

*THE JAMAICAN BAR ASSOCIATION
CONTINUING LEGAL EDUCATION
OUT OF TOWN WEEKEND SEMINAR
HEDONISM III/BREEZES BEACH RESORT - RUNAWAY BAY*

*SATURDAY, MAY 6, 2000
10:00 A.M.*

*TOPIC: CUSTODY OF CHILDREN

PARENT RIGHTS AND CHILD'S RIGHTS

WHERE DOES THE BALANCE LIE?*

PRESENTER: PRIYA A. LEVERS (MRS.)

*MRS. PRIYA A. LEVERS
ATTORNEY-AT-LAW
14-16 DUKE STREET
KINGSTON*

*TELEPHONE: 876-922-1875 OR
876-967-2363*

INTRODUCTION

The integrity and the independence of the family are the basic building blocks of a free and democratic society and the need to defend it should be clearly perceivable in the law.

Accordingly, unless there is evidence that a child is being, or is likely to be positively harmed or there is a failure in the family the Court should not interfere. However, when a Court does interfere in custody matters the paramount consideration is the “welfare of the child”, but not the only consideration.

In most custody matters, the court is intended to re-enforce rather than to undermine parental responsibility.

In matters of custody it is good for us to be reminded from time to time that our system of law is human, and therefore fallible and that the most we can hope in this sort of case is to achieve a certain type of justice bearing in mind that at all times a decision must be made with the welfare of the child as the paramount consideration which might displease one or all of the parties concerned.

The Child

A child is always a child of a parent. But for purposes of custody a child may be said to be a person under the age of eighteen years. The English common law refused to accept that the mere fact of parenthood gave rise to a legally recognized custodial relationship between parent and child instead it chose to recognize only the legal relationship between parent and legitimate child. However, in Jamaica today the right of custody by either parent to the child is recognized under the (Status of Children Act).

Our jurisdiction does not now draw a distinction between the legal position of a child born of a legally recognized union and that of a child born of any other union or as a result of a casual act of intercourse. Children are all equal in the eyes of the law in Jamaica and of such the question of custody does not necessarily center around husband and wife but a father and mother.

Jamaica is not exceptional in the recognition of illegitimacy, interestingly the Soviets in 1918 abolished the distinction between legitimate and illegitimate children.

CUSTODY APPLICATIONS

The application for custody may be made under three Acts:-

- (1) Matrimonial Causes Act - where the parties are married
- (2) Children (Guardianship and Custody) Act - if parties are not married to each other.
- (3) Affiliation Act which adjudges a man to be the putative father and then rights to custody will flow therefrom.

Either parent or a guardian may make an application for custody under one of each of these acts in the proper circumstances.

Section 7 (I) of the Children (Guardianship and Custody) Act provides that, the court may upon the application of the father or mother of the child make such order as it may see fit regarding the custody of each child and the right of access thereto of either parent having regard to welfare to the child, to the conduct of the parents and to the wishes as well of the mother and/or father and may alter, vary or discharge such order on the application of either parent or any guardian under this Act and in every case may make such order respecting costs as it may deem

just.

Section 2

The court shall not enforce any agreement as to custody if it is of the opinion that it will not be for the benefit of the child to be affected.

The Test

The court will always hold the welfare of the child as of paramount importance.

There is no statutory presumption in Jamaica that joint custody is in the best interest of the minor children. In some states in the United States and Canada this is the case.

A Judge looking at the question of custody, considers - “parents rights - children rights and where the balance lies?” A Judge must take into account not necessarily the overall welfare of the children but also the best interests of the child and in considering this the following factors have been held to be of some importance.

1. The wishes of the child's parents,
2. The wishes of the child,
3. The interaction and inter-relationship of the child, his parents, siblings, and other persons who may significantly affect the child's best interest, and the ability to provide financial and emotional stability.
4. The child's adjustment to his home, school and community
5. The mental and physical health of all individuals in whose the care the child may fall.

Child's Rights

When considering the question of the child's rights under these tests the child's basic human rights are of essential importance, the most important of them for the purposes of these applications are the right to life and the care and protection necessary for his/her well being and development. Another is the right to live with his or her parents, unless separation is in the child's best, interest due to abuse, neglect or any other factor.

As it is the court's duty to consider the welfare and the best interest of the child these must be held superior to the desires of either parent. The

wishes of the parent are entitled to little if any consideration.

SOLE AND JOINT CUSTODY

There is of course the entitlement to be awarded sole custody to one parent with access to the other parent. There is the question of joint legal custody, which means that the joint custodians of the child have all parental right with the exception of physical custody which occurs only during visitation. The court shall not give preference to either parent in issuing the custody order because of the parent's sex. In issuing a custody order the court may consider any preference however shown by the child of an appropriate age and maturity in England 11 for boys, 14 for girls.

In the case of Joint Custody the court may award joint custody even when it is not sought by either parent, when it is determined to be in the best interest of the child. A change of sole custody to joint legal custody is possible on the application of either party. The trial court retains discretion to award joint legal custody of the child when it is determined to be in the best interest of the child regardless of the absence of the parent agreeing on joint legal custody or either parents applying for it.

Joint custody is determined not to be in the best interest of the child however, where the court finds that the parents' manifest bitterness, animosity and inability to reach accord, is affecting the relationship, and undermining the welfare of the child. This is so because it is difficult to have a majority in a committee of two. The discretion is that of the Court's. See Section 8 (1) Children (Guardianship and Custody) Act.

What is very true in these cases is that every case is unique and is to be determined by its own particular facts.

In R vs Gyngall [1893- 2 Q.B. 232-248] it was said that "It is not right to see a guardianship dispute simply as adversarial. It is not a question of which parent has the better case, it is a question of which of a range of options will best promote the welfare of each child".

The jurisdiction was outlined nearly 20 years ago by Lord Cross of Chelsea, when he wrote in "Wards of Court (1967) 83 LQR 207".

"In an ordinary action the court has before it two parties each of whom are certain that legal rights to a decision are in his favour. The function of the judge is to act as umpire in a fight and to decide which side has

won. In a wardship case the court is asked to take the child into its care and decide how, and with whom it is best for the child to be brought up. The rule of the parties is simply to put before the judge for his consideration the suggestions with regards to the child's upbringing".

The supervisory feature of that function has been underlined again more recently by Lord Scarman in the unanimous decision of the House of Lords in Re E [1984] 1 WLR 156, when he said "A court in exercising jurisdiction must never lose sight of a fundamental feature of the jurisdiction namely that it is exercising a wardship not an adversarial jurisdiction. Its duty is not limited to the dispute between the party, on the contrary, its duty is to act in the way best suited in its judgement to serve the true interest and welfare of its ward. It's paramount concern is the welfare of its ward it will therefore be the duty of the court to look beyond the submissions of the parties and endeavour to do what it judges is necessary".

I refer now to two cases, one of which simply sets out the principles under which custody is awarded to either party or jointly and I believe that these principles now have been accepted fairly universally.

The case is D v W (1995) 13 FRNZ 336 (High Court Auckland) Fisher J, and I refer in particular to page 349. It reviews the matter succinctly as set out hereunder:-

The matters to be considered are:

a. Welfare of the Child

b. Love and Security

A child's greatest non physical need is for love and security.

Parental love requires an unconditional and irrational commitment to the child. Security is promoted by a stable family relationship, consistent and dependable attitudes and behaviour, familiar surrounding and a known routine.

c. Opportunity for personal growth

d. Wider family and connections

e. Wishes of the child

f. Damage containment

A child needs a stable and loving relationship with both parents. It follows that whenever possible there should be a strong continuing relationship with the non custodial parent consultation and co-

operation between the parent over the child's future and a separating out of the child's needs from the parent's own grievances and emotional needs, arising from the breakdown.

g. Other considerations

The list of other considerations bearing upon the welfare of the child include physical care, material comfort - however a child can be made just as comfortable in a poor home, intellectual stimulation, educational opportunity and moral guidance.

h. Broad and personalized view

All of the foregoing situation must be taken into account and no one factor should be treated as a decisive approach. It must be personalized to each individual child and family without rigid preconception as to what would best suit every child.

It follows that in cases where a choice must be made between competing custodial parents, a checklist of possible considerations usually also include the following:-

- a. Strength of existing and future bonding
- b. Parenting attitudes and abilities
- c. Availability for and commitment to quality time with the child

- d. Support for continued relationship with the other spouse
- e. Security and stability of home environment
- f. Availability and suitability of role models
- g. Positive or negatives effects of the wider family
- h. Provision for physical care and help
- i. Material welfare
- j. Stimulation and new experience
- k. Educational opportunities
- l. Wishes of the child

In Tremblay v Tremblay (Alberta Queens Bench) Trussler J. (1987), “as a general rule the non custodial parent has the right to access and the child has a right to contact that parent. Denial of such right by the custodial parent without sufficient justification is a form of abuse”.

Where a parent refuses access by the other parent serious questions are raised of parent’s fitness. It is in the child’s best interest to live with the parent who is prepared to co-operate with respect to access where both parents can equally care for the child.

In most custody cases, whether it is sole custody or joint custody, both parents must be prepared to play an important role in the child’s life.

The above principles and check list mentioned in D&W apply not only to a custody application but also to a variation of custody applications due to change of circumstances.

When a party is seeking a change or variation in the custody order he must demonstrate a change in the circumstances affecting the welfare of the child that it has been so greatly altered that there is a strong possibility that the child will be harmed if he continues to live under the present arrangement. Psychological harm, for example, sexual abuse, non access to the other parent, educational failure, and relocation of the custodial parent are other examples.

Custody hearings arise in many ways. When the parties who are married, temporarily separate, or divorced; when two parties who lived together are involved only in a physical separation from each other; when parties do not live together and third parties applying for custody of children, for example, a guardian apply for custody of an infant child in the appropriate circumstances:- unsound mind, in prison, dead or off the island.

All these scenarios raise interesting and unusual heart rending decisions

that have to be made. Whatever circumstances the application is brought before the court the principles and guidelines enunciated in D&W are the ones to be considered by the trial judge.

Most custody matters are not heard in public. The courts endeavour to do the best with the Affidavits and Psychologist evaluations. It is therefore important to have the test previously enunciated in the forefront of the matter and that is the welfare of the child.

What we do not have in Jamaica and what I discovered in New Zealand on a recent visit was the appointment of a legal counsel for the child. This is done by the Family Court automatically and was so done in a recent case involving a Jamaican Attorney who had kidnaped his child and taken him to New Zealand. The role of the counsel for the child is to interview both father and mother, meet with the child, ensure that the child is taken to the Psychologist for evaluation and present a fair and unbiased picture to the court by way of cross-examination of both mother and father. The weakness and strength of each party is highlighted by cross examination by the Counsel for the child. The court does not ask the Counsel for the child to come down on either side of the fence, but purely to highlight the weaknesses and strengths of each

party's case. The matter is one for the court entirely.

Also what I discovered in New Zealand, and perhaps it is something that would assist the backlog in our country, is the requirement for mandatory mediation. In custody matters, there is a requirement that both parties with their counsel appear before an independent judge, that is, not the trial judge. Counsel does not participate openly in the mediation. The parties sit at either side of the table and are allowed to ask questions of each other and make allegations of each other and endeavour to resolve the matter in the presence of an independent judge and their counsel. They may turn to their counsel for assistance in a particular aspect of the matter but counsel is not allowed to address either party. The Judge only intervenes when it is evident that the parties are being purely acrimonious and irrelevant.

If the mediation proceedings work, then there is a consent order drawn up and presented to another trial judge who will review the order and accept it or reject it. If the mediation proceedings do not work, then the matter proceeds to trial.

The following set of facts would bear mediation:-

Two young students unmarried have a child born out of their relationship in Canada. In Canada both parents automatically by statute have joint legal custody. The mother comes to Jamaica and asks the parents of the father to take care of the child while she finishes her final exams. The father agrees. The mother finally finishes her final exams and comes back and the father refuses to give her the child and allows her only supervised access. The father's parents however are willing to be care givers and allow both young people generous access.

In this case, the mother could take the child as the father was not in Jamaica and grandparents were not awarded care nor control of the child by a Court. She has been advised to make an application for sole custody of the child in this jurisdiction as she may wish to travel with the child and make other arrangements for care and control of the child. An ideal case for mediation, initially.

May I now turn to the interesting and fairly complicated cases of child kidnaping and the parents' custodial rights over such a child. Frequently one hears both in this jurisdiction and internationally of a child being kidnaped and taken to another jurisdiction.

THE HAGUE CONVENTION

In Jamaica we are hampered by the fact that although we are parties to the Hague Convention, we have not ratified same. I turn briefly to the articles of the Hague Convention.

The Convention #10 concerns powers of authorities and the law applicable in respect to the protection of infants concluded at the Hague on the 5th of October 1961. It's aim is to establish common provisions and the powers of authorities and the law in respect of the protection of infants.

Article 3

“A relationship subjecting the infant to authority, which arises directly from the domestic law of the State of the infant's nationality, shall be recognized in all the Contracting States”.

Article 4

“If the authorities of the State of the infant's nationality consider that the interests of the infant so require, they may, after having informed the authorities of the state of his habitual residence, take measures according

to their own law for the protection of his person or property. That law shall determine the conditions for the initiation, modification and termination of the said measures. It shall also govern their effects both in respect of relations between the infant and the persons or institutions responsible for his care, and in respect of their persons. The application of the measures taken shall be assured by the authorities of the State of the infant's nationality. The measures taken by virtue of the preceding paragraphs of the present Article shall replace any measures which may have been taken by the authorities of the State where the infant has his habitual residence”.

Article 5

“If the habitual residence of an infant is transferred from one Contracting State to another, measures taken by the authorities of the State of the former habitual residence shall remain in force in so far as the authorities of the new habitual residence have not terminated or replaced them.

Measures taken by the authorities of the State of the former habitual residence shall be terminated or replaced only after previous notice to the said authorities. In the case of change of residence of an infant who

was under the protection of authorities of the State of his nationality, measures taken by them according to their domestic law shall remain in force in the State of the new habitual residence”;

Article 9

In all cases of urgency, the authorities of any Contracting State in whose territory the infant or his property, is may take any necessary measures of protection. When the authorities which are competent according to the present Convention shall have taken the steps demanded by the situation, measures taken theretofore under this Article shall cease, subject to the continued effectiveness of action completed thereunder.

I bring these particular article of the Convention to your attention because, take the case of the kidnaping to New Zealand, had we ratified the Convention, it would be merely a question of producing the Court Order made in Jamaica to have the child placed in foster care and thereafter the Court would have returned the child to Jamaica.

As it is in that case a whole court hearing de nova had to be commenced with evidence being produced in Affidavit form and the entire “territory”

that was covered in Jamaica had to be covered again in New Zealand so that the trial judge could come to a decision based on the evidence presented in New Zealand.

CONTEMPT OF COURT

In CL v CL (1985) 3NZF LR 455

There was a question of a reversal of an order as result of a breach of a custody and access order. The parties were in contempt. On the question of contempt, the court said contempt of court proceedings is based on public policy. "Once litigants put their dispute in the hands of the court system and ask the court to decide it for them, they are bound by the court's decision. The rule of law in our society can operate in no other way. People are not entitled to ignore the court's decision simply because they do not agree with it or because they think it is unfair. Otherwise there would be anarchy. When the court has made a decision it must be accepted and obeyed".

The Privy Council in Isaacs v Robinson [1984] 3 WLR 705 adopted as "All that needs to be said upon the topic" the following passage from

Romer, L J in *Hadkinson v Hadkinson* [1952], "It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless or until that order is discharged. The uncompromising nature for this obligation is shown by the fact that it extends even to cases where the persons affected by an order believes it to be irregular. The first is that anyone who disobeys the Court is in contempt and may be punished by committal or attachment or otherwise"

Surprisingly even where one parent kidnaps the child and leaves the jurisdiction in contempt of court that is not in it self a bar to a suitable parent getting care and control of the child. In *Re L Minors* [1974] 1 WLR 34;

The court looks at the reasons for the contempt and the attitude of the parent and at the end of the day the paramount consideration would be the welfare of the child. Suffice it to say adults who defy the court in the face of a custody order must be looked at carefully vis a vis their respect for the law and standards of behaviour that would be handed down to the child.

THE MOTHER

One further aspect of custody matters is that there is a natural tendency to feel that a mother is the obvious custodian and care giver of a child. There are three possible approaches between a mother and a child of tender years in the determination of the question of custody:-

1. A presumption that care and custody by the mother is in the best interest of the child and that it requires clear evidence that the mother is unfit to deny her care and custody.
2. That on the basis of human experiences and common sense, the bond between the child and the biological mother is by itself an important but not a decisive factor to be taken into account in deciding on the question of custody.
3. There is no principle or presumption that a young child is best left in the care and custody of the mother and the circumstances of each case must be considered. It appears that the English decisions tender to favour the first approach although more recently the second approach is gaining support.

In Findley, "Family Law in Australia" fourth edition, of paragraphs 638 to 647, the Australian cases are considered, these seem to fluctuate between the second and third approaches. The Jamaican authorities have adopted the second approach, Lord v Lord (1981), 18 JLR 288 and Simpson v Condoppa (1988), 25 JLR 44.

CONCLUSION

Therefore the mere desire of one or other of the parents to have the children or any of them must be subordinate to the welfare of the children and can be effective only if it coincides with the welfare of the children. Parents must remember if there is to be any peace and harmony in the lives of the children, it must eventually be through the machinery of the family and not through the machinery of the Courts.

A handwritten signature in black ink, consisting of a stylized, angular shape that resembles a 'Z' or a similar character, followed by a long horizontal stroke extending to the right.

Prepared by: *Priya A. Levers (Mrs.)*
Attorney-at-Law