

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT**

IN THE HIGH COURT OF JUSTICE

CLAIM NO.SKBHAP2021/0001

BETWEEN:

ZL

Applicant

AND

GR

Respondent

Appearances:

Ms. Pauline Hendrickson for Applicant
Ms. Miselle O'Brien for Respondent

2022: September 23;
November 3, 25

DECISION

- [1] **WALLACE, J.** (Ag): The applicant ZL and the respondent GR are the unmarried parents of a male child LAL who was born on 29th June 2010. ZL filed a Summons on the 2nd December 2021 for an order pursuant to the Guardianship, Custody and Access to Children Act Cap 12.05 of the Laws of the Federation of Saint Christopher and Nevis ("the Act") that he be granted legal custody of LAL and or access to the child and also that he be allowed, with the permission of GR, to take LAL out of the jurisdiction if the need arises. GR opposed the granting of the order and asked that she be allowed to retain sole legal custody of LAL.

The Evidence

- [2] ZL filed several affidavits in support of the application and deposed that:

- (a) The parties met in 2006 and shared a relationship until July of 2010. On the 29th June 2010 GR gave birth to LAL. At the birth of LAL, ZL's name was not registered on the birth certificate and that LAL has lived with his maternal grandmother, ML from LAL was six months old with access being given to him, ZL, whenever GR and ML were inclined to do so. He had to seek the assistance of the court to get his name endorsed on LAL's birth certificate and to get access to the child without having to be subjected to verbal abuse from GR and ML.
- (b) ML has been LAL's primary caregiver for the most part and he, ZL has always fulfilled his parental and financial obligations towards LAL. He wants to be more than just paying money for LAL's maintenance. He wants to have a healthy part of his son's life and overall development.
- (c) He is a lawful permanent resident of the United State of America where he currently resides and he can offer LAL a secure loving and safe environment and provide the necessary environment for his well-rounded development and stability. He can also provide the nurturing environment and guidance that all young boys need from their father. Provided, he is given full custody or access that he desires, he knows that LAL will be able to grow and mature with a balanced perception of his parents and be happy.
- (d) Over the years he has been requesting that GR apply for the necessary papers/documents for LAL to travel to the United States to visit him. GR made promises to do so but never made any attempt to make such application.
- (e) This application is predicated on recent occurrences regarding LAL which has led him, ZL, to be worried and fearful for the welfare of LAL. There was a phone conversation of 10th September 2021 in which LAL said:

“... I don't think I will be living at the end of the year.”, and “I am not happy.” He also said that his mother was away for some time and

when she returned to St. Kitts a gentleman came with her and was living with her. He also said that his mother had a baby and both of them live with the father of the baby as a family and he is not living with his mother and is not treated as part of the family unit. LAL also told him, ZL, that his mother has taken away his phone and had deleted all information that he had on it.

- (f) As a result of what he learnt he travelled to St. Kitts and visited LAL's school and became even more concerned about his welfare, both physically and mentally. At a meeting at the school attended by both parties, the issue of applying for a green card for LAL came up and while GR expressed a willingness to make the application, she indicated she was unable to, although she gave no reason at the time.
- (g) He has exhausted all cordial attempts to have GR apply for the green card, has even offered to pay all fees and related expenses but has been unsuccessful in resolving this issue while GR continues to do everything to keep LAL away from him.
- (h) He has applied for legal custody of LAL, or in the alternative, access so that LAL can visit and spend time with him in the USA.

[3] GR filed affidavits in response to the application and deposed as follows:

- (a) She and ZL met in 2008 and that the relationship between the parties was a difficult one and ended in or about 2010. After some legal battles between them, they re-engaged in an intimate relationship from 2011 to 2013.
- (b) During her pregnancy she lived with her mother, ML who was the one who supported her without the assistance of ZL.
- (c) After the first few months of LAL's birth, ZL contributed to the care of LAL by bringing pampers and cereal. After this first three months ZL asked GR

to move in and live with him but she refused. ZL then reduced the frequency of his visit in which he used to spend time with the infant LAL.

- (d) In 2011, while ZL was living in St. Kitts, the parties had an agreement that ZL would have access to LAL every week from Friday at 4pm to Sunday at 6pm. However, in 2016 ZL migrated to the United States of America (“USA”) where he remains to date. ZL and his family continue to have liberal access to LAL even after his migration.
- (e) LAL, who was 11 years old at the time the matter commenced (12 years old at the date of hearing) has resided with his extended maternal family in the maternal family home. That she, GR, for a brief period (2011 until 2016), travelled to the USA to pursue tertiary studies. While she was overseas, LAL remained with ML, with the consent of ZL. Further, since 2020, she constructed a small apartment on the same family land in very close proximity to the family home and so while LAL continues to sleep in his own room in the main house with ML and his uncle, he continues to be cared for by her and his maternal grandmother, ML.
- (f) In 2019 she became pregnant and gave birth to another child. On learning that she was pregnant, ZL called her and told her how “disappointed” he was that GR was pregnant again. He was angry. She had a difficult delivery and was very ill. After the birth, LAL stayed with his paternal grandmother for four (4) months. LAL, being an only child for a long time, took some time to adjust to the change.
- (g) In September 2020, on his return to the family home, LAL began making statements about killing his mother, his new sibling and himself. GR was gravely concerned and tried to reassure LAL of the love the family had for him has not changed with the arrival of a new sibling and that he would always be loved and cared for. With the assistance of a child psychologist, LAL eventually settled down and no longer says those negative things.

- (h) Although ZL shows very little interest in LAL's development educationally and has very little involvement in the child's life, she has attempted to encourage the development of paternal relationship between ZL and LAL and has allowed LAL to travel with his paternal grandmother for holidays.
- (i) ZL has refused to work along with her in co-parenting LAL. ZL does not speak to her on matters concerning LAL. She provided a number of examples of the hostility that accompanies the parties' engagements concerning LAL.
- (j) Given that she, GR, is a citizen of the USA by birth, LAL is entitled to citizenship of the USA. However, as far as she is aware, the process for LAL to be allowed to travel to and enter the USA will include a requirement that LAL remain in the USA for some time. She was unclear whether the child of a USA citizen who resides overseas would qualify for a non-immigrant visa. Moreover, she is not prepared to uproot the lives of herself and LAL as all her family and support are in St. Kitts.

[4] ML also filed an affidavit in response to ZL's affidavit and deposed:

- (a) That she is a retired nurse and currently provides private home care nursing as well as other nursing services.
- (b) Except for the period that GR was away at school (after LAL made 1 year old to 2016), she has been and continues to be the primary care giver of LAL. She has been and continues to provide assistance and give support to GR in relation to parenting LAL and enjoys assisting in his care.
- (c) She has never interfered with ZL's right of access to LAL and while he was resident in the Federation, ZL always had access whenever he wanted it.

(d) LAL had an extended stay with his paternal grandmother in 2020 when his mother, GR, had her second child and experienced some health challenges. She also corroborated GR's evidence that indeed, when LAL returned to the family home, he began making statements about killing his mother, his new sibling and himself. Acting on the advice of a psychologist, efforts were made to reassure LAL. She stated further that LAL is no longer expressing violent or suicidal thoughts and has access to the expertise of a psychologist if the need ever arises.

[5] The court ordered a Social Inquiry Report ("the Report") in this matter. The Officer interviewed ZL and his mother via video, and GR and ML in person. In the Report the Officer stated that ZL *"explained the purpose for his son obtaining a visa because the family travels often and he wants his son to be part of these travel experiences. Additionally, ZL wanted to ensure that a contingency plan was in place in the event of a medical emergency that required his son to travel abroad and for his son's educational options to remain open - for these reasons ZL thought it would be necessary for his son to have access to the United States of America."*

[6] In the assessment, the Officer found that while research suggests that when both parents are actively involved in their child's life there can be several benefits to the child's overall development, this is lacking in LAL as his parents are unable to communicate effectively or to agree on important decisions regarding the child's life.

Issue

[7] In this matter the court is called upon to consider whether it is in the welfare and best interests of LAL to grant sole legal custody to ZL as well as to grant to him permission to take LAL out of the jurisdiction.

Submissions

- [8] Learned counsel for ZL, Ms. Pauline Hendrickson, submitted that in addition to the Act, the court should be guided by the principles enunciated in **J v C**¹ and **Shuric Merchant v Tameika Williams**². She contends, on ZL's behalf that GR has made no effort to obtain any green card or other document to facilitate LAL's travel to the USA even though this was a term of the agreement between the parties. Throughout the years ZL has maintained contact with LAL even though at times he has had some challenges in reaching him by telephone and he has always been accommodating.
- [9] Ms. Hendrickson submitted that there is no indication in the Report that the Officer interviewed LAL or went to the school to interview his teacher as to his development and his behaviour in school. She submitted that the court would have benefited from such an interview, particularly as it relates to the Officer's comment in the Report that "...LAL does not adjust well to change...".
- [10] Ms. Hendrickson argued that based on this evidence, LAL took some time to adjust to that particular change in his life in the form of a new sibling to his family. However, LAL eventually adjusted to the fact that that his mother has another child. Therefore, LAL is capable of adjusting to change should he be given the opportunity to spend time with his father outside of St. Kitts while he is still young.
- [11] Learned counsel for GR, Ms. Miselle O'Brien urged the court to dismiss the application of ZL. She also agreed that the principles stated in the Act are those that should guide the court. She submitted that in **J v C** the welfare of the minor is paramount and this was also confirmed in **Leah Zilpha Richardson v Ovin Whitfield Richardson**³ where Her Ladyship George-Creque J opined that when

¹ [1970] AC 668

² Claim No. NEVHCV 2009/0085.

³ Claim No. AXAHMT2005/0006 at paragraph 26

the court in deciding matters in relation to children “it is their welfare which takes paramount consideration and not the views or wishes of the parents.”

[12] Ms. O’Brien submitted that, as in **Richardson**, the court in this case should consider ZL’s conduct in terms of his unwillingness to work with GR to deal with matters concerning the welfare of LAL, his hostile and aggressive manner towards GR on the occasions that ZL chooses to engage with her and the derogatory way in which he speaks about GR to LAL.

[13] Learned counsel Ms. O’Brien also submitted that where the parties do not get along, an order for joint custody would not be appropriate. Counsel also referred to **Brixey v Lynas**⁴ on the advantage of a very young child being with its mother as a factor to be taken into account in deciding where lies its best interest in custody proceedings.

Analysis and Findings

[14] Applications of this nature are often challenging in that they require the court to consider one parent in a better light than the other, even in situations where both parties love the child.

[15] The Act governs matters related to the determination of guardianship, custody and access to children in this jurisdiction. Section 4 establishes that the child’s welfare and best interests to be of paramount consideration in proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child. The welfare and best interests of a child in his particular circumstances must be considered in proceedings under the Act.

[16] Section 5 of the Act sets out the principles that are relevant to the child’s welfare and best interests. These are:-

⁴ [1996] UKHL 17

“(a) the child’s parents and guardians should have the primary responsibility, and should be encouraged to agree to their own arrangements, for the child’s care, development, and upbringing;

(b) there should be continuity in arrangements for the child’s care, development and upbringing, and the child’s relationships with his or her family should be stable and ongoing, in particular, the child should have continuing relationships with both of his or her parents and guardians;

(c) the child’s care, development, and upbringing should be facilitated by ongoing consultation and co-operation among and between the child’s parents and guardians and all persons exercising the role of providing day-to-day care for, or entitled to have contact with the child;

(d) relationships between the child and members of his family should be preserved and strengthened, and those members should be encouraged to participate in the child’s care, development and upbringing;

(e) the child’s safety must be protected and, in particular, he or she must be protected from all forms of violence whether by members of his family or by other persons.

[17] Section 16 gives the court discretion to make orders for the custody of children. In determining custody rights, the court must have regard to the welfare of the child and the conduct and wishes of the father or mother. Specifically, section 16 (1) states:

“The Court may on the application of the father or mother of a child ... make such Order regarding—

(a) the legal custody of the child; and

(b) the right of access to the child by the applicant... as the Court thinks fit having regard to the welfare of the child and to the conduct and wishes of the mother or father...”

[18] Section 19 (1) states:

“An Order shall not be made under section 16(l) giving the legal custody of a child to more than one person, but where the Court makes an Order giving legal custody of a child to a person, it may order that -

(a) a parent of the child who is not given the legal custody of the child shall, as the Court may specify, retain all or such of the parental rights and duties comprised in legal custody, other than the right to the care and control of the child; and

(b) such person shall have those rights and duties jointly with the person who is given legal custody of the child.”

- [19] This Court is well cognizant that in determining an application of this nature the first and paramount consideration is the welfare of the child. It has however been long recognized that the welfare of the child though of “paramount importance” is not exclusive and must take into account other just as important considerations. As stated previously, in determining what is best for LAL’s welfare the court must consider the factors stated in the Act and evaluate those that affect the particular child.
- [20] This is a highly contested matter with claims and counterclaims by the parties. The court has read the evidence on both sides. The evidence was not tested by cross-examination as both parties rested on the evidence presented in their various affidavits filed⁵.
- [21] I do not intend to discuss each of the factors individually. Suffice it to say, having considered the evidence and the carefully prepared submissions of counsel for the parties, I find that LAL’s welfare and best interests are better served if legal custody be vested in GR.
- [22] He has lived at the home of ML, or in very close proximity to it since his birth. There has been no evidence led that the accommodations are substandard. The Report, which is the only independent one that we have, has outlined the current accommodations for LAL which appears adequate.
- [23] This Court would indeed be slow to place a 12 year old child in a new environment especially when the only independent assessment of the alternative accommodations was not in person and moreover, did not indicate a support system that would be in place for LAL should legal custody be granted to ZL. There has been no evidence before this Court on this issue and the court will not speculate on the same. Moreover, this new accommodation is outside the

⁵ At the further hearing on 3rd November 2022 the court enquired whether the parties wished to cross examine the other and after consultation they each declined.

jurisdiction of this Court. In all the circumstances I do not consider granting sole custody of LAL to ZL to be in his best interest.

[24] It is worth noting that what started out as a claim for legal custody based on concerns for the welfare of the child, seemed to have morphed into one that is based on making it more convenient for ZL to see LAL. Neither party has presented any cogent evidence that LAL, having been born to a citizen of the USA is ineligible for a visitor's visa or that he must be resident in the USA for some time so that he can apply for a green card. In any event, the court cannot countenance granting legal custody to one party largely to facilitate what ZL is asking it for.

[25] My findings above ought not to be interpreted as a finding that ZL is an unfit parent. What I do find is that it is in LAL's welfare and best interests that legal custody be granted to GR with liberal access to ZL.

[26] The parties will however have to consult with each other regarding LAL's educational and travel plans outside of the jurisdiction.

Order

[27] Consequently, the orders of the court are as follows:

- (i) ZL's summons for legal custody of LAL and for permission to take the said child out of the jurisdiction filed on the 2nd of December 2021 is dismissed.
- (ii) Sole legal and physical custody of the child, LAL, be granted to GR.
- (iii) ZL shall have liberal access to LAL whenever he visits the Federation of Christopher and Nevis, including but not limited to every weekend from Friday at 4:00 PM to Sunday at 4:00 PM.

(iv) The parties shall consult with each other regarding LAL's educational and travel plans outside of the jurisdiction.

(v) Each party to bear his or her own costs.

[28] The court gratefully acknowledges the assistance of both learned Counsel.

Yvette Wallace
High Court Judge

By the Court

Registrar