[2013] JMCA Civ 12

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES CIVIL APPEAL NO 13/2011

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McINTOSH JA

BETWEEN	**LM**	**APPELLANT**
AND	**CS**	**RESPONDENT**

Gordon Steer and Mrs Judith Cooper-Batchelor instructed by Chambers Bunny & Steer for the appellant

Mrs Vivienne Washington for the respondent

21 and 22 November 2012 and 22 March 2013

HARRIS JA

[1] I have read in draft the judgment of my sister McIntosh JA. I agree with her reasons and conclusion and have nothing to add.

PHILLIPS JA

[2] I too have read the draft judgment of my sister McIntosh JA and agree with her reasoning and conclusion.

McINTOSH JA

[3] Love of their off-spring, whom I shall refer to as "SS" or "the child", for the purposes of this judgment and a desire to act in his best interests, must be taken to be the motivating factors behind the efforts of his mother LM (the appellant) and his father CS, (the respondent) to arrive at suitable arrangements for his care and upbringing, with the help of the court.

[4] The appellant had first initiated proceedings in the Family Court for the parishes of Kingston and St Andrew with a view to gaining access to "SS" who at the time was in the care and control of the respondent. On being granted access, the appellant sought to convince the court that she should be granted custody of "SS" and on 28 January 2009 the court made an interim order granting joint custody of the said child to the parties with care and control to the appellant and residential access to the respondent. Then, on 13 May 2009 that order was varied to the extent that care and control of "SS" was removed from the appellant and given to the respondent. However, on 21 October 2009 the interim order was again varied to restore care and control to the appellant.

[5] The appellant's application for custody was then set for hearing on 23 February 2010 but on that date the parties consented to the following order being made by the court:

> "By consent **IT IS HEREBY ORDERED** that joint custody be granted to both parents Applicant mother [LM] and Respondent father [CS] with Care and Control to Applicant mother [LM].

> **IT IS HEREBY FURTHER ORDERED** that Residential access to be granted to Respondent father [CS] on every weekend from Saturday 5:00 p.m. to Sunday 5:00 p.m. Father to collect child at mother's home. Effective the 23rd day of February 2010. Liberty to apply."

[6] Then followed an application by the respondent made on form number 5058 (which seems to have been designed for variation of orders where a complainant has been adjudged as putative father of a child, ordered to pay maintenance and seeks a variation of "the said order"). It is dated 26 March 2010, approximately one month and three days after the order of 23 February 2010 to which the parties consented (the consent order) and prayed that:

> "the said Order be varied in manner following that is to say
>
> (a) the order be varied that the father gets care and control of the child ["SS"].

on the grounds that (b) (1) The mother will soon be deported out of the Island.

(2) Mother is preventing the father from seeing the child."

This application went before the court on 7 April 2010 at which time the parties again consented, as they did on 23 February 2010, to an order for joint custody with care and control of the child "SS" being granted to the appellant.

[7] The hearing of the application commenced on 23 June 2010 and continued on divers days with extensions of the April interim order at the appropriate points until the conclusion of the hearing on 16 June 2011 when the learned judge handed down the following decision:

> "**IT IS HEREBY ORDERED** that joint legal custody of the child [SS] to the Applicant father [CS] and the respondent mother [LM] with Care and Control to the Applicant father [CS].
>
> **IT IS HEREBY FURTHER ORDERED** that Residential access is granted to the Respondent mother [LM] between Saturday 10:00 a.m. to Sunday 5:00 p.m. The child is not to be removed from the jurisdiction without written consent of both parents. Effective on the 16th June 2011. Liberty to apply."

[8] The appellant is understandably unhappy about this turn of events. On the one hand she has an order which was entered with the consent of the respondent, granting her care and control of "SS" and, on the other hand, the respondent has an order made by the learned judge of the court granting him care and control at the conclusion of a trial which took place some four months after the order agreed to by the parties. These are the background circumstances which have led to this appeal.

[9] For an appreciation of the appellant's challenge to the learned judge's decision it is necessary to give a brief summary of the evidence upon which the learned judge based her findings, reasoning and conclusions.

The evidence

[10] During the course of the trial the learned judge heard from the respondent, the appellant, her employer in whose household she resides and the probation officer who conducted investigations at the behest of the court into the circumstances of the child's upbringing.

[11] It was the testimony of the respondent that he had had care and control of "SS" for three and a half years and that up to 23 June 2010, the appellant had him in her care and control for nine months. When the appellant changed the focus of her application for access to custody, he decided to contest it. He had consented to the appellant having care and control in February 2010 but applied to have that order varied in March of that same year "because the mother has a history of abusing the child". He went on to say that he thought she had changed and wanted to be a good mother but that the child was afraid of her. He spoke of the child's reaction when he is returned to his mother on a Sunday afternoon at the end of his court ordered access but made specific reference to "yesterday" (22 February 2010?) saying that the child cries and screams and said his foot hurt. The child, he said, also reported that "mama bend his hand." The respondent said it was the appellant's handling of "SS" that caused the break-up of their relationship.

[12] In the appellant's testimony it was evident that there were language challenges but her English was sufficient to indicate that she felt that her son loved her and was

saying some of the negative things he said because of things his father told him and from witnessing his father's behaviour towards her. In this regard, her evidence was that "SS" would say things like his father told him that she was bad and that she was going to kill him (that is, "SS"). The respondent has also been mean to her and has shouted at her in the child's presence. When "SS" was nine months old she left the relationship taking him with her. She initially had no settled place of abode and received help from others. Eventually she found employment with her present employers with whom she now resides.

[13] She spoke of incidents of screaming and shouting at the gate of the complex where her employers reside when the respondent would take "SS" to her after school as they had agreed. The people in the complex complained about the noise so the arrangement had to be discontinued. It was her evidence that she did not know if the child loves his father or vice versa but accepts that he needs to have his father's involvement in his life. She wants to go on a one month vacation to Columbia and to take "SS" with her after which she plans to return to Jamaica where she wishes to reside permanently. The appellant further testified that "SS" is happy living with her and she wants to have custody of him.

[14] The appellant's employer was supportive of her opposition to the respondent's application indicating his views that she was the better parent and that care and control of "SS" should remain with her. He described "SS" as a child of his family and indicated

that as such he had the full run of his house. He also gave assurances that the appellant's job was secure and that whatever needed to be done with regard to renewing her work permit would be addressed by his wife when the time came.

[15] The report prepared by the probation officer was admitted into evidence. She had observed "SS" in the presence of the respondent at his home and in the presence of the appellant in her home surroundings. She had also visited the school "SS" attends and interviewed school officials. Her significant conclusions were that:

a. there was a strong bond between the respondent and "SS";

b. the respondent's accommodation was spacious and conducive to the child's physical and intellectual development. On the other hand the mother's accommodation was relatively small and whereas "SS" was energetic and playful in the respondent's environment he was subdued in the appellant's surroundings;

c. the child recounted incidents of physical abuse consistent with what was reported to the respondent and when repeated in the appellant's presence she only smiled;

d. school officials described the child as well balanced and well behaved. He engages in extra-curricular activities, socializes well with his peers, appears to bond with his mother and shows no fear of her. It was also stated that he is doing well academically;

e. one concluding observation was the emotional outburst of "SS" at his father's home when he was told that he was to be taken to his mother's home in contrast to the absence of any signs of anxiety or any fear of his mother when in her presence, in her home surroundings. This led the officer to comment that a child of such tender years may well be susceptible to suggestions and influences of others and that this may be evident in this case.

The learned judge's findings

[16] The following findings were recorded by the learned judge:

1. The child shares a very close relationship with his father which differs from his relationship with his mother.

2. The child did suffer some physical harm from his mother.

3. There is a real risk that the mother will return to her native country Columbia and if granted primary care and control will remove the child from the jurisdiction to a country where the order of the Jamaican court would be unenforceable. Therefore there is a real risk of the child being permanently separated from his father resulting in emotional harm to the child.

4. The father is best suited to provide for the emotional, educational and physical needs of the child. His environment and capacity are more conducive to the child's intellectual and emotional development.

5. There were instances where the father was aggressive towards the mother.

6. The conduct of the father was not of such a nature as to be likely to impact negatively on the child

7. It is in the best interest of the child to maintain contact with both parents. Further, it is in his best interests that both share legal custody with care and control to the father and residential access to mother every weekend Saturday to Sunday.

[17] She expanded on these in the reasons for her decision indicating that the single issue for the court's determination was what was in the best interest of the child, referring to section 18 of the Children (Guardianship and Custody) Act for guidance in that regard. One of the factors she considered to arrive at the arrangement which would best inure to the interests of the child was any harm the child has suffered or is at risk of suffering. Though there was evidence of abuse, she found that it was not substantial enough to produce obvious injuries and that there was some improvement

in that area since the start of the trial and the visit of the probation officer. She also considered the effect any changes in his circumstances may have on "SS". The learned judge described the appellant's residency status as uncertain as also her employment status beyond the duration of her present work permit. Any change in the child's living arrangement which would place him with the applicant (now the respondent) would have positive rather than negative results. On the other hand, the learned judge reasoned, a change of living arrangement placing him in the care of the appellant carried risks of severing or limiting contact with the respondent and would have a negative result.

The grounds of appeal

[18] In her notice of appeal dated 23 June 2011, the appellant formulated one ground, namely that:

> "(a) The learned family court judge did not take all relevant matters into consideration when making her decision."

However, in her further grounds of appeal filed on 6 October 2011, another ground was added as follows:

> "(b) Her findings of fact are not supported by the evidence."

[19] In addition, the appellant also challenged the learned judge's findings of fact and law, namely that:

> "a. The child did suffer some physical harm from his mother.
>
> b. There is a real risk of the child suffering emotional harm were his mother to be granted primary care and control.

c. The applicant [CS] is best suited to provide for the child's emotional, educational and physical needs.

d. The conduct of the applicant is not of such a nature that it is likely to have negative impact on the child ["SS"]."

Submissions

[20] In relation to ground (a) Mrs Cooper-Batchelor contended that the learned judge had failed to have regard to the absence of suitable arrangements by the respondent for the child's education and religious instructions as well as extra-curricular activities. These were factors which the learned judge was obliged to take into her consideration for a proper determination of the matter, counsel argued.

[21] Mr Steer addressed ground (b) submitting that the two bases given by the respondent for his application made on 26 March 2010, to vary the consent order was that the appellant would soon be deported out of the island and that she was preventing him from seeing the child. Accordingly, counsel submitted, the respondent sought an order for care and control of "SS" to be granted to him and also an order preventing "SS" from leaving the jurisdiction.

[22] Counsel contended that in seeking a variation of the consent order, it was incumbent upon the respondent to provide evidentiary support for the grounds stated in his application. Mr Steer submitted that the respondent had to show some new factor having occurred since 23 February 2010 to convince the court that the variation sought was appropriate in all the circumstances. However, Mr Steer contended, the

respondent gave no evidence relating to any deportation and spoke only of two occasions when he went to pick up the child in accordance with the court order granting him access but was told by the appellant that "SS" had gone to a party.

[23] Instead, Mr Steer submitted, the respondent based his case on his allegation that the appellant had "a history of abusing the child from birth" and evidence elicited from her employer relating to the appellant's work permit. Counsel submitted that although the respondent referred to complaints by the child of physical abuse (the breaking of his finger, the hitting of his head against a wall and the throwing of soup in his ear) there was no evidence that this was present behavior; that anything complained of had occurred between 23 February and 26 March 2010. Furthermore, it was the respondent's evidence that she had mended her ways and was making efforts to be a better mother, though the child remained afraid of her and was traumatized whenever he was to be taken to her. Counsel asked this court to say that the report of the appellant smiling when the child spoke of instances of abusive conduct in her presence could well have been an indication that she did not understand what was being said to her because of a language challenge and was merely responding to the child pointing at her. Further, the record did not disclose any changes in the circumstances since the consent order, counsel submitted, but showed that from October 2009, the child has been in the continuous custody of the appellant. To make a variation to the child's living arrangements at this stage would not be in his best interests, counsel submitted and he referred to the case of **Gronow v Gronow** [1979] HCA 63.

[24] Additionally, counsel submitted, it was clear that the risk of harm to which the learned judge referred was the risk of the appellant leaving the jurisdiction with the child permanently but there was no basis for that finding as the only evidence before her was from the appellant who spoke of her vacation plans and her desire to become a permanent resident in Jamaica. In other words, it was Mr Steer's submission that there was no evidence upon which the learned trial judge could properly have made a finding that if she was awarded care and control the appellant would take the child to Columbia permanently. Consequently, counsel argued, there is no real risk of the child suffering psychological harm by being permanently separated from the respondent if care and control was given to the appellant. In short, counsel contended, there was no evidence to justify the variation of the consent order so that the finding of the learned judge was plainly wrong and upon that basis the appellant seeks a restoration of the consent order.

[25] Treating with the grounds generally Mrs Washington submitted on behalf of the respondent that there was evidence of something new having arisen in the matter because the respondent had become fearful that the child was going to be removed from the jurisdiction. To that end, the consent order made in April 2010 had the added feature of a stop order speaking to a restriction on the movement of the child from the jurisdiction. The learned judge had evidence before her of the appellant's current working arrangement and was entitled to look into the future, counsel argued, to see that there was a possibility that the child would be removed to a jurisdiction where

there is no reciprocity, based on the terms of her employment and on the fact that her work permit was due to expire in October 2011, with no indication that it would have been renewed. In support of this submission counsel cited the case of **Judith Thompson v Ronald Thompson** (1993) 30 JLR 414.

[26] Counsel submitted that contrary to the submissions of the appellant there was evidence of physical abuse of the child by his mother upon which the judge was entitled to arrive at her conclusions. She referred to the observations and findings of the probation officer in the report of her interview with "SS" where he not only related two incidents of violent behaviour by the appellant but demonstrated what he alleged was done to him. Counsel said there was no indication in the report that the child was prompted and from all appearances he had spoken and acted voluntarily. Mrs Washington further contended that the appellant's smile when "SS" spoke to the probation officer about her abusive behaviour was an indication that she not only understood but was acknowledging the truth of what was said. Counsel argued that based on the child's level of development the instances related by him seemed to be nearer to the time of the hearing.

[27] Mrs Washington also referred to the probation officer's concluding views that while the accommodation of both parents was conducive to the physical development of the child the respondent's accommodation may be seen as more conducive to his intellectual development. This, counsel submitted, was a factor which would have weighed heavily on the mind of the learned judge, together with considerations of the

time that the appellant would have to spend with the child based on her current working arrangement. Having had the benefit of seeing the parties and speaking to them, counsel submitted, it was for the judge to determine what was in the best interest of the child and with which parent those interests would be best served, to consider the capacity of each parent to provide for the child's educational, moral and physical needs and the real risk of the child being permanently separated from his father as also his constitutional rights as a Jamaican citizen and she cited the cases of **Panton v Panton** SCCA No 21/2006 judgment delivered 29 November 2006 and **Clarke v Carey** (1971) 12 JLR 637, to bolster her submission.

[28] Mrs Washington also cited the case of **Re K (Minors)** [1977] 1 All ER 647 where the court held that if the trial judge having seen and heard the parties, had the benefit of a good welfare officer's report and correctly applied the law, an appellate court ought not to disturb the judge's findings unless the judge failed to take into account something which he or she should or the appellate court is satisfied that the decision is plainly wrong. Mrs Washgington submitted that the learned judge, after due consideration of the material before her, came to a conclusion that was just and fair, always guided by the welfare principle. Counsel further argued that the respondent was entitled to make the application on 26 March 2010 as liberty to apply had been given to the parties in the consent order. She asks that the order of the learned judge be allowed to stand and that costs of the appeal be awarded to the respondent.

Analysis

Grounds (a) and (b) together

[29] Essentially what was before the Family Court was an application to vary a consent order entered into willingly by the parties on 23 February 2010, as far as is discernible from the record and according to the respondent's counsel who submitted that the respondent was entitled to bring his application under the liberty to apply provision of the consent order. In fact, the parties had expressed agreement from the interim stage of the appellant's application, before the final order was made on 23 February 2010. What then had occurred between 23 February and 26 March 2010 to cause the respondent to return to the court for assistance in the implementation of the order to which he had agreed? Mrs Washington submitted that the respondent had become fearful that the appellant would take the child out of the jurisdiction but although in his complaint it had been stated that the appellant was about to be deported from the island, he gave no evidence to support that ground before the learned judge. He gave no evidence about the appellant leaving the jurisdiction or the basis for his alleged fears that she would.

[30] The other ground of his complaint was that the appellant was preventing him from seeing the child. In this regard, his evidence in cross examination was that for two straight weeks he "went to pick up "SS" and was told by the appellant that the child was at a party. He called her from her gate and she kept repeating that "SS" was at a party. To my mind this does not mean that he was not allowed access to the child after

the party and it was his evidence that since the court order "there are no weeks I do not collect ["SS"]." He further testified that "I have access to my child ["SS"] I have access Saturday evening 5:00 pm to Sunday evening 5:00 pm. Prior to this week end the past two weeks I was denied access. I am not satisfied with this access". This raises the question as to exactly when this denial of access occurred because when the respondent spoke of this week end it seems to me that he must be taken to mean the week end prior to 23 June when he was giving his evidence and two weeks before that must therefore be in early June. But how could he be basing his complaint, which he lodged at the Family Court on 26 March 2010, on a denial of access that had not yet occurred? Did the learned judge consider this in her evaluation of the evidence? It is clear that she made no findings pertaining to the grounds of the application.

[31] With no evidence concerning the appellant's pending deportation and no relevant evidence of denial of access upon what was the application for variation to be considered? The respondent took no issue with that part of the consent order granting joint custody to the appellant and himself so the purported award of joint custody on 16 June 2011 was unnecessary. He spoke about an award of custody made in March 2010 in favour of the appellant but at no time in the several appearances by the parties in the Family Court did the record show any custody order made other than a joint custody order so that the applicant's contention that he was seeking to vary that order is clearly mistaken and what he was really seeking was a variation of that part of the

consent order of 23 February 2010 which awarded primary care and control of "SS" to the appellant with liberty granted to the parties to apply.

The effect of an order providing liberty to apply

[32] As I understand the authorities a liberty to apply provision is either expressed or implied where the order drawn up is one which requires working out and the working out involves matters on which it may be necessary to seek the guidance of the court, but it does not permit a request for a variation of the order (see **Cristel v Cristel** [1951] 2 KB 725). Therefore the respondent's application to vary the consent order could not have been considered under the liberty to apply provision of the order. It nevertheless remained an application to vary the consent order by virtue of section 7(1) of the Children (Guardianship and Custody) Act which reads as follows:

> "7.—(1) The Court may, upon the application of the father or mother of a child, make such order as it may think fit regarding the custody of such child and the right of access thereto of either parent, having regard to the welfare of the child, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter vary o discharge such order on the application of either parent , …"

[33] When the court sanctioned the consent order it must be taken to have had regard to the welfare of the child and to the wishes of both parents, accepting that their agreement was in the best interest of their child. Therefore, it seems to me that Mr Steer's submission is sound that for such an order to be varied the party seeking the variation must show that there has been a change of circumstances which make their agreement no longer in the best interests of the child. Mr Steer submitted that nothing

has changed since 23 February 2010 but Mrs Washington submitted that since consenting to the order there has been a development which has caused the respondent to fear that the child will be permanently separated from him. However, all that she has advanced in that regard is the ground he gave for the application and the interim order made in April 2010, before any evidence was heard in the matter. But surely a ground formulated in the application cannot suffice as something new having occurred without evidence to support it. The interim order would have been made upon a bare assertion to the court but at the time of trial the respondent would have been required to prove his case.

The determining factors from the judge's perspective

[34] With no evidence before her to that effect it would seem that the learned judge came to the conclusion that there was a risk of the child's separation from the respondent merely because the appellant is a Columbian national and in spite of her evidence that she intends to make Jamaica her home where she has resided for 11 years and has the support of the persons with whom she is employed. To my mind there was no basis for her finding of this risk. The learned judge seemed also to have had some concerns that the appellant's work permit was drawing to a close but work permits may be renewed and orders may be made by the court in the nature of the interim order to prevent the child's removal from the jurisdiction.

[35] The other concerns which the learned judge expressed about abusive behaviour on the part of the appellant and the adequacy or inadequacy of the appellant's accommodation would have been matters known to the respondent and his attorney at the time of the consent order. It is instructive to note that in relation to the appellant's application, the record disclosed that the interim order made in January 2009 granted care and control to the appellant and while that was varied in May of that same year to an award of care and control to the respondent, care and control was restored to the appellant in October 2009 and has remained so until the present time with the respondent's consent until the judge's order in June 2011. The court was told that the position has been maintained since the judge's decision by virtue of a stay of execution, though I have not been able to find evidence of it in the record. It seems inconceivable to me that the respondent whom the judge regarded as a vigilant parent, ever watchful for the welfare of his child could have consented to the person he said had a history of abusing the child, having care and control of the child from October 2009 and, even when he made his bid for the variation, continued to consent to that status quo remaining in place. I am constrained to agree with Mr Steer's assessment of the unaltered circumstances since 23 February 2010.

[36] In addition, the learned judge, unreasonably in my view, discounted the school officials' observation of a bond between the appellant and "SS" in circumstances where they would have had the advantage of a longer period of observation of parent and child than the learned judge.

[37] As I see it, the matter came down to the difference in the accommodation which was available to the parties. There was no evidence to suggest that as the child grew older, the appellant would not make appropriate adjustments in her living arrangements to meet her altered circumstances and no questions were asked of her if there were any misgivings in that area. The respondent himself was living in rented accommodation. His circumstances were also capable of change. What it seems to me is of critical importance at this point is how the child has been developing in the prevailing circumstances. Here the report of the school officials is telling. They reported that at this point in his development "SS" is well balanced and well behaved, interacting with his peers, friendly, sociable and importantly, performing well academically. However small his mother's living accommodation is and notwithstanding the demands of her job there seemed to have been no basis for the judge's conclusion that the welfare of the child would be any better served with his father than with his mother with whom up to the time of the hearing he was residing.

Conclusion

[38] The authorities are clear on the role which the appellate court must play when called upon to review a trial judge's decision based on findings of fact as in the instant case. I accept as a correct statement of the law applicable in our jurisdiction the opinion expressed by Stamp LJ extracted from his judgment in **Re K (Minors)** relied on by Mrs Washington and summarized in paragraph [27] above. His Lordship's words bear repeating and I adopt them accordingly:

> "…I would emphasize that where a judge has seen the parties concerned, has had the assistance of a good welfare officer's report and has correctly applied the law, an appellate court ought not to disturb his decision unless it appears that he has failed to take into account something which he ought to have taken into account, or has taken into account something which he ought not to have taken into account, or the appellate court is satisfied that his decision was wrong;…"

[39] In the oft cited case of **Watt (or Thomas) v Thomas** [1947] 1 All ER 582 Lord Simon had put it this way:

> "… the decision of an appellate court whether or not to reverse conclusions of fact reached by the judge at the trial must naturally be affected by the nature and circumstances of the case under consideration."

That court held that in circumstances where the appellate court is convinced by the plainest considerations, that it would be justified in finding that the trial judge had formed a wrong opinion the decision ought not to be allowed to stand.

[40] For my part, I am entirely satisfied that the learned trial judge was plainly wrong in the approach she took to the application before her. It was not a fresh application for custody care and control of "SS" but an application to vary the order that the court had already approved on 23 February 2010. It was in those circumstances that the respondent had failed to advance any supporting evidence to justify variation of the order to which he had agreed only one month and three days prior to his application. He gave no evidence in support of his contention that the appellant was to be deported and the judge made no finding on his complaint that he was being denied access to the

child. The variation of the order was plainly wrong in my opinion and ought to be set aside.

[41] Accordingly, I would allow the appeal, set aside the order of the learned judge of the Family Court made on 16 June 2011 and reinstate the consent order of 23 February 2010 as set out in paragraph [5] above.

HARRIS JA

ORDER

Appeal allowed. The order of the learned judge of the Family Court is set aside. The consent order of 23 February 2010 is reinstated. Costs of $15,000.00 to the appellant.