

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCv2019/0162

BETWEEN:

KIMBERLY WHITE

Petitioner

And

CRAIG JOSEPH

Respondent

Appearances:

Ms. Joanne Massiah for the Petitioner

Mr. Kendrickson Kentish and Mr. Jamal Gordon for the Respondent

2025: February 20th;
March 19th

JUDGMENT

1. **BYER, J.:** "If the family were a boat, it would have to be a canoe that makes no progress unless everyone paddles."¹
2. This court finds that the above quotation fully and completely encapsulates what is needed by a family to meet common goals and work together. In this court's mind, this present case is a clear example of where there are two different boats, two different destinations and one child whom the captain of each boat wants with

1 Quotation by Letty Cottin Pogrebin – American author and founding editor of "Ms Magazine."

them. A sad and unfortunate state of affairs, but slightly different from most as this child has categorically stated his preference. A preference which counsel for the Respondent has urged the court to fully consider.

3. The application before the court is one that appears simple on the face of the relief being sought by the applicant. 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 26th July 2024 as an application of urgency, sought the assistance of the court to ensure compliance by the Respondent to a consent order made between the parties on 11th July 2022 (the consent order). I will return to the terms of the said order shortly. By the time the matter came on for its first hearing on 31st July 2024, it was clear that the assistance of the court was to act as a bridge between the parties and to allow them to find a way to act upon the terms of the consent order. However, by the time it was finally heard in December 2024, as the final date before the end of the term, it had become clear to the court that the application had, in fact, morphed into an application for variation as both sides agreed that the manner in which access and custody had been agreed upon some two years previously was not now working for the child or the parties.
5. The trial of the matter therefore on 20th February 2025 was solely about whether the terms of the consent order should prevail or whether the court should vary the same to effect a better division of time as between the parents.

[6] Since the terms of the consent order are in fact critical to the matter now before the court the same are set out verbatim herein:

“It is by consent ordered that:

1. The Applicant/Petitioner and the Respondent shall have joint custody of the child of the marriage.
2. There shall be a continuation of alternate weekly access as per the order of the 13th of August 2020. Each party shall be allowed

reasonable telephone contact with the child whenever the child is not in his/her care.

3. The Applicant/Petitioner shall continue to collect and return the minor child on each occasion.
4. The Respondent is to provide to the Applicant during the period of access any relevant academic materials in his possession as well as uniforms, school supplies and stationery required for the child's education. The Applicant/Petitioner shall return the same during the access period of the Respondent.
5. Each party shall be responsible for the maintenance of the child during his/her care
6. The parties shall equally contribute towards the educational and medical expenses of the child of the marriage when incurred until the child attains the age of 18 years or until he completes his tertiary education whichever one is later.
7. The parties are at liberty to apply for a variation of this order."

[7] The nub of the application is therefore seeking to vary paragraph 2 and tangentially paragraph 1 of the consent order.

[8] The sole issue for the court's determination is therefore whether the present access arrangements for the child of the family should be varied, allowing for the child to remain with one of his parents with liberal weekend and vacation access to the other parent.

Court's considerations and analysis

[9] In considering the evidence that was adduced in this matter, from the applicant, the respondent and the social worker who prepared the social inquiry report with the minor child's wishes clearly articulated, the court accepts and finds the following:

- a) Both the applicant and the respondent love their child. This is the only child for the respondent and the applicant's third.
- b) Both the applicant and the respondent say they want the best for their child but it is clear that they are incapable of burying the proverbial hatchet as between them
- c) the minor child is clearly very cognizant of the ongoing conflict as between his parents and although there was no psychological report, it is also clear from the conversation relayed by the social worker in her evidence, that he seeks to broach that gap by accepting that he needs to share his time between his parents
- d) that the minor child having made it clear to the social worker that his preference is to remain primarily at the respondent's home while visiting the applicant on weekend may have been influenced on the two clearly disparate parenting skills and styles noted by the social worker as between the applicant and the respondent whereby the respondent is more lenient than the applicant who is more schedule oriented.
- e) There is an urgent and imperative need for the parties to engage in co-parenting classes to understand their role and functions as divorced persons of a young child who they will still need to parent into his majority.

[10] That being said the critical consideration for this court must always be in cases of this nature, the best interests of the child.

- [11] In the article published in the International Journal of Law and the Policy of 2015² 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.
- [12] In undertaking this assessment, the court must therefore be mindful of the long-term welfare of the child.³
- [13] 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 Ashley Arthurton Massicotte**⁴ interpreted to be the happiness of the child or as Ramdhani J in **GC v LC**⁵ put it, in quoting from **J v C**⁶ “ 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.”

2 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.”

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

4 DOMHMT 2012/0081 at paragraph 34

5 BVIHMT 2015/0023 at paragraph 20

6 [1970] AC 686

- [14] Thus in undertaking this exercise, this court must be mindful as much as it can, not so much as to the wishes of the parents (which of course fall within the matters to be considered⁷) but more so as to which parent can meet the needs of the child at this particular point in time and who is able to foster the relationship with the non - custodial parent to ensure that the child has contact with both parents.
- [15] In this case, this is even more important, given the fact that the relationship between the parents at present is clearly still very acrimonious and to some degree toxic which manifested itself in the charges laid before the court against both of them in 2024 for assault.
- [16] In the case of **Durity v Benjamin**⁸, 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:

- “a) Behaviour and characteristics of the parties.
- b) Child’s education
- c) Whether the child is suffering from any serious illness.
- d) Accommodation and material advantages.
- e) Satisfaction of the child’s basic needs.
- f) Whether the custody application is bona fide or not
- g) Wishes of the parent and if possible, wishes of the child.
- h) Sex and age of the child and ages of the parents.
- i) Religion of the child.
- j) Happiness of the child.

7 Re O (Contact; imposition of conditions) [1995] 2 FLR 124 at 128

8 (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

- k) Future prospects of the child if granted to one parent.
- l) Question of access to the unsuccessful party.”

- [17] However, at the end of the day, there is never a hard and fast or simple answer to this question and as the court at first instance declared in the case of **Brixey v Lynas**⁹ “the decision [to be made] is Solomonic in its difficulty” and like that court in its discussion on the matter, this court can “...lay no claim to Solomon’s traditional wisdom.”
- [18] 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 despite there being an ongoing dynamic between these parties and the fact that it is clear that their personalities would dictate their very different parenting styles, they would both be able to provide their son with the requisite education and assistance, meeting his basic needs, accommodation and material advantages including extended family settings.
- [19] However, this court must also put into this mix the clear indication from the social worker of the wishes of the minor child, who is will be 13 years old in a few months.
- [20] Indeed, it cannot be doubted that the court should be at liberty to rely on reports produced for the benefit of the court proceedings and the parties. As was stated in the case of **Foster v Foster**¹⁰ in Australia, “the discretion of the court to admit a welfare report into evidence is without limitation.... we see no inhibition against full weight to the report insofar as it is not inconsistent with any other sworn testimony before the court.” In fact, in this instance, it was clear that both the applicant and the respondent relied on the evidence of the social worker to advance their

9 [1996] UKHL J0704-1 at paragraph 5

10 Supra

respective cases as to the maturity level of the child and the repetitive assertion of the need for co-parenting skills for both parties.

[21] That being said, the assessment of the court must be approached with the broadest brush stroke as possible, taking into account the wishes of the child as expressed through the social worker, the firm stand of the applicant that the child is in need of structure and the desires of the respondent that the child should remain with him where he is comfortable and well looked after by him and his extended family. The assessment is therefore not one that can ever be seen in absolutes. That is that there is only one way to view what would be in the best interest of a child.

[22] This court can clearly see from its broad overview that this child must be given the best opportunity to develop and grow. This court believes that in the round, that at this juncture of the child's life, structure and routine which can be supplied by the applicant but which are required to be balanced with unequivocal access to those things that bring him joy (or happiness) like looking after his animals on his father's farm or engaging in football, which can be provided by the respondent. To achieve this this court must therefore impress upon the parents of this child that the onus lies on them to find a workable solution to the impasse and in the meantime, to assist that process and to grasp a better understanding of their own need to be guided by their parental obligations, the court makes the following determination;

- i) The minor child shall remain in the care and control of the applicant for three weeks in every month. The fourth week is to be spent with the respondent at his home and the respondent shall also have three weekends in a month to run as consecutive weekends. In this court's mind this will balance both the desires of the child and those of the parents, allowing for an access arrangement that ultimately is to the benefit of the child. However, as it appears that the parties also need structure the

access and control for the avoidance of doubt will be as follows commencing the 31st March 2025:

a) The child shall remain with the applicant during the week from the 31st March to the 21st April 2025. From the 21st April (after school) to the 28th April the child shall remain with the Respondent and be returned to his mother at the end of school on the 28th April. Thereafter the change will take place every three weeks.

1. In relation to the weekends, the respondent shall have every weekend commencing from the second week in the month to the weekend which is included in his week that he has the child in his custody.

1. So again, by way of example in April 2025, the respondent shall have the weekends of the 12th, 19th and 26th.

2. The change over for the child shall take place according to the terms of the order of this court dated the 31st July 2024 unless the parties agree otherwise.

3. Each school vacation shall be shared equally as between the parties with the first half of any vacation period being with the respondent and the second half of the vacation period being the period prior to school's re-opening with the applicant

4. The court is cognizant that this initial period in 2025 shall include the Easter vacation of the child, however, by way of having the arrangements commence and continue for the purpose of understanding the same, the sharing of access for Easter vacation 2025 shall be forfeited.

- [23] In relation to the matter raised in submissions by counsel for the respondent that there be a variation of the order for joint custody to entertain an order for sole custody, this court does not find favour with this submission at this time. It is accepted by the court that an order for joint custody works best between two people, who are perhaps singing from the same book if not the same page and certainly these parties are in two complete different parts of the choir. However, I have heard them both say to this court and this court is taking them at their word that they are prepared to do better and communicate with each other.
- [24] This court is therefore hoping that at some point these parents will recognize that they need to be as mature as their son appears to be and understand that they must "... accep[t] the other on an equal basis as one with whom the responsibility for the child can be shared, in accepting that the child must physically reside with one or other of them, and in accepting that generous access by the other parent is an essential part of the arrangement.."11
- [25] The order for joint custody therefore remains, and the parties are mandated to undergo a programme of co- parenting classes that may be accessed through the Family and Social Services Division as a matter of urgency. A report by the relevant officer in charge of such programme is to be made to the court at the completion of the process, for the court to determine whether its intervention is further required at that point. The court upon application may at that point reconsider its position with regard to sole custody.
- [26] **The order of the court is therefore as follows:**
1. The order of the court of the 11th July 2022 is varied in the following manner:
 - i) The minor child shall remain in the care and control of the applicant for three weeks in every month. The fourth week is to be spent with the respondent at his home and the respondent shall also have three weekends in a month to run as consecutive weekends.

11 **Kruger v Kruger** 104 D.L.R. (3d) 481

ii) In relation to the weekends, the respondent shall have every weekend commencing from the second week in the month to the weekend which is included in his week that he has the child in his custody.

iii) The changeover for the child shall take place according to the terms of the order of this court dated the 31st July 2024 unless the parties agree otherwise.

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 put on the record that in its opinion the continuation of animosity and lack of genuine communication and co- operation as between these parties will not augur well for the development of healthy relationships either between the parties themselves or with their son. It is therefore this court's opinion that this judgment be used as a means to reevaluate their respective positions and as stated use it as the start of a fresh chapter in a new book which needs to be centered and focused not on them but on their child, the hero of this story