

THE EASTERN CARIBBEAN SUPREME COURT

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHMT2025/0088 formerly CLAIM NO. ANUHMT2017/0034

BETWEEN:

[1] MCF Respondent

And

[1] EF Applicant

Appearances:

Ms. Joanne Massiah and Mr. Warren Cassell for the Applicant

Mrs. Stacey Ann Saunders- Osbourne and Ms. Karennia Nicholson for the
Respondent

2025: July 14th

July 30th

JUDGMENT

- [1] **BYER, J.:** It has once again saddened this court, that it has before it another example of the way in which parties to divorce, can become so caught up in their own reality that they do not appreciate, the fall out that their actions can have on the children of the union to whom they bear ultimate responsibility.
- [2] The sadness is even more poignant when this court considers that this is a matter that was settled more than 6 years ago and the court is sure that the parties believed that they were able to put this chapter of their life behind them and concentrate on the future as it unfolded and as the dynamics between themselves and their child would morph change and evolve.

[3] The application before the court is one that appears simple on the face of the relief being sought by the applicant, in that he seeks a variation of the order of the court made in 2019, where the respondent was given care and control of the child of the family S, with the applicant having liberal access by way of physical visits in Antigua each and every holiday period. However, it was clear to the court that at the hearing of the matter, the case was anything but simple.

[4] The initial application, filed on 10th January 2025 was a motion of committal filed by the respondent seeking the immediate return of the child S who had travelled to Antigua for the Christmas holidays spending the same with the applicant. On the 8th January 2025, when the child was still in the care of the applicant, the applicant informed the respondent that the child S did not wish to return to Canada where he had been living with the respondent since the making of the order on the 24th October 2019. In response to that application for his committal for his breach of the order of the court, the applicant filed an application supported by a certificate of urgency on the 16th January 2025, seeking to vary the order of the court of 24th October 2019 by varying the terms in relation to care and control inter alia in the following terms that:

- I. S would be permitted to remain in Antigua and Barbuda with the Applicant who shall have physical care and control of him and that;
- II. S would be permitted to spend one half of the summer, spring and alternate Christmas vacations with the respondent with the respondent bearing the cost of that travel.¹

[5] On the 21st January 2025, the committal application was heard and determined and the court found the applicant guilty of contempt and committed him to His Majesty's Prison for two weeks, suspended on certain terms, including the payment of arrears of maintenance payments and that the child S was to be made available for interview

¹ The Order of the 24th October 2019 had ordered inter alia that the child S would reside with the Respondent who would have care and control of him within the country of Canada and that the child was to spend every school vacation with the applicant, who was responsible for the payment of that travel.

by the court and that the respondent was to have weekly access to him by way of virtual means. The court thereafter ordered on the 27th January 2025, that the committal order would stand discharged after a period of three months and the child S was to remain in the jurisdiction of the court for the remainder of the school year while the full trial on the application for variation came on for hearing. That full hearing took place on the 14th July 2025. The court at the close of the matter, indicated due to the nature of the proceedings, it would issue a decision for the parties by the end of the law term. I therefore wish to indicate clearly that although this court will not make specific reference to each and every piece of evidence elicited at trial or in examination in chief, every submission made or case referred to, in the interest of having this decision produced, for the record the court has read and considered them all.

- [6] As the nature of the application before the court is for variation of an order, it is necessary for the court to consider the operative law in relation to the variation of orders for custody, maintenance and access. However, in saying so, this court must also be cognizant that such an application for variation, must in the end result, be in the best interests of the child.

Court's considerations and analysis

- [7] The applicable law in relation to the court's determination of an application for variation is contained in Section 15 of the Divorce Act. At Section 15(5) it is clearly stated that " before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order as the case may be and in making the variation order, the court shall take into the consideration only the best interests of the child as determined, by reference to that change." Additionally at section 15(9), " in making a variation order the court shall give effect to the principle that a child of the marriage should have as much contact

with each former spouse as is consistent with the best interests of the child and for that purpose where the variation would grant custody of the child to a person who does not currently have custody, the court shall take into consideration the willingness of that person to facilitate such contact.”

[8] It is therefore clear that the court is mandated to undertake the exercise in relation to variation by bearing in mind the following

1. that there has been a change in circumstances since the making of the last relevant order in relation to that child,
2. that the court must consider the best interests of the child in making any such variation and;
3. that the child should have contact with both parents and must also consider if in making the variation that the parent with whom the child resides will support that access to contact.

[9] The starting point must therefore be the evidence that supports the application for variation, and whether the evidence that is led supports first and foremost, the changed circumstances that underlies any application for variation. In that regard, the provisions of the Divorce Rules 1998 should be noted.² By Rule 24 an affidavit in support of an application to vary an order for custody or access under Section 15 of the Divorce Act, should contain the following,

- the place or ordinary residence of the parties and the children of the marriage,
- the current marital status of the parties,
- particulars of the change in circumstances relied on,
- particulars of current custody and access arrangements and of any proposed change,

² These rules are still technically in force in that the Family Proceedings Rules 2022 promulgated in 2022 did not specifically repeal the Divorce Rules.

- particulars of current support arrangements and any proposed changes,
- particulars of any arrears of support or agreement and
- particulars of any efforts made to mediate the matters in issue or of any assessment made in relation to custody or access.

[10] In the case at bar the application was supported by the affidavit of the applicant in which a myriad of allegations were made in relation to the respondent and the respondent's relationship with S, which the court can only surmise were included to give context to the changed circumstances which led to S remaining in Antigua in January. However this court wishes to go on record to say the following in as reticent a manner as I can, so as not to give either party any ammunition to use against the other by relying on any judicial pronouncement.³ I will say, that in relation to the allegations of abuse that were lobbed at the respondent in the affidavit of the applicant, this court finds were categorically not made out. In this court's view, a decision by a parent who has day-to-day control of a child, must be considered in the light of the best decision that parent makes in order to effect the parental style that that parent adopts. Thus, the deprivation of a phone from S for an extensive period, although may have been seen as excessive, was not abusive in a situation where the respondent had no ability to craft parental controls on that phone. Further, the actions of the respondent in seeking assistance for S with what was determined by an expert as to his shortcomings in relation to his executive functioning and taking advice from professionals which included the use of medication, cannot be seen as abusive. Any parent who seeks advice and is given advice is entitled to rely on that advice where it is professionally provided and reliable, even if it may appear to be counter to their own personal beliefs.

[11] That being said, in the applicant's affidavit it is was quite evident that some of the details required by the Divorce Rules were missing such as his current marital status, details of the maintenance arrangements and the changes he sought to

³ **Foster v Foster** [1977] FLC 90-281

make to those as well as any details in relation to efforts he would have made with the use of mediation to resolve the conflict, save his passing reference to a conversation he had with the respondent, asking her to consider the wishes of S not to return to Canada.⁴

[12] Be that as it may, even though that information may have been useful for the court in the overall consideration of the matter, and that the wording of the Divorce Rules make the inclusion of such information mandatory, there is no sanction implied or explicit for such failure. Thus, in this court's view, it must be that such failure would only impact the overall tenor of the evidence if it failed to establish any grounds at all for the court to consider on a variation application. The court is not satisfied that pertains here.

[13] Thus, this court is satisfied that it only needs to be satisfied that there has been a material change in circumstances of the child since the last custody order was made. In the seminal case of **Gordon v Goertz**⁵,

“ 11. The requirement of a material change in the situation of the child means an application to vary custody cannot serve as an indirect route of appeal from the original custody order. The court cannot retry the case, substituting its discretion for that of the original judge, it must assume the correctness of the decision and consider only the change in circumstances since the order was issued.....

12. What suffices to establish a material change in circumstances of the child? Change alone is not enough; the change must have altered the child's needs or ability of the parents to meet those needs in a fundamental way: **Watson v Watson** (1991) 35 R.F.L. (3d) (B.C.S.C) The question is whether the previous order might have been different had the circumstances now existing prevailed earlier: **MacCallum v MacCallum** (1976) 30 R.F.L. 32 (P.E.I.S.C) Moreover the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. “ What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place.” J .G. McLeod , Child Custody Law and Practice (1992) at p 11-5.

13. It follows therefore that before entering on the merits of an application to vary a custody order, the judge must be satisfied of (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the

⁴ Paragraph 19 affidavit of the Applicant filed 16/1/2025

⁵ [1996] 2 S.C.R . 27 at paragraph 10 and referred to with approval in the case of **Melson McMillan v Zoe Walcott – McMillan** BVIHMT2016/0065 per Ellis J (as she then was)

needs of the child (2) which materially affect the child and (3) which was either not foreseen of could not have been reasonably contemplated by the judge who made the initial order.”

[14] In that regard the applicant had this to say, which the court ascribes as the nub of the changed circumstances that he said compelled him to make what cannot be considered anything else than the unilateral move to keep S in the jurisdiction.

[15] At paragraph 18 of the affidavit in support of the application, the applicant stated this,

“... When I began to make plans for our son’s return to Canada approximately 10 days ago, he was adamant that he did not wish to return to Canada at this time. He disclosed certain information to me regarding inter alia, his home environment in Canada, the ongoing conflicts with the Respondent, the steady deterioration of their relationship and his fragile emotional and psychological mental health.”

Paragraph 22 of the affidavit in response filed on the 22nd May 2025 (the May affidavit)

“S has told me repeatedly that his home environment is highly stressed and his mother’s parental style and her desire to dictate to him and control every aspect of his life without every considering his opinions, views and feelings only exacerbates the ongoing rift between them”

Paragraph 27 (the May Affidavit)

“...S has told me repeatedly about the ongoing extreme difficulties he was experiencing with the respondent. His account of their deteriorating relationship was corroborated by the Respondent who reached out to me on several occasions to assist her to “ control him and his behaviour”.

Paragraph 28 (the May Affidavit)

“ In fact, since the summer of 2024, S told me that he wanted to move back to Antigua and again chronicled a myriad of challenges and issues he was having with the Respondent which were the underlying causes for his deep despair and unhappiness. From my knowledge and belief, he also told the Respondent that he wanted to move back to Antigua”

and finally Paragraph 31

(the May Affidavit) “ I cannot pretend not to hear my son’s pleas and pretend that all is well with him in Canada”.

[16] When the court considers the totality of this evidence the court is satisfied, even after having heard the evidence of the respondent at the trial of the matter, who this court finds has done all that she could have done as a responsible caring parent , that there has been a change in the way that S now fits within the familial structure contemplated in the initial custody order.

[17] That being said however it must be made clear that this court even though satisfied that there has been a change, that being the age of S now, as compared to him 6 years ago, and giving that age a voice (something to which this court will return to shortly), this court must forever be reminded that even where there are changes that are evident, that the best interest of the child must still be paramount.

[18] In the article published in the International Journal of Law and the Policy of 2015⁶ the authors Goodburt, Parent and Saint-Jacques defined the best interest of the child as the following- acts that provide the child with stability, protecting them from parental conflicts and preserving the primary relationships they have developed. This assessment of what is the best interest of the child at the end of the day, the learned authors surmised, should not solely be undertaken from the perspective of the parent but also due consideration being given to the perspective of the child as to what is in the best interest of that particular child.

[19] In undertaking this assessment, the court must therefore be mindful of the long-term welfare of the child.⁷

[20] This term, best interest of the child has therefore been read interchangeably with the term that the court must consider the welfare of the child as its paramount concern, which my brother of blessed memory Thomas J in **Theresa Massicotte v**

⁶ 2015 Vol 29 Issue 3 Dec at page 272- “Positions taken by judges and custody experts on issues relating to the best interest of children in custody disputes in Quebec.”

⁷ **M v M (Custody of children)** 1983 4 FLR 603

Ashley Arthurton Massicotte⁸ interpreted to be the happiness of the child or as Ramdhani J in **GC v LC**⁹ put it, in quoting from **J v C**¹⁰ “ that [it] must mean more than the child’s welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they [the words] connote a process whereby when all relevant facts, relationships, claims and wishes of parents, risks, choices, and other circumstances are taken into account and weighed, the course to be followed will be that which is the most in the interests of the child’s welfare as that term has now to be understood.”

[21] In the case of **Durity v Benjamin**¹¹, the learned Judge Basdeo Persad-Maharaj set out what may be considered a formula to strive to achieve an order that adheres to the principle of the best interest of the child or making the welfare of the child of paramount importance. He identified the following:

- Behaviour and characteristics of the parties.
- Child’s education
- Whether the child is suffering from any serious illness.
- Accommodation and material advantages.
- Satisfaction of the child’s basic needs.
- Whether the custody application is bona fide or not
- Wishes of the parent and if possible, wishes of the child.
- Sex and age of the child and ages of the parents
- Religion of the child.
- Happiness of the child.
- Future prospects of the child if granted to one parent.
- Question of access to the unsuccessful party.”

⁸ DOMHMT 2012/0081 at paragraph 34

⁹ BVIHMT 2015/0023 at paragraph 20

¹⁰ [1970] AC 686

¹¹ (Unreported) 30 July 1993 HC, Trinidad and Tobago (No 156 of 1993)

Elements of Child Law in the Commonwealth Caribbean by Zanifa McDowell page 177

[22] In the case at bar, this court is satisfied that the ability of the applicant and the respondent to care and provide for their son is almost, if not equal. The court is satisfied, on a balance of probabilities, that there is an ongoing dynamic between these parties and it is clear that their personalities would dictate their very different parenting styles. Thus, this court is satisfied that under the above headings at (d) and (e) they would both be able to provide for their son by meeting his basic needs, accommodation and material advantages including extended family settings. The court does not believe that this application is anything but bona fide so will not consider (f) above. Additionally, no evidence was given as to the future prospects of S if he remains in Antigua or as to any religious context of the parties.¹²

[23] However it was clear to the court that in-depth consideration has to be given to the other matters to be included in the final analysis

Behaviour and characteristics of the Parties

[24] When this court considers these parties, the way in which they gave their evidence and the clear attachment that they have for S, it was pellucid to this court that there was and is a fundamental incompatibility between these parties on what they both consider the important aspects of family life and more importantly how that should be addressed.

[25] Nowhere was this more clearly indicated than in the report of the expert Mrs. Jittan-Johnson provided to the court. Under the heading Parental Functioning and Personality assessment, Mrs. Jittan-Johnson made the following statement:

“the personality profiles of each parent demonstrates clearly why they experience challenges within their co-parenting relationship due to contrasting interpersonal styles. [the mother] is described as modest and passive in her communication. She appears less confident or skilled in asserting herself in contrastHe is comfortable in social settings and interactions where he can maintain some level of control...may be perceived as ...leaderlike which could contribute to the

¹² (I) and (K)

perception of imbalance in decision making or communication dynamics between the two parents.”

[26] It was also clear to the court at the trial of the application that regardless of the protestations of both parties and in particular the applicant, the manner in which the marriage broke down and the subsequent way in which S came to live in Canada (still referred to as absconding by the applicant) causes them to harbour some resentments and mistrust which impacts unfortunately how they communicate (or do not) about S.

[27] The court must therefore consider how the parties’ latent animosity will affect S as he gets older.

Child’s Education/Whether the child is suffering from a serious illness

[28] It was clear from the reports provided from Canada that the transition of S to High School had created some challenges. This was also coupled with a diagnosis of ADHD, which diagnosis has pulled the parents even further apart in their fundamental agreement as to how such a diagnosis should be addressed.

[29] At the trial of the matter, the applicant admitted that although S had been promoted to 3rd Form at the school which he attends in Antigua, he did not perform as well as he had attempted to suggest in his evidence and it is clear that S needs support on that front. In fact, the applicant further admitted on cross examination that he had not accessed any support for S but recognized that academics were important for S to continue to higher education, even as early as now.

[30] The expert that presented evidence to the court disagreed that S was in fact an ADHD sufferer and that her assessment did not support a diagnosis of ADHD.

[31] The court therefore is in the unenviable position of being faced with two diametrically opposed diagnosis, both given by competent individuals. Therefore, the very real possibility that S may need some form of mental health support, coping skills or

even medicinal intervention cannot be determined by this court but it is apparent that there needs to be further assessment which is supported by both parents.

Access to the other party

- [32] One of the factors that the court is mandated to consider on an application for variation is how the parent to whom custody is given will facilitate contact with the other parent.
- [33] For the last 6 years it was clear that the respondent has adhered to the access order made by the court and has ensured that S has travelled to Antigua for each of his school holidays. Unfortunately, the applicant has not been so easily amenable and in fact the court takes note of the order that was made against the applicant in 2020 at the onset of the Covid 19 pandemic. It was during that time that the applicant caused S to remain in Antigua for an extended period and for which the court was required to intervene to have his return made to the respondent.
- [34] It was also clear to the court that even during the interim order of this court, when the court ordered virtual contact with the respondent and access when the respondent travelled to Antigua to see S, that the applicant did not seem to willingly enable the contact.
- [35] Indeed, it was clear to the court from the evidence elicited on cross examination from the applicant that he seemed to consider that open communication with the respondent or even active engagement with her and S as a family unit or even to encourage access with the respondent by S, was not his primary concern.
- [36] It would therefore be necessary if the court is satisfied to vary this order to have clear orders in place in facilitate access and visitation by the non-custodial parent.

Wishes of the parent/wishes of the child/happiness of the child

- [37] In this matter, and in this court's mind this is a matter which takes primary importance in this case at bar, the court having accepted that this is the true basis of the application stripped to its bare bones, that is the wishes of S.
- [38] It has long been accepted that the wishes of a child, although ranking high in the list of matters which a court should consider, in their best interest, that their view is not ever considered determinative. In the case of **Melson McMillan v Zoe Walcott-MacMillan** ¹³ Ellis J (as she then was) at paragraph 52 encapsulated it in this way, "the courts have held that the child's views must be considered and may but not necessarily must, carry more weight as the child grows older. Rather it has been said that where all other factors are even, it is appropriate to recognize the extra significance of an older child's views."¹⁴
- [39] Indeed, as counsel for the applicant sought to impress on the court that S's voice should be heard in this matter, she also quite rightly indicated that such a consideration should be taken into account in the totality of the matter. This position, although approached from a different vantage point, was agreed to by counsel for the respondent but that it was for the court to ascribe as much weight to those wishes as was warranted in the circumstances of what the respondent considered to be parental alienation or manipulation by the applicant.
- [40] In this regard, the court is guided by two factors, independent of the wishes conveyed by the applicant to the court. The first was the added voice of the expert Mrs. Jittan-Johnson. Mrs. Jittan-Johnson as her number one recommendation to this court, stated categorically that given his age and emotional maturity (accepted by the respondent as emotional intelligence) that S's preferences regarding his living arrangements should be considered seriously not having found any factors of coaching or manipulation. In fact, on questions from counsel for the applicant she

¹³ Supra

¹⁴ **Rupertus v Rupertus** 2012 BCCA 426 at para 13

used terms in relation to S as “sufficiently mature”, capable of understanding ramifications of his decision” and “capable to make such decision.”

[41] The other factor the court had at its disposal was its own interview with S, at the very start of the proceedings. Although the content of that conversation was not divulged to the parties, as S did not give me leave to do so, this court is satisfied that what it saw and heard in January 2025 completely mirrored the findings of the expert. However, I wish to make it clear that this private interview was not with a view to obtaining any preference from S as to his living arrangements, although they did arise in the conversation, but rather to “...obtain a better idea of the nature of the child. It is helpful to a judge considering the difficult question arising in custody cases to know the child as well as he can.”¹⁵ Indeed, as was said in the case of **K.M.H v P.S.W**¹⁶ “the judicial interview is not intended to be an evidence gathering exercise or to give the child an opportunity to provide factual information about the dispute between his or her parents. Rather it allows the court to hear from children directly in their own words about their wishes and views. As observed by the court of appeal in *Rupertus v Rupertus*, the children’s views are not determinative but provide useful context for considering the evidence as a whole.”

[42] In that context, this court is therefore very cognizant to the expressed views of S. The court found him to be an articulate and open child, although wary of talking to yet another professional (in whatever capacity) about himself. He will be 14 in two months, and this court must recognize the total futility of completely disregarding the clearly stated wishes, even if they were obtained by the manipulation of the applicant, a finding of fact I do not make. As the court in the case of **Shapiro v Shapiro**¹⁷ stated, “...no matter how that feeling on the part of the [child] was induced, it is present and real and the [child] now honestly wants to live with her father”. The learned judge then went on to say “I cannot conceive in ordinary circumstances why the wishes of a [child] of 15 years of age who, without

¹⁵ **L.E.G v A.G** 2002 BCSC 1455 at para 30

¹⁶ 2018 BCSC 1318 at paragraph 39

¹⁷ 33D.L.R (3d) 764 at 766

necessarily any fault on the part of the mother, has turned against her should be ignored by a Court.”

[43] This court endorses this view. It cannot be denied that for an order in relation to teenage children to be practical, they should in large part “reasonably conform with the wishes of the child.”¹⁸

[44] Taking the matter in the round, the court considers that given the age of the child, the fact that the court is satisfied that the applicant is not a danger to the minor child, that the relationship between S and the respondent, although remains largely intact in terms of emotional attachment, it is also clear that the respondent is also responsible for raising a child who can clearly articulate challenges he has with his relationship with the respondent, which must be heard. That being said, the court does not believe that the respondent has done anything to bring about those feelings of discontent in S, however this court must be realistic and pragmatic in line with case law that it must do what is needed for the child at the present time. I am therefore satisfied that the applicant has met the threshold for the variation as sought. I will therefore make the variation in part as sought by the applicant with clear parameters to ensure that the applicant understands the tremendous responsibility he now bears for S and that how he needs to conduct himself in relation to the respondent including immediately desisting from referring to her in denigrating terms. If the applicant is unable to so conduct himself as strongly advised by this court, the court will not hesitate to consider further variation upon application.

The order of the court is therefore as follows:

1. The order of the court of the 24th October 2019 is varied in the following manner:

¹⁸ **O’Connell v McIndoe** 166 D.L.R (4ed) 653 para 13

At paragraph 3, EF shall have daily care and control of the minor child with unrestricted access to MCF until he reaches the age of 16 or finishes secondary school whichever one shall come first.

At paragraph 4, S shall relocate to Antigua and Barbuda where he shall remain until the age of 16 or finishes secondary school whichever one shall come first.

At paragraph 5, MCF shall have access to the minor child for the full duration of all school vacations per the yearly school calendar including the remaining portion of summer 2025 up to the age of 16. MCF shall have leave to remove the minor child from Antigua during those school vacations and remain with MCF wherever she may be during those vacations. Should MCF travel to Antigua to visit the minor child, she shall have unrestricted access to the minor child. The Cost of the travel of the minor child to and from Antigua shall be borne by the Applicant and Respondent in equal parts.

At paragraph 6, all such payments shall cease upon the minor child returning to the state of Antigua in August 2025 for the start of the school year and recommence as per the original order upon his return to the respondent

Court also orders that the applicant is to take steps to put the following in place before the 31st August 2025

- a. To add the respondent to the school parent portal as co parent for S
- b. To put together and present a structured and detailed plan for the support systems that will be made available to S for the upcoming term for both his educational and mental health needs.
- c. To present the respondent with at least 2 options for the operating of a parallel parenting process in which they can both participate.

The failure of the applicant to complete any of the above noted matters without a reasonable explanation, shall result in a breach of this order,

which shall empower the respondent to make all relevant applications for a revisiting of the terms of the variation as herein set out.

2. Each party is to bear his or her own costs.
3. Liberty to apply

P. Nicola Byer
High Court Judge



By the Court

Registrar

Postscript: This court wishes to rely on the words of the court in the case of O'connell v McIndoe ¹⁹ which in these proceedings are very apropos, "this decision will be profoundly disappointing to the mother. It may appear that the father triumphed in his program to alienate her son from her and that a 13 year old boy is allowed to make decisions about his own life which are not in his best interests. It must be recognized however that the damage to the relationship [whether real or imagined] however it was caused cannot be repaired and indeed will probably be exacerbated by forcing teenagers to act against their will."

¹⁹ Supra at paragraph 15