

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
FEDERATION OF ST CHRISTOPHER AND NEVIS
NEVIS CIRCUIT
A.D. 2022**

CLAIM NO. NEVHCV2022/0041

BETWEEN:

**In the matter of an application pursuant to Section 16 of the Guardianship,
Custody and Access to Children Act, CAP 12.05**

AND

In the matter of an application for an order regarding the legal custody of minors

BETWEEN:

MK

And

AK

Before: His Lordship Justice Patrick Thompson Jr

Appearances: Ms. Kurlyn Merchant for the Claimant
Mr. Eustace Nisbett for the Defendant

**2022: May 16th
July 25th
September 15th & 30th**

JUDGMENT

1. The boys are brothers. They are the sons of the Applicant and Respondent in these proceedings and are aged 9 and 6 years old respectively.

2. Their parents love and care for them very much but their parents are unable to agree on which parent is to have custody and/or primary care and control of them.
3. Their inability to agree on what is in the best interests of their sons has necessitated these proceedings and this Court's decision in this matter.
4. At the outset, it is important to note that their parents were given every opportunity throughout the course of these proceedings to come to their own agreement on their son's best interests. So that at the start of the hearing in this matter on September 15, 2022 this court invited their parents and their counsel to initiate discussions with a view to finding a consensus on their sons' best interests.
5. After an hour of discussions, this court was advised that the parties were far apart and unlikely to agree. At the close of the evidence in this matter, the parties and their lawyers were again urged to continue their discussions. Despite this Court's considerable urging the parties again confirmed that they were not able to arrive at an agreed position. Even after this Court had made orders for the filing of closing submissions and authorities, this court ordered that the parties were at liberty to pursue mediation of their dispute, if they wished, at any time up to the date fixed for delivery of the judgment in this matter.
6. I have set out this important aspect of the matter because this Court is mandated to encourage the parties, certainly in custody proceedings to arrive at an agreement, if they can. See Section 5 (a) of the Guardianship, Custody and Access to Children Act ("the Act") which provides that:

"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"

Preliminary Point:

7. After the close of the evidence in this matter counsel for the Respondent in his closing submissions argued that the proceedings brought by the Applicant were brought by a fixed date claim form. Mr. Nisbett drew to the Court's attention the case of SKBHCV 2016/0211 - Shervon Lewis v Indira Butler. In that case, Ward J (as he then was) held that the Civil Procedure Rules do not apply to family proceedings. Therefore if this court were to follow the reasoning of Ward J, there being no good reason why it would not do so, any fixed date claim form which relates to family proceedings is an abuse of the processes of the Court and is thus liable to be struck out
8. Mr. Nisbett did not expressly argue that the Applicant's fixed date claim form should be struck out. He sought finality to the proceedings but wanted to ensure that this Court properly dispensed with the Applicant's application.

- 9.** Ms. Merchant would have been taken by surprise by Mr. Nisbett's submissions on this issue since both sides were ordered to simultaneously file and serve their closing submissions on or before September 23rd, 2022. This Court of its own motion and pursuant to its wide case management powers scheduled the matter for case management on September 28th, 2022 in order to discern Ms. Merchant's position.
- 10.** Ms. Merchant with the concurrence of Mr. Nisbett urgently agreed to file and serve an originating summons and affidavit in support. Ms. Merchant's supporting affidavit would be brief and would simply cite and rely upon all of her client's previous affidavits and exhibits in these proceedings. In this way, this Court was thus empowered to render the finality that the family deserved. Mr. Nisbett did not articulate any prejudice that could be occasioned to his client if Ms. Merchant proceeded in this way and indicated his consent to this approach.
- 11.** Prior to the CPR, proceedings in the High Court were commenced by (i) originating motion, (ii) originating summons (iii) petition and (iv) writ. The CPR simplified these varying modes and all proceedings in the High Court are commenced via a claim form or fixed date claim form or notice of application.
- 12.** CPR. 8.1 (4) and (5) provide that a claim form must be in Form 1 except in the circumstances set out in paragraph 5 which provides that a fixed date claim form must be used (a) in claims arising out of hire-purchase or credit sale agreements; (b) in proceedings for possession of land; (c) whenever its use is required by a rule or practice direction; and (d) where by any enactment proceedings are required to be commenced by originating summons or motion.
- 13.** CPR 2.2 (3) (a) clearly provides that the CPR does not apply to family proceedings. What then should be done? The High Court clearly has jurisdiction to entertain an application for guardianship, custody and access to children. The Guardianship, Custody and Access to Children Act ("the Act") does not provide for such proceedings to be commenced by originating summons or motion and no rules have been made under the Act which prescribe the procedure for proceedings under the Act. The jurisdiction of the High Court should be exercised as far as possible in conformity with the procedure, law and practice in England but this would not permit the wholesale importation of English substantive rules and procedures on this issue.
- 14.** In this Court's view, there are two possible solutions to this conundrum. One, Parliament can promptly amend the Act to provide that proceedings for guardianship, custody and access are to be commenced via originating summons. Any attorney who thus commenced a suit for these reliefs via fixed date claim form would thus do so with full awareness of the risks being run.

- 15.** Two, the Chief Justice could issue a practice direction or authorize an amendment to the CPR permitting either the CPR, or selected rules to expressly apply to family proceedings. This may ultimately take place after consultation with all interested parties since the Court's case management powers under the CPR (see part 25 for example) would be extremely useful. The CPR was promulgated for the purpose of modernizing civil litigation and there is no reason why family proceedings, comprising a significant share of the litigation before this Court's 10 member states and territories should be left behind.
- 16.** Each parent's case for custody and/or primary care and control can be summarized as follows.

The case for the father

- 17.** In summary, the father says that he is best placed to provide for the boys for the following reasons
- (i) He is gainfully employed and thus able to provide for all of their current financial needs.
 - (ii) The house that he occupies is clean and spacious and has enough room for the boys to each have their own rooms.
 - (iii) He is willing and able to assist them with their homework and meet their emotional needs.
- 18.** The mother does not dispute any of these matters. Her view is that her ex-husband only seeks custody and/or care and control of the boys because her current partner is Afro-Caribbean (the mother and father are of Indo-Guyanese origin) and the father is opposed to having his children raised by her current partner.
- 19.** The mother was of the view that the father does not have a bona fide interest in the boys' well-being and only seeks custody and/or care and control of the boys in order to avoid paying maintenance for the boys. It was also her contention that the boys would not be actually raised by their father but by their aunt. In her view, the father's interest in the boys is newfound and largely prompted by the matters set out above.

The case for the mother

- 20.** In summary the mother says that she is best placed to provide for the boys for the following reasons
- (i) She is their mother and has been providing for them for all of their lives.

- (ii) She and her current partner provide a stable and safe home for the boys where all of their needs are met
- (iii) The boys have two younger siblings and all four children form a cohesive family unit that should not be disrupted.

21. The father contends that the mother is unemployed. In his view, the mother and her partner are unable to meet the financial needs of the boys. The father is also concerned that the mother and her partner are unable to meet the boys' emotional needs. The father also contends that the oldest boy was kept at home for 2 weeks by the mother. According to him, the mother has also sent the oldest boy to Charlestown to sell her homemade pastries at a time when he should have been attending school.

Court's Analysis & Findings:

22. The Act governs the exercise of this Court's discretion in this matter. Section 4 of the Act provides that the welfare and best interests of the children are paramount. Section 5 of the Act provides for the principles relevant to the welfare and best interests of the boys. These include but are not limited to continuity in arrangements for childcare and that childcare, development, and upbringing should be facilitated by ongoing consultation and co-operation between the parents. Safety is a paramount consideration and the children should be protected from all forms of violence.

23. Section 6 of the Act mandates that the Court is to give the children an opportunity to express their views and their views, whether expressed directly or through a representative shall (not may) be taken into account. Crucially, Section 7 of the Act provides for equality of parental rights. Both parents shall have the same rights and authority and the right and authority of both parents shall be equal and exercisable by either parent without the other.

24. These fundamental precepts inform the Court's approach to custody. They are the touchstone principles which govern this and any other court that comes to deal with questions of guardianship, custody and access to children. I do not propose to resolve every question of fact raised in these proceedings but only so many of those questions that allow me to determine this application in keeping with relevant legal principles.

25. Everyone agrees that the 'welfare checklist' outlined in the UK Children's Act provides a useful guide to determining and applying the principles set out under the Act. These headings are as follows

- (a) The ascertainable wishes and feelings of the children concerned in view of their age and understanding

- (b) The physical, emotional and educational needs of the children
- (c) The likely effect on the children of any change in their circumstances
- (d) Their age, sex, background and any characteristics which the Court considers relevant
- (e) Any harm which they have suffered or are at risk of suffering
- (f) How capable each parent and any other person in relation to whom the Court considers the question to be relevant is of meeting their needs

The boys' wishes

- 26.** The boys' wishes were expressed via the Social Services Department. The elder of the boys expressed that does not like living with his mother and would prefer to live with his father. The younger boy expressed that he liked living with his mother but would prefer to live with his father. Critically, both boys indicated that they had been beaten by their mother and their mother's current partner (their step-father).
- 27.** The mother disputed the boys' account of corporal punishment being meted out to them by either her or her partner. In cross examination she accepted that the boys were good boys and were generally truthful but maintained that they were not speaking the truth on this issue. This Court took a balanced approach to this evidence.
- 28.** It is natural for children of that age to feel aggrieved and even exaggerate the nature and frequency of any corporal punishment administered to them. Any corporal punishment however reasonably and fairly imposed may seem to 9 and 6 years old as unjust. That fact is considered against the backdrop that children of that age are unlikely to wholly simulate and manufacture such allegations. It is easy to see why they may wish to manufacture such allegations against their stepfather, less so against both their mother and stepfather.
- 29.** If this Court were to accept the mother's evidence it would mean the boys had both conspired to lie to the social workers. This Court met with the boys for the purpose of explaining the nature of the proceedings to them and would be surprised if either boy could persuade each other, in view of their ages, to agree to manufacture and maintain untruths against their mother and stepfather. This Court is thus compelled to reject the mother's evidence in this regard. As a result this Court has taken into account the limited weight that can be accorded to the views of the boys in view of their age but is prepared to find that the boys' wishes tell against an order for sole custody or primary care and control being vested in their mother.

The physical, emotional and educational needs of the boys

- 30.** There is no doubt that both parents aim to meet the physical, emotional and educational needs of the boys. The boys need to be raised in a loving nurturing environment that would allow them to realize their full potential in keeping with the ideals expressed in the United Nations Convention on the Rights of a Child.
- 31.** The home visits to both parents concluded that both homes are tidy and child friendly. The father's home is larger and contains more space than the mother's but their mother's home has been their primary residence. They thus have ample space at both residences for recreation.
- 32.** Both parents appear to meet the emotional needs of the boys. The boys appear to have good relationships with their mother and father. Their mother will say that she has been meeting their emotional needs for all their life while their father will no doubt say that he's been meeting their emotional needs as far as he's been allowed to.
- 33.** In their mother's house they are part of a larger unit with their stepfather and 2 younger siblings. In their father's house they spend time with their aunt (their father's sister) and cousins. This Court notes in passing that neither side called the children's stepfather or their aunt as witnesses or obtained affidavits or witness statements from them. It would have been useful to hear directly from these persons, as opposed to via the social inquiry report. Their aunt and stepfather are clearly part of their wider family unit irrespective of whatever orders the Court ultimately decides to make. Ultimately, this Court finds that both parents are well placed to meet the boys' emotional needs.

The likely effect of any change in their circumstances

- 34.** The boys are aged 9 and 6. They have spent considerable time with their father and aside from the dislocation that may be occasioned by a change of school the impact of a change in their circumstances is likely to be minimal. No doubt they will miss their siblings and the life they enjoyed with their mother but children are resilient and the change is not so great as to cause any real impact on their day to day life.
- 35.** In the context of permission to relocate with children application, Sir Nicholas Wall P in his judgment in W(Children (Relocation Permission), Re [2011] EWCA Civ 345, referred to the following at paragraph 108:

"Professor Marilyn Freeman of the Centre for Family Law and Practice in London,conducted a one year qualitative research project into the question of relocation commencing in June 2008.Professor Freemanasks the direct question: "Is Relocation in Children's Best Interests?" And the short answer which she gives is: "we don't know". She concludes her article with these words:

“So we have much work to do. We need to know, firstly, what impact relocation has on the relocated child and, in particular, about children's resiliency in these circumstances. From here, we will need to have the basis for international law to do what it says on the tin: to work in the best interests of the children the law seeks to serve.”

Nobody, I think, could disagree with that. I certainly do not.”

- 36.** Professor Freeman's comments were in the context of a relocation from one country to another country. Relocation within Nevis from one residence to another residence that is close to their cousins and wholly familiar to them is unlikely to have any negative impact on the children. In view of this Court's findings, such a relocation is likely to result in real and tangible benefits to the boys. In any event, the power to compel semiannual reports on the boys' progress will ensure that any negative impact is managed and/or mitigated.

Their age, sex, background and any other factor that the court considers relevant

- 37.** The boys and their parents are Indo-Guyanese. Their stepfather is Afro-Caribbean. There was a suggestion from the mother that the father did not want his children to grow up in a home in which there was an Afro-Caribbean influence. This argument was not pressed upon this Court either by evidence or in argument by the parties. In any event, the age, sex and background of the boys does not tilt the balance in favour of or against either parent. In this Court's view, the boys would benefit from an exposure to all cultures so that the fact that their stepfather is Afro-Caribbean is a benefit to them.
- 38.** The social inquiry report recommends that access be given to the father while the mother should have weekend visitations with the boys. The recommendations in the social inquiry report are a relevant consideration. That report recognizes that the mother is a good and loving mother but that the father is better placed to financially provide the stability that the boys need. The recommendations of the social inquiry report are not binding on the Court but are accorded significant weight since their role is an independent one.

Any harm which the boys have suffered are at risk of suffering

- 39.** Neither side argued that the boys suffered or were at risk of suffering harm in the care and control of either parent. The corporal punishment that had been administered did not rise to the threshold of harm and Mr. Nisbett makes a fair point that there was no complaint to a social worker or teacher that the boys suffered harm or were at risk of doing so because they had been punished.
- 40.** All the same, this Court is concerned that the mother accepted that the older boy missed two weeks of school. This Court does not accept that it was reasonable of the mother to have withdrawn the older boy from Ivor Walters Primary before the

transfer to Charlestown Primary had taken place. Two weeks of schooling, particularly post pandemic cannot easily be replaced. The harm done to the older boy is not 'cogently and reasonably' explained. The UN Convention on the Rights of a Child provides that every child is entitled to an education. The right to education should also be enshrined as a fundamental right under the Constitution of St Christopher and Nevis. See Article 22 of the Virgin Islands Constitution Order of 200 for an example of the nature of this constitutional right.

41. The mother's approach to this matter suggests that education is not uppermost in her mind as a fundamental need for the boys. The loss of two weeks schooling cannot easily be undone and there is a real risk that the boys may suffer further harm in this regard if they remain in the primary care and control of their mother. Their attendance record is poor and this further underscores the harm that they have suffered and continue to suffer while in their mother's care. This Court must take real steps to address this issue and it is significant that their stepfather does not appear to play any role in their education.
42. This Court's concerns about the boys and their education is underscored by the issue of the tablet. The mother contends that the device that had been bought by the father for the boys' education was only useful for playing games. The evidence at trial revealed that the device could in fact be used for education but the boys appeared to have missed numerous days of school before this was ironed out.
43. According to the father, all that was required is that the relevant application be downloaded for this purpose. Even if the mother did not possess the technical knowhow to perform what appears to be a simple maneuver there is no reason why she did not and could not either enlist assistance from her partner or a third party to operate the device. For what it's worth, it was also incumbent on the father to ensure that the device had not only been supplied but was being used for the education of the boys. There was no real obstacle to the parents resolving this issue. All the same, the boys were at the time in the primary care and control of the mother and the onus was on her to resolve the problem and her inability to do so further underscores her attitude to education for the boys and tilts the balance against an order for primary care and control being made in her favour.

The capabilities of each parent or any other person in meeting the boys' needs

44. It is clear that the combined efforts of both parents will ensure that the boys' needs are met. All the same, the mother for the reasons set out above is not currently best placed to fully meet the needs of the boys. She is unemployed. Her financial circumstances are strained and there is no evidence that this situation is likely to change in the future. On the other hand, the father appears ready, willing and able to meet the financial, emotional and physical needs of the boys.
45. In view of this Court's findings, there is no need to exclude their mother from decision making rights in their life and as such no scope for an order for sole

custody. This Court notes the reference to the Canadian authority cited by Byer J at paragraph 35 in SVGHMT 2018/0123 - Knights v Knights that:

“In the wrong family circumstances a joint custody order can perpetuate hostilities, indecision and power struggles. Children, particularly children already exposed to the upset of family breakdown look to their parents for love, guidance, stability, protection and consistency. They need to have confidence that adult decisions will be made quickly, properly and uneventfully.”

46. This Court recognizes the considerable force of the paragraph cited above but is of the view that this Court's orders for mandatory mediation and co-parenting classes with consequences for noncompliance accords with Part V of the Act which speaks to the use of mediation and family experts in these matters. In the absence of any significant harm to the boys being posed by their relationship with their mother and stepfather it seems a bridge too far to deprive her of any say in their lives, particularly in view of their ages.

47. It is noteworthy that Byer J in the case of SVGHMT- 2018/0064 – LaBorde v LaBorde, a case dealing with an application for sole custody, cited the same Canadian authority referred to above in Knights v Knights and went on to cite the Canadian Supreme Court authority of C(G) v V-F(T) [1987] 2 SCR 244. In C(G) v V-F(T) [1987] 2 SCR the Canadian Supreme Court held that

“Whether total or partial, deprivation of parental authority means not only that the person be precluded from exercising the attributes of parental authority, but also entails the loss of the authority itself which then ceases to be vested in the holder. It can only be ordered for serious cause and in the interest of the child. Deprivation of parental authority amounts to a value judgment in respect of its holder's conduct. A person cannot be even partially deprived unless it be concluded that he or she has been guilty, by action or inaction, of a serious and unjustified failure to perform the parental duty.”

48. This Court is not satisfied that an order for sole custody is warranted. An order for sole custody is warranted only where the boys' best interests mandate same. The loss of parental authority with a vesting of said authority solely in the father is unwarranted. This Court is not persuaded that the parents are so unable to work in a collaborative manner such that all decision making authority for the boys should be vested solely in their father to the mother's exclusion. In any event, this Court has clear powers to provide for liberty to apply and in any event the parties are ordered to take all such steps in order enhance their ability to communicate and thus meet the boys' best interests.

49. This Court is not unsympathetic to the plight of the mother but applying the paramount nature of the best interests of the children means that this Court must make an order for joint custody with primary care to the father. Simply put, the mother, despite her best efforts is not currently well placed to meet all of the boys'

needs when they are in her primary care and control. For all of these reasons, this Court finds that the needs of the boys are best met by the following orders.

- a. Their parents are granted joint custody of the boys.
- b. Their father, is to have primary care and control of the boys. The boys are to reside with their father at Clay Ghaut with their mother being granted liberal access to them as follows:
- c. The boys are to be collected by their mother at their father's residence or such other places in the Federation as the parties may agree, no later than 5:30 pm on Friday of every week.
- d. The boys are to be returned by their mother, to their father's residence or such other places in the Federation as the parties may agree, no later than 5:30 pm on Sunday of every week.
- e. The boys are to spend half of the Christmas and Easter and Summer vacations with their mother on such terms and conditions as are mutually agreed upon by the parties.
- f. The Social Services Department is ordered to provide semiannual reports to this Court at the end of June and the middle of December in every calendar year on the boys' and their development until further order of the Court.
- g. The parents are ordered to attend, participate and complete all such co-parenting classes or activities (whether in person or virtually) as are available in the Federation for the next three years. The coordinator of such co-parenting sessions is ordered to provide this court with a report on the attendance, participation and any improvement in the parenting and communication skills of the parents at the conclusion of each such session. **Should the parties fail to comply with or satisfactorily comply with the foregoing order they may be liable to be imprisoned.**
- h. **A copy of this order is to be served on the Social Services Department to ensure that they do not frustrate the terms of the order by failing to arrange for and coordinate the said co-parenting classes within the terms of this order.**
- i. All travel documents (if and whenever they come into existence) for the boys are to be immediately held by their father, unless said travel documents are required by their mother. Should either parent wish to travel with or authorize other persons to travel with the boys they are to communicate no less than 72 hours' notice of their proposed travel plans to the other parent. The consent of requested parent should not be unreasonably withheld and either party is at liberty to approach this Court if the parties are unable to resolve any question

of who should have custody of the travel documents for the boys during the currency of this order.

- j. This order comes into force on the date of delivery of judgment and is expressed to remain in force until the boys each attain the age of 18 or such other further order of this Court.
- k. The father is at liberty to obtain the assistance of all such governmental authorities for the purpose of effecting the terms of this order.
- l. The parties are ordered to meet with a trained mediator in the Federation, whether virtually or in person for the purpose of mediating any dispute between them as to any matter not covered by the scope of this order.
- m. The order from the District C Magistrate's Court dated March 20th, 2018 ordering the Applicant to pay \$EC160.00 per week in respect of the boys is set aside.
- n. Liberty to Apply.
- o. Costs to the Applicant in the sum of \$1,500.00 payable within 6 months of the date of this order.

**Patrick Thompson Jr
Resident High Court Judge**

BY THE COURT

REGISTRAR