is mildly retarded, does not use a dictionary to find word meanings, does not use an index, is forgetful and misses important appointments that she has made. She has formed the opinion

that the interaction between the child and the mother is negative, as the child cries and displays emotional shut-downs around the time when access is required and when she returns from residential access. She states that the child "*resents her biological parents*" and it is in her best interest that she remains in her custody with limited access to the parents.

- [122] The claimant disagrees with the parenting style of the mother. The mother's use of corporal punishment, shouting at the child and being 'rough' with the child is objectionable to the claimant. The claimant believes a child has a voice and should be heard and her views respected and that the child should be allowed to indicate her preferences and express herself, instead of being forced to be what someone else thinks she should be.
- [123] In order to either satisfy herself that her prognosis that the child is psychologically, emotionally and possibly physically at risk in the care of her mother, the claimant subjected the child and mother to a number of psychological assessments and evaluation. These assessments agree with her prognosis. Consequently, despite the provision of access in the interim orders, the orders of the court were not fully complied with.
- [124] As the assessment and evaluation of the mother and child form a large part of the claimant's contentions that the mother is unable to rear her child, it is useful to have a closer look at the reports submitted.
- [125] The reports prepared by Miss Buckley and signed by Dr. Kai Morgan as well as that prepared by Professor Samms-Vaughn, both speak negatively about the 1<sup>st</sup> defendant and recommended that access should cease or be limited. Miss Buckley found the mother to be mildly retarded and functioning at the level of a grades 2 and 3 academically. These are the reports commissioned by the claimant and for which she provided her assessment of the claimant as background information. All the actions of the claimant to interfere with access,

re-name the child and informing the child that her mother was retarded, are based on these reports.

**[126]** Professor Samms-Vaughn says the claimant should not have given background information on the mother for the assessment of her intellectual ability, as she does not know her well enough. Professor Samms-Vaughn also says that the test should not have been administered to persons with mental challenges.

**[127]** Miss Buckley who did the assessment is a Master candidate - a student. The claimant worked, at the time, at the same university. I have no doubt that Miss Buckley could have been influenced into accepting and acting on the claimant's assessment of the mother by the fact that she was a lecturer at the university. Collecting the background information in that way also speaks to the experience and judgment of the assessor. Inputting of that information into the report along with administering it to a person who is believed to be mentally challenged, according to Professor Samms-Vaughn, must render the outcome flawed. The claimant has therefore been guided by a flawed report and a questionable assessment of the mother in the conclusions arrived at regarding her fitness to take care of the child.

**[128]** I am fortified in this view of those reports by the independent assessment done by Mrs. Brown-Johnson at the instance of The Abilities Foundation. This report is uninfluenced by the custody controversy and designed to assess whether the mother is capable of rearing her child. The report concludes that the mother is eager to learn, personable, of average intellectual capacity and can adequately care for her child. The only concern Mrs. Brown-Johnson has is the emotional state of the mother as a result of this custody situation with her daughter.

**[129]** In addition the investigation of Mrs. Rodriguez-Mill at the instance of the court, observed a normal mother/daughter relationship between the child and her mother.

- [130] The upshot of all this is that the major basis of this application, that the mother is **unable** because of mild retardation to care for her child, is questionable, if not flawed. Relying on such a report in an application of this nature is fraught with danger. The court prefers the independent reports of Mrs. Rodriguez-Mills and Mrs. Brown-Johnson.
- [131] Much has been said about the amount of time the child has spent in the custody of the claimant. This application for custody was filed in December 2011. After the court made the interim orders in December 2011, the matter came virtually to a standstill. In fact this hearing is the result of an Order by Wolfe-Reece J (Actg.) in an application to vary the interim order. No effort was made by either party to prosecute the matter to a conclusion. The file could not be located for some time and the child remained in the custody of the claimant for 7 years at the time of trial.
- [132] Counsel for the claimant argued that this passage of time has caused the child to become accustomed to the quality of life offered by the claimant, along with the nurturing, emotional support and stimulation for her development. He urged the court to maintain the status quo and allow for continuity of care by making the interim order final. He argued that Brooks J had all the information this court now has before it and applied all the relevant legal principles to arrive at the interim orders. There is no written judgment setting out the reasoning of the learned judge regarding the interim orders but what is clear from the record and the evidence is that all Brooks J had before him was the application and supporting affidavit and the report supervised by Dr. Kai Morgan as well as Dr. Crawford-Brown's assessment of the child. All the learned judge did was provide structure and precision to the existing arrangements. It is worthy of note that he gave residential, unsupervised access to the mother and demonstrated no anxiety or concern that the child would be harmed in the care of the mother. To make the interim orders final would ignore the evidence of the parents and the further

evidence and other reports before this court and would not be a counsel of prudence.

- [133]** More importantly, the evidence concerning the long sojourn of the child with the claimant and the actions of the parents provides great insight into how best the court can determine what promotes the welfare of the child. In addition the child is now older and has verbalized her views on the matter. The 1<sup>st</sup> defendant's life circumstances have changed significantly. The father of the child has also expressed his view on the matter. The conduct of all the parties can be analyzed in the wake of this evidence.
- [134]** The main reason the mother agreed with the arrangement allowing her child to reside with the claimant, was so she could go back to school and equip herself to better care for herself and the child. She has done this by successfully passing 3 CXC subjects and completing a parenting course. She has also sought and gained employment and is now a small entrepreneur. In relation to housing and stability, she is now married and the mother of a small child and resides in a house provided by her family. She cares for her son's day to day needs unassisted, as her husband resides overseas. Mrs. Rodriguez-Mills saw the child and stated that he was properly cared for. The mother is therefore now in a better position to care for her child.
- [135]** A thorny issue for the 1<sup>st</sup> defendant during the 7 years the child has been with the claimant is access. She says she has tried to co-operate with the claimant in this regard. However, the evidence discloses that on numerous occasions, running at one time into a full month, she was not allowed to be with the child. Weekend country excursions, extra curricula school activities like swimming and gymnastics, were scheduled on visitation dates. When she is with the child the claimant interrupts their interaction by taking the child away, hugging and kissing her. She has been asked to leave the claimant's premises, dogs were let out on her on occasion, and she would be at the gate standing knocking, in the sun, without a response. These actions have impacted the ability of mother and child

to bond naturally and have allowed the claimant to be the primary attachment figure for the child. The mother has been reduced to tears and says she even cries herself to sleep at night because of the situation.

**[136]** These complaints have not been denied by the claimant and in fact the explanation given is that her posture regarding access was in the best interest of the child, as she has a negative reaction to the mother and does not want to engage in access activities. The cumulative effect of this is that by and large the child has had limited interaction with the parents over the years, and, according to the reports, has come to regard the claimant as her secure attachment figure and the mother' role has been diminished, but not distinguished.

**[137]** The diminution of the image of the mother negatively in the eyes of the child is also apparent from the evidence. The mother recounts in her evidence, the child asking if her brother was retarded like her and indicating that the claimant told her that her mother was retarded. In addition the evidence reveals that the retardation is common knowledge at her school. The child, during the assessment of Dr. Crawford-Brown, also stated that her mother says negative things about the claimant that is not true. This conduct by both the claimant and the 1<sup>st</sup> defendant provides an arena for the child to be conflicted in this drama, as according to the report, she loves both women. Furthermore, the denigration of the mother to the child is psychologically harmful.

**[138]** The combined effect of this is manifested in the letter penned by the child to the judge, expressing a desire to be with the claimant. This preference by the child is not determinative of the issue but cannot be ignored.

**[139]** The attempt, I find, to distance the child from the natural parents is manifested in the alteration of the child's name. In the psych-edu report supervised by Dr. Kai Morgan and during the investigative report of Mrs. Keisha Rodriguez-Mills, the child assumed the name given to her by the claimant and declared that the claimant's home is her home and the claimant is her mother. The school she

attends uses in the name given by the claimant. The child's given name was changed when the DNA results came out. The name given by the claimant is different from the new name. The 1<sup>st</sup> defendant spoke to the claimant about the child calling her mommy as it was confusing the child and sought, in her own way, to reinforce that she is the child's mother.

**[140]** The explanation given by the claimant that she did not know what name to use as when the first gentleman was ruled out as the father it took some time for the father to be identified, to my mind, is not substantial. Even if there were proceedings concerning the identity of the child's father, the prudent thing to do is not to disturb the name until it is resolved. The fact that all members of the claimant's family have her surname and the child would feel left out, also put forward as an explanation by the claimant, cannot justify the psychological and self-image distortion that can result from this name changing. To involve a small child in this web of name changing cannot be a wholesome course of conduct. The child at that stage of development, when identity and personality, confidence and self-assurance are being formed, must be impacted by these changes. It cannot be for her welfare. She should not even, to my mind, have been made aware, at such a tender age, about the details of the use of DNA evidence to determine her paternity. The Psych-edu report of Mrs. Justine East-Campbell speaks to the claimant finding it more acceptable socially, as a single woman to have the child use her surname. This seems to me to be the real explanation for the name change and has nothing to do with the need for the child to have an identity.

**[141]** Mrs. Brown-Johnson's report, describes the 1<sup>st</sup> defendant as operating from a high moral and ethical platform, taught to her in her socialization and resonating from her religious beliefs. She is a Christian. The claimant is a subscriber to a different kind of religious orientation from the 1<sup>st</sup> defendant. She is an Ifa Devotee. Both parents mistrust and are opposed to the child being exposed to this kind of religion. The mother, during her pregnancy was exposed to an Ifa

Devotee Gathering with the claimant and a ritual, said to protect the unborn child, was offered to her, which she refused. She also observed the claimant's altar and religious paraphernalia in her home. The claimant has been taking the child to worship with her but has stated that she will expose the child to Christianity as she also is a Christian. In **Shelle v Westbrooke**, *Supra* James L.J. refused an application for custody of a child, who along with her father were baptised Christians, to a mother who promulgated anti-religious opinions and beliefs. The court has a duty to ensure that the religion of the child, if she has one, is protected and that the wishes of the parents are respected. (See Lord Esher MR in **Re Gyngall** *Supra*. The claimant has agreed to expose the child to Christianity if awarded custody. The importance of religion on moral underpinning and in the formation of outlook, values and attitudes cannot be overstated. Since custody and guardianship is not the severance of parental rights, it follows that the views and wishes of the parents should be respected by the person in whom custody, care and control is reposed.

**[142]** The parents complain that they are not allowed to be involved in the education of the child. They do not see report cards, participate in preparation for school, selection of school or, except on one occasion since the claimant has been living overseas, attend school functions. This exclusion of the parents is part of the efforts to minimize the involvement of the parents in the life of the child. The report that the child was spirited away into a class room when the parents visited the school is strong indication of this. It cannot be for the welfare of the child for this course of action to continue. She loves her parents and should interact with them.

**[143]** The belief of the claimant that the child resents her mother and does not want to participate in access and staying overnight is in contradistinction to the evidence of the mother and the observation of Mrs. Rodriquez-Mills when she observed her during her investigations. In cross-examination Mrs. Rodriquez-Mills said,

*I saw KP interact with her mom (biological). It is a normal mother/daughter relationship. She takes instructions from her. The relationship did not appear to be strained and they interacted well. I didn't detect any fear in KP of her mom – it was a free interaction, meaning it was not forced. It did not appear as if KP was under any instruction to say certain things and behave a certain way. It appeared a genuine interaction.*

- [144] An examination of the evidence reveals that the child enjoys her time with her siblings when she visits her mother and father. She also, importantly, confides in her mother some of her experiences while living with the claimant. We do not know what was confided as her mother does not wish to betray her confidences, but the fact of reposing confidence in her mother is instructive. It does not demonstrate that she resents her mother or that the mother is negatively viewed by her. It is more in keeping with a normal mother/daughter relationship and based on the demeanour of the claimant in court, was somewhat surprising to her.
- [145] The reposing of confidence by the child is also symptomatic of the fact that she is well aware of the controversy concerning custody, care and control. The 1<sup>st</sup> defendant has, I find, also contributed to how much the child knows about the case. There is a contest going on, consciously or unconsciously, to win the favour of the child. The effect of this on the child is very troubling. At 7 years old she is balancing her feelings for both parties and obviously not wishing to upset either of them. A child of that age should not have to cope with this kind of pressure and although the adults may be activated by their conviction of what is best for the child, the emotional damage and strain on the child is not in her best interest.
- [146] What is clear and is supported by the mother's evidence is that when the child is in the company of the claimant she acts aloof toward her and is a different child. This evidence is very indicative of her trying to cope and please the claimant,

confident that her mother will understand. The claimant has provided her with a lifestyle she enjoys. She loves both parties and is conflicted. It also speaks to the quality of the relationship between the child and the parties.

**[147]** The circumstances of the 1<sup>st</sup> defendant have changed substantially since entering into the arrangement for her daughter 2011. She has married and is the mother of a 2 year old son. She is an entrepreneur engaged in vending. She is supported emotionally and financially by her husband, who lives in the United States of America and she is hoping to join him in due course. She has improved her education and has completed a parenting course. She is older and more experienced in operating as an adult as opposed to the time of the arrangement.

**[148]** The claimant financially and educationally is in a better position than the 1<sup>st</sup> defendant. She has a well formed world view regarding parenting and the development of children. If the consideration for custody were limited to these factors, she would be in a very good position.

**[149]** The father of the child, who came to know of the existence of the child 2 years old after her birth, has put himself in a peculiar position. Initially he supported the child being returned to her mother who is caring and capable of taking care of his child. He said if he had been around, the arrangement entered into by the 1<sup>st</sup> defendant and the claimant could not have happened. He complained of challenges with access and exhibited terse Whatsapp exchanges between himself and the claimant. He is gainfully employed as a police officer and is in a stable relationship. He can adequately care for the child and has applied for custody. The claimant views his involvement with the child as minimal and says the child is indifferent to him. She has encouraged him to be more involved with the child.

**[150]** When he gave evidence, however, he released what can only be described as a bombshell, when he declared that his brother overseas contacted him and based

on their discussions he now consents for custody care and control of the child being granted to the claimant. He has changed his views of the 1<sup>st</sup> defendant because he now knows that she is a member of a disabilities organization and consequently is unfit to raise the child. He has already embarked on discussions with the claimant about access and maintenance. Further, he is of the view that the child has been in the custody of the claimant for a long time and he has no complaint about how she is being reared.

- [151]** What is clear is that during the course of this matter the father has adopted three positions regarding custody – joint custody with himself and the mother, sole custody to him and latterly sole custody to the claimant. This shifting position must be viewed in relation to the welfare of the child. It calls into question whether his application is genuine, with the welfare of the child as the paramount consideration. The burning question also beckons - what was communicated to his brother and ultimately to him and by whom? The upshot of this is that he seems to have abandoned his application for custody and is now a strident supporter of the claimant's application.
- [152]** The real issue in this matter is the state of the child in this cosmography of contending adults, psychological evaluations, distorted imaging of the mother and challenges concerning access. The report authored by Mrs. Justine East-Campbell in 2018 and signed by Dr. Kai Morgan, speaks to an upsurge of bed wetting by the child, noticeable distraction in school and a decline in performance, since the departure of the claimant and the prosecuting of this application. This is symptomatic of a child under pressure and striving to cope with significant issues.
- [153]** The cross-examination of Mrs. East-Campbell introduced into the discussion the concept of parental alienation, defined as the programming of a child by one parent to denigrate the other parent to interfere with the child's relationship with that parent. She agrees that it impacts negatively on the child, as it results in the

emotional rejection of the other parent and the loss of a capable and loving parent from the child's life.

- [154] The denigration of the other parent results from a combination of programming by the main parent, indoctrination and the child's own contribution to the vilification of the other parent. It involves a set of strategies including bad mouthing the other parent, limiting contact with the other parent, restricting the other parent from the life and the mind of the child, creating the impression that the other parent is not capable, by belittling and limiting contact with the extended family of the other parent.
- [155] She agrees that statistics show that parental alienation is very common in custody applications.
- [156] For a child, parental alienation is a serious mental condition based on a false belief that the parent being alienated is unworthy. The effect on the child is
- Low self-esteem
  - Self hatred
  - Lack of trust
  - Depression - substance abuse can result in later life as well as other forms of addictions.
- [157] Mrs. East-Campbell further agrees that more often than not the child develops a syndrome that arises out of being led to believe that the alienated parent did not love or want them and that this more often than not lead to the child – whether in childhood or adulthood – experiencing guilt related to betraying the alienated parent and depression rooted in that feeling of being unloved by one or both parents.
- [158] The alienated child typically has conflicted or distant relationships with the alienated parent and is at high risk of being alienated from their own children.

- [159] The circumstance of the matter at Bar manifests signs of parental alienation in this child against both parents, especially her mother. The evidence is replete with examples of the claimant's interference with interaction between the child and her natural parents. It shows effort to belittle and erode the image of the mother in particular, in the eyes of the child. Whether done consciously or unconsciously its negative, destructive effect on the child is undeniable. It causes this court to consider seriously whether it is the welfare of the child or that of the claimant that is the activating force. It cannot be ignored.
- [160] The destructive, corrosive potential of this syndrome is the most troubling factor in this matter. When the evidence is looked at as a whole, there really is no patent reason for this child to continue to be separated from her natural parents, in particular her mother. The bases upon which the claimant has argued for custody are not consistent with the independent evidence which the court accepts. The danger of the already manifested symptoms of parental alienation, being allowed to escalate by a continuation of the interim orders of Brooks J has to be cauterized.
- [161] Much has been said about continuity of care and the effect of separation of the child from the claimant, thus disturbing her secure attachment to the claimant. Very little has been said about the disruption of her secure attachment to her mother at the time the child went to live with the claimant. The crying around the time of access and the emotional shut-downs associated with access is more the result of the disruption of the secure attachment to her mother than any negative interaction between mother and child, in my judgment. The evidence reveals that the child confides in her mother. There is therefore some attachment to her. The claimant too and the child have a good relationship and severance from her will impact the child.
- [162] However, the claimant now lives in Barbados and has been separated from the child for almost a year. The child now resides with the claimant's mother, without the knowledge and approval of the court. This forced separation should minimize

the effects of any disruption. In addition the child is older (8 years) and is familiar with the 1<sup>st</sup> defendant so the transition, though upsetting, should not be devastating.

[163] In addition Mrs. East-Campbell testified that with support and understanding the effects of parental alienation can be reversed and cauterized and the child can develop a normal, healthy relationship with her parents.

[164] The Office of the Children's Advocate can assist the mother and child with the psychological care and support mechanisms essential for this adjustment in their lives.

[165] Counsel for the claimant in his submissions referred to Section 14 of the Children (Guardianship and Custody) Act. He argued that the claimant has, in large measure, shouldered the maintenance of the child without any meaningful contribution from either parent. He estimates that it cost approximately \$70,000.00 per month to support the child. School fees and extra curricula activities are in excess of \$500,000.00 per year. He urged the court to be guided by section 14(b) of the Act and not deliver the child to the parents unless it is satisfied, having regard to the welfare of the child, that the parent is a fit person to have custody of the child. He asks the court to be satisfied that the parents can adequately maintain the child, before it delivers the child to them. The father of the child is gainfully employed and is willing to support his child. The mother is also earning her income and can maintain her child and she is supported by her husband, who has assisted with providing for the child. There may be a quantitative alteration in the standard of living the child is accustomed to but, hopefully, not a qualitative change. Also, because of residential access, the child is accustomed to her mother's home. I cannot add to the words of Lord Esher MR in **R v Gyngall** *Supra* in this regard and they bear repeating;

*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 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 be thereby bettered.*

[166] The mother, from the evidence, has demonstrated steadfastness for the development of herself and the welfare of her child. The claimant has also evidenced a devotion to the child and it might be a counsel of prudence that some contact be maintained between her and the child.

[167] Counsel for the claimant in his submissions, referred to the fact that the defendants do not have a settled plan for the education and development of the child. This contention is not supported by the affidavit of the father and mother who both have plans for the school the child could attend and demonstrate an interest in continuing the extra curricula activities the child is involved in.

## **CONCLUSION**

[168] The granting of custody of a child to a stranger against the wishes of the parents is permissible in our courts but the governing principle and first and paramount consideration is the welfare of the child. The evaluation and determination of what is best for the welfare of the child must be approached widely and should include and contemplate not just physical care and control but also the emotional and psychological nurturing of the child, to create a well adjusted and balanced adult, well equipped to deal with the vicissitudes of life.

ORDER

1. An Order for Taitu Heron to have legal custody, care and control of KAILIE KAY-ANNA PURAN born on the 3<sup>rd</sup> day of November 2010 is refused.
2. The child KAILIE KAY-ANNA PURAN be returned to the custody care and control of the 1<sup>st</sup>. Defendant Tiffany Ferguson-Pinto forthwith.
3. The Office of the Children's Advocate to assist with access to psychological care and support to the 1<sup>st</sup> defendant and the child in collaboration with other relevant agencies.
4. No order as to cost.
5. The 1<sup>st</sup> defendant's attorney to prepare file and serve this Order.

JF 2  
8/2/19