



[2023] JMSC Civ. 240

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

**IN CIVIL DIVISION**

**CLAIM NO. SU2020CV00530**

<b>BETWEEN</b>	<b>CHRISTOPHER WILLIMAS</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>CHARMAINE MILLER</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

**November 9, 2023 and December 6, 2023**

**Applicant (In pro se)**

**Ms. Dennese Smith Attorney-at-Law for the Respondent**

**Family Law – Application for Custody of Child – Application for Variation of Custody Order – Whether there has been a Material Change of Circumstances to Justify Variation of Custody Order Already Made.**

**Family Law – Application for Custody of Child – Whether Variation of Custody Order is in the Best Interest of the Child.**

**D. STAPLE J (Ag)**

**BACKGROUND**

[1] Ms. Charmaine Miller (hereinafter CM), the Applicant in this present application before the Court is the mother of the child, NAW. CM has gotten an opportunity to emigrate to the United States of America and now wishes to have full custody of NAW.

- [2] Prior to this, there was an Order that had given custody of NAW to Mr. Christopher Williams (hereinafter CW), the father of the child. According to the Application filed by CM, among the reasons she believes that care and control of NAW was given to CW was because she had a job with Caribbean Airlines and there were certain inconveniences which prevented this from happening.
- [3] However, according to her, her working circumstances have changed significantly and this would now allow for her to have NAW and afford for him a better life and opportunities than he has now.
- [4] CW has resisted this application. He insists that he is still the best person to have custody, care and control of the child NAW and that the care being received by NAW is adequate and there is no need to change the custody arrangements.

#### **THE LAW ON VARIATION OF CUSTODY ORDERS**

- [5] The law concerning custody of children is governed by the **Children (Guardianship and Custody) Act** 1956 and the rules made thereunder in 1957.
- [6] Sections 7(1) and 7(5) of the **Children (Guardianship and Custody) Act** authorises the Court to vary orders previously made. In applications for variation, as for first time applications, the Court must have regard to the matters set out in section 7(1) of the Act that is:
- The welfare of the child;  
The conduct of the parents; and  
The wishes of both parents.
- [7] The welfare of the child is the dominant consideration for the Court in considering these applications. This is according to section 18 of the Act. In the case of

***Forsythe v Jones***<sup>1</sup>, Harrison P stated that a Court considering the custody of a child, mindful that its welfare is of paramount importance, must consider the child's happiness, its moral and religious upbringing, the social and educational influence, the psychological and physical well-being as well as the physical and material surroundings.

- [8] The other factors relating to the conduct and wishes of the parents are subordinate considerations to the overriding factor of the welfare of the child.
- [9] Where an Order for custody has been made already, the Court considering the application to vary the original order has to presume that that previous Court had fully weighed and considered the matters that were present before it in order that it might come to its decision. Therefore, this Court should tread very carefully in seeking to vary such an order and would only vary such order where it is demonstrated that circumstances have changed to such a degree as to warrant the interference with the Order (see paragraph 33 of the judgment of McIntosh JA in *LM v CS*<sup>2</sup>).
- [10] Bearing these in mind, I will now review the evidence.

## **THE EVIDENCE**

- [11] On the 21<sup>st</sup> October 2020 V. Smith J (Ag) (as he then was), made the following interim orders upon this matter being transferred to the Supreme Court from the Family Court:
- (i) Joint custody to both parties (mother and father) with care and control to father and liberal residential access to mother.
  - (ii) Alternate weekends to the mother with liberal residential access during the week and this is to take effect on 23<sup>rd</sup> October 2020. The

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<sup>1</sup> Unreported SCCA No. 409/1999 delivered 6<sup>th</sup> April 2001

<sup>2</sup> [2013] JMCA Civ 12

- (iii) mother is to collect the child on a Friday at 5:00 pm and the father to pick up the child on a Sunday at 7:00 pm.
- (iv) All major school holidays are to be shared equally between the parties. The first half of all major holidays to mother and second half to father.
- (v) Both parties to make the necessary application for the renewal of [NAW]'s US passport. The father to be the primary applicant and the mother to be the secondary applicant.
- (vi) Costs of therapy and educational expenses to be shared equally between the parties.
- (vii) Liberty to apply.

**[12]** At the time of the making of this Order, CM was living in Jamaica. She was employed to Caribbean Airlines as a crew scheduler. These facts, deponed to in her affidavit sworn on the 21<sup>st</sup> October 2022, were not disputed.

**[13]** NAW had been living with his father at the time of the application. CM was living at her mother's home at De La Vega City in Spanish Town in St. Catherine. Needless to say, this is a difficult community in which to live in ordinary circumstances.

**[14]** NAW is also on the autism spectrum. There is no official expert report which confirms this diagnosis and the Court is not aware of where on the spectrum NAW falls. Autism spectrum disorder covers a very broad range of symptoms and the parties have not provided the Court with any report which illustrates where on the spectrum NAW falls and the nature of his symptoms and peculiarities. It is, however, accepted between the parties that NAW is on the autism spectrum and the Court accepts that this was the case and remains the case.

**[15]** At the time of the Order being made, NAW was enrolled in Liberty Academy (LA) but he had not been attending school due to the circumstances created by the pandemic. CW does not dispute that NAW was not attending school and had not done so since 2020 up to 2022. According to him, in his Affidavit in Response sworn on the 15<sup>th</sup> February 2023, NAW was not attending school because:

- a. The school was closed for a period;

- b. Upon reopening, the school had strict conditions for wearing of face covering and NAW refused;
- c. The school refused to admit him without a shadow (there was no evidence from him as to why no shadow was afforded NAW).

[16] So that, in a nutshell, was the circumstances in which the parties found themselves at the time when V. Smith J (Ag) made the orders.

### ***What Has Changed Since?***

#### **The Home Life of the Parties**

[17] The CM has now testified, and the Court accepts, that she is about to emigrate to the United States and has gone there as part of the protocol necessary for the emigration process. She is living with her mother in a home that, based on a home study report filed on the 24<sup>th</sup> July 2023 in this Court as requested by the Court, is more than adequate for the child.

[18] Indeed, it was the recommendation of the person conducting the assessment that it would be in the best interests of NAW that he live with his mother<sup>3</sup>. However, the Court must point out that the Assessor had not carried out any interview with the father and so the recommendation is limited in that regard and not used as determinative of the issue of custody.

[19] A social enquiry report was also requested and obtained pursuant to an Order of the Court. I have perused that Report thoroughly and I allowed CW to review and submit his comments on same as well as to question the social worker who conducted the enquiry. The social worker provided her answers and those answers were deemed and considered to be part of her initial report.

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<sup>3</sup> See the last paragraph of the report.

[20] The Court accepted that the social worker performed her duty objectively and in accordance with the law and her duties. I rejected CW's assertions of bias on her part. I found as truthful that the social worker was not biased in her report. CW has not provided, in his response, any information that I accept as proof of the social worker's bias in her presentation of her report.

[21] I accepted her explanations as provided in her response as being reasonable and credible.

### **Education and Psycho-Social State of NAW**

[22] The fact of the matter is that NAW was not enrolled in school for any consistent period of time since the Order of V. Smith J (Ag) in October 2020 until very late in 2022. There was then a significant absence from school between the end of the Christmas Term of 2022 and May of 2023.

[23] The reasons advanced by CW are, in my view, not acceptable. The evidence suggests that shadows were available for NAW, but, for various reasons, they were not acceptable to either parent and the school refused to admit him without a shadow. So then I ask, why not explore other school options outside of LA if LA was the issue? There is no evidence of any effort on the part of CW to explore other facilities for children with more severe symptoms of Autism Spectrum Disorder (ASD) that are and remain available in Jamaica that may have been more accommodating without a shadow. It seems that there was just a fixation with getting him back to LA.

[24] In my view, for any child, let alone one with ASD, to be out of **any** (emphasis mine) educational system for such prolonged period, is unfortunate. Based on the findings of the social worker and her report on NAW's school life, it seems as though NAW was having very grave difficulty at LA and readjusting to life there in 2023 after such prolonged absences. If that was the case, it was incumbent on

CW, as the primary care giver, to seek alternate schooling arrangements for a more suitable learning institution. There is no evidence that this was done.

**[25]** I do accept the evidence from the social worker in her report that NAW's absenteeism was more than unacceptable and proved to be a hindrance to his development.

**[26]** I found paragraph 5 of CW's affidavit in response, filed on the 27<sup>th</sup> April 2023, to that of CM's affidavit, filed on the 24<sup>th</sup> April 2023, interesting. CW has insisted that the social worker's concern about CW's complaining about the cost of therapy was misplaced. But paragraph 5 of his Affidavit filed on the 27<sup>th</sup> April 2023 bears out the same issue raised by the social worker. In the first sentence of the paragraph, CW highlights the costs associated with the therapy. He then goes on to say that unless he can address NAW's anxiety issues with attending school, then paying for the specialised therapy sessions is essentially throwing away money.

**[27]** This is a most unfortunate statement and betrays that CW, despite what he says, is very concerned about the costs associated with the additional required therapy. It also is evidence, which I accept, that CW is very much aware of the fact that NAW needs these additional therapy treatments, but **he** (emphasis mine) has determined which ones he is going to prioritize based on his own views and not based on the recommendation of any expert in the area.

**[28]** So concerning NAW's education and psycho-social development, I find that there has been a material change whilst NAW has been under the primary care and control of CW. It has not improved much and the child has not been in the required attendance at a formal educational institution. In fact, the evidence, which I accept, is that it has declined.

**[29]** It is my view that based on the home report filed on July 24, 2023, the opportunities for NAW to be enrolled in adequate programmes for his condition are available in the US as in Jamaica. So it is my finding that NAW would not be at a loss.

## Health and Home Life

- [30] Other than the issue with NAW's oral health care, there is no other evidence that NAW suffers any other health issue that has changed. However, the Court is concerned that the oral health of NAW, whilst he was primarily under the care of CW, was in such a bad state that it was noticeable by the social worker. Such a bad state of oral health takes time to develop. In that regard, I can infer and do find, that CW was not properly supervising the oral health care of NAW.
- [31] Indeed, even after being confronted with the social enquiry report and the query from the social worker as to why CW did not take NAW to the dentist, which enquiry I find she made, there is no evidence that CW took NAW to the dentist for the issue to be addressed.
- [32] There is no evidence that the bruising noted on NAW had any connection to CM. It is my view that despite the complaint made by CW to the authorities, he himself has done no follow up work on the investigations. One wonders why not.
- [33] The Court does note the concern of CW as expressed in paragraph 7 of his Affidavit filed on the 27<sup>th</sup> April 2023 about the level of supervision of the welfare of NAW if CM should have care and control over him and take him to the US. However, I would point out that the child care authorities in the United States are fairly resourced to monitor the situation and respond appropriately should there be any issues that arise with NAW's care.
- [34] Indeed, the fact that CW was able to go to the US and retrieve NAW when CM took NAW there in breach of the order of the Court is testament to this fact.
- [35] So I am satisfied that there was a material change in the oral health of NAW, but there was not much other change in the health of NAW since the granting of the 2020 Order. But I find that the change in the oral health was significant enough to be of concern to this Court.



## **Conclusion on Material Change**

- [36] I found as a fact that there has been a material change in the circumstances since the 2020 Order.
- [37] CM's living and working circumstances have stabilized significantly since the granting of the 2020 order. Indeed, I find that they would have improved tremendously. From living in the rough community of De La Vega City to being in a very good home environment in Florida in the United States is certainly a vast improvement.
- [38] She now has a job, which I accept as true, that puts her in a position to provide better care and attention for NAW.
- [39] I also find that NAW's educational and psycho-social status has declined significantly since the 2020 Order. His school life has suffered due to significant stretches of absence from a formal school environment and this has had, I find, a very significant negative impact on his ASD.
- [40] There was also a significant deterioration in his oral health care to the point where it was noticeable by the social worker who conducted the investigations for the social enquiry report ordered by the Court. This is evidence of inadequate supervision of NAW by CW in NAW's oral care.

## **What is in the Best Interest of NAW?**

- [41] The paramount concern for the Court is what is in the best interest of NAW. Whilst the thoughts of the child, the subject of the claim, can and should be considered, NAW is unable to properly express his own views and thoughts on this matter due to his mental state.

- [42] I do not accept the views of either parent as to whom NAW prefers as they are both speculating and they are relying on evidence that is not, in any way, conclusive or even remotely indicative of anything.
- [43] It is also very significant that NAW is a citizen of the United States of America. He needs to reside in his other country just as much as in Jamaica. Since he cannot express any independent view as to his preferred country, to deprive him of the opportunity to reside in his other country would, in my view, be to prevent him from experiencing and benefitting from tremendous opportunities that are objectively available there.
- [44] In my view, in all the circumstances, it would be in the best interest of NAW to vary the existing order to allow for NAW to reside with his mother in the United States.

## **DISPOSITION**

1. The Orders of Vaughn Smith J (Ag) (as he then was) are varied to read as follows:
  - a. Order 1 is varied as follows:
    - i. Joint Custody to both parties (mother and father) with care and control to the mother and liberal residential access to the father (in the circumstances set out in Order 3 as varied below).
  - b. Order 2 is dispensed with
  - c. Order 3 is varied as follows:
    - i. Easter and Summer holidays shall be given to the father. The father shall return the child to the Mother 2 weeks before the child's scheduled resumption of school (at the end of the summer holiday and 1 week in the case of the Easter Holiday) which date of resumption shall be communicated to the father by the mother at the start of the holiday period.

- II. During the period in 1(c)(i) above, the mother shall enjoy liberal access to the child by means of videoconference, teleconference, telephonic or other electronic means of communication subject to reasonable notice being communicated to the father as to date and time of the exercise of the access.
- III. The father shall otherwise have liberal access to the child by means of videoconference, teleconference, telephonic or other electronic means of communication subject to reasonable notice being communicated to the mother as to date and time of the exercise of the access.

d. Order 4 is varied as follows:

- i. The parties shall ensure that the process of renewal of the child's passport commences within two weeks of today's date by the filing of the necessary documentation with the local relevant United States authorities.

e. Order 5 is varied to include the additional provision that the mother shall advise the father of any of the costs within 1 month of the due date for payment and vice versa when the child is with the father in Jamaica.

- 2. Liberty to Apply.
- 3. Mother's Attorney-at-Law is to prepare, file and serve this Order on the Defendant on or before the 15<sup>th</sup> December 2023 by 4:00 pm.
- 4. Leave to appeal refused.

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**Dale Staple**  
**Puisne Judge (Ag)**