

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ST. CHRISTOPHER AND NEVIS
NEVIS CIRCUIT

CLAIM NO. NEVHCV 2009/0085

In the Matter of the Guardianship of Infants Act Cap. 323
of the Revised Laws of St. Christopher and Nevis

and

In the Matter of an Application by SHURIC MERCHANT, the father
for sole custody of FAITH MERCHANT a child
born of the body of TAMEIKA WILLIAMS

BETWEEN

SHURIC MERCHANT

Applicant

And

TAMEIKA WILLIAMS

Respondent

Appearances:

Mr. Geoffrey Romany for the Applicant.

Ms. Asure Dee Liburd for the Respondent.

2010: January 13;

November 11.

JUDGMENT

Introduction

- [1] **LEIGERTWOOD-OCTAVE J:** I start by indicating that in this judgment, I will be referring to the parties by their first names. I do so only because other persons mentioned in the case have the same last names, so the first name references are not casual but expedient in the circumstances.

- [2] Tameika Williams [**“Tameika”**] and Shuric Merchant [**“Shuric”**] are the fairly young and unmarried parents of Faith Tamoya Nathanya Williams [**“Faith”**], who was born on 24th April 2007. Although they had been involved in an intimate relationship, Shuric was not aware that he was Faith’s father until a DNA test was done shortly after her birth.
- [3] Faith initially lived with Tameika at the home of her maternal grandmother, Mrs. Vania Williams [**“Mrs. Williams”**] but she began to live at with Shuric at his parents’ [**“the Merchants”**] home not long after she was born. Shuric suggests that it was three weeks after, Tameika puts the period at three months. It is however common ground that Tameika herself moved into the Merchant’s home sometime later but again she and Shuric do not agree on the circumstances which precipitated that move.
- [4] Both Tameika and Faith were at the Merchant’s home for about two years until Tameika left on 6th June 2009 and returned to her mother’s home. Not surprisingly, there are competing versions from Tameika and Shuric as to what led to that move. Her version is that it evidenced the end of their relationship and they had previously discussed it. His version is that it came as a complete surprise to him. The only thing that is agreed is that Faith remained behind.
- [5] Four days after Tameika’s departure, the unpleasantness between her and Shuric culminated in a physical altercation at his parents’ home in which the police became involved. At that time Tameika demanded that Shuric and his parents hand over Faith and they refused. Two days later Shuric filed the application for sole custody of Faith, which is now for determination by the court. In her affidavit opposing the application Tameika has asked the court to give her sole custody.

The Law

- [6] **The Guardianship of Infants Act [“the Act”] Cap.323 of the Laws of the Federation of St. Christopher and Nevis** governs matters related to the determination of custody in this jurisdiction.
- [7] **Section 3** is by far the most important section as it sets out the two primary matters that the court must consider in these types of proceedings. The Court is mandated to regard *the welfare of the*

infant as the first and paramount consideration and it shall not consider the claim of either the mother or father to be superior¹.

[8] What is meant by the term “*welfare of the infant*” was considered in the authorities submitted by Ms. Liburd. In **Re Thain**², it is defined as being related to the infant’s general well-being rather being restricted to a question as to whether the child would be happier in one place or another.

[9] In **J v C**³ Lord MacDermott, offered guidance when in considering the words in the English statute he stated:

“Reading these words in their ordinary significance ...it seems to me that they must mean more than that 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 connote a process whereby, when all the 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 interest of the child’s welfare as that term has now to be understood. That is the first consideration because it is of first importance and paramount consideration because it rules on or determines the course to be followed.”

The Custody to the Mother Issue

[10] There is one issue raised by Ms. Liburd which I think it would appropriate to address at this time. Although **section 3 of the Act** provides that neither parent has a superior claim in custody proceedings, Ms. Liburd urged the court to consider and adopt the principle that the custody of young children, especially girls should be given to a capable mother⁴.

[11] She relied on **Austin v Austin**⁵, **Stephenson v Stephenson**⁶ and **Brixey v Lyman**⁷ for that proposition. In each of these cases the courts went to great lengths to underscore the importance of the irreplaceable maternal bond in relation to children of tender years, emphasizing what counsel for the father in **Brixey**⁸ referred to as the “maternal preference”.

¹ See *Livingston Williams v Sharon Thompson* Unreported St. Kitts and Nevis [Nevis Circuit] Misc. Suit No. 24 of 1999

² [1926] All ER 384

³ [1970] AC 686

⁴ *Marzouca v Marzouca* Jamaica Suit No. M127 of 1998

⁵ [1865] 55 ER 634

⁶ [1980] CILR 93 – Cayman Islands

⁷ [1997] S.C. (H.L.) 1

⁸ *Ibid*

- [12] The courts found that there with a child of tender years there was no substitute for a mother and the care of a mother⁹; a female child's interest is better served when she is in her mother's custody and care¹⁰ and the relationship and bond between a very young child and his or her mother cannot be duplicated by the father¹¹.
- [13] The approach of these courts in both England and in the Commonwealth Caribbean, an approach Mr. Romany urged this court to move away from, is analogous to the "tender years doctrine" which was previously applied by courts in many states throughout the United States. This doctrine which was formalized in 1839¹² presumed that the mother of a child in their tender year is the preferred parent when custody is being determined. The doctrine has been abolished and the legal presumption no longer exists¹³, it has been replaced by a "best-interests-of-the-child" standard".
- [14] What I glean from the cases is that in the case of a child of tender years very much for emotional and perhaps psychological reasons, his or her mother, once she is capable, is usually the proper person to be given custody. As Lord Jauncey of Tullichettle observed¹⁴ this is neither a presumption nor a principle but rather recognition of a widely held belief based on practical experience and the workings of nature.
- [15] The mother can be said to be the starting point but as no two child custody cases are the same there cannot be "one size fits all" application to every case. Each case must be viewed on its particular facts and circumstances. The capability of a mother is not the deciding factor in awarding custody.
- [16] In **Brixey**, the House of Lords approved Butler-Sloss LJ whose words in my view are an apt conclusion on the "custody to the mother" issue:

"There are dicta of this court to the effect that it is likely that a young child, particularly perhaps a little girl, would be expected to be with her mother, but that is subject to the overriding factor that the welfare of the child is the paramount consideration."

⁹ Supra Note 5

¹⁰ Ibid Note 6

¹¹ Ibid

¹² The Talfoud Act of 1839

¹³ In re Marriage of Kennedy, 94 Ill.App.3d 537, 545, 49 Ill.Dec. 927, 933, 418 N.E.2d. 947, 953 (1st Dist. 1981)

¹⁴ Brixey v Lyman supra at Note 7

What is best for Faith's welfare?

- [17] Determining what is best for Faith's welfare takes us back to Lord Mac Dermott in **J v C**¹⁵. It is at this stage that the court must consider and evaluate all the factors which affect her welfare.
- [18] Mr. Romany's attempt, in his submissions, to set out the factors that the court should take into consideration accords with the process, outlined by Lord Mac Dermott.
- [19] Those factors were age and sex of the child; physical, mental health and emotional needs of the child; the parent who has been taking care of the child; conduct and character of each parent; conduct and character of each grandparent/other family members assisting parent in raising the child; religious education and the detriment to the child if removed from present environment. I have noted the submissions of both Mr. Romany and Ms. Liburd on each factor but I do not intend to slavishly consider each in turn.
- [20] I have taken additional factors into consideration: the love and affection and emotional ties between the parents and Faith; the capacity and willingness of each parent to provide for and take care of Faith; the length of time that Faith has lived in her present environment; the stability of her present environment; the desirability to maintain continuity; the family units in Shuric and Tameika's homes; the willingness and ability of each parent to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent.
- [21] This might be an appropriate juncture to refer to the Social Inquiry Report prepared by the Social Services Department.
- [22] Neither party had an investigative history with the Department. In compiling the report, the social worker interviewed several persons: Shuric and Tameika; the Merchants; Mrs. Williams; Faith's day care provider; one of the Merchant's neighbours and the father of Tameika's first child. She also observed Faith at the homes of both her maternal and paternal grandparents.

¹⁵ Supra at para. [9]

- [23] The report revealed no remarkable observations in relation to either parent or any of the grandparents. Faith was described by her teacher to be a very happy child, who was apparently entirely unaffected by the custody issues surrounding her.
- [24] The assessment noted that both parents loved and cared for Faith but they needed to rely less on their parents in raising her. The lack of communication between them is the big issue. Both households were found to be appropriate but the Shuric and his parents could offer Faith a more luxurious home and lifestyle.
- [25] The recommendation was that the parents be awarded joint custody with the court determining where Faith should spend the majority of her time.
- [26] There are some matters in this case that both sides will never agree on and I referred to some of them earlier in my decision but there are other matters on which there has been no negative comment. Those are the matters on which I can easily make my findings.
- [27] Both Shuric and Tameika are hard-working, industrious young people and they are of good character. I take Mrs. Williams' evidence regarding Tameika's apparent "waywardness" at times to fall within the category of youthful indiscretions and nothing more, there is no evidence on which I can make a finding that this behaviour has continued.
- [28] They have the benefit of living with parents with care for, love and support them. They have a well-adjusted two and half year old daughter Faith who they love and who they are both able and willing to provide for. Through their actions, they show their love for Faith. Both of them depend on their parents to a great extent to help them raise her.
- [29] Their parents love Faith and that is evident, she seems to bring them much happiness. In case of Mrs. Merchant, Faith is the daughter she never had and she is clearly the apple of her eye.
- [30] Faith has lived with the Merchants practically from birth, in the life of a baby there is not much difference between three weeks and three months. I believe Shuric when he said that Faith had

come to live with him and his parents and later Tameika because Mrs. Williams had put them out. Tameika was not convincing in her denial and her mother even less so. I find it inconceivable that Shuric would have concocted that entire story. In addition, Tameika's evidence was that her mother did not like Shuric and she was not all happy that he was Faith's father.

[31] The environment at the Merchant's home has been stable for Faith. She has enjoyed both her primary residence with Shuric and her temporary residence with her mother, where she interacts with and enjoys the company of her older sister under the interim order made by the court. She does not appear to have suffered being separate from her mother and I find as a fact that she is a happy, healthy and well-adjusted and well-cared for child.

[29] Counsel on both sides agreed that it is not difficult to find that the scales are quite evenly balanced, where Shuric and Tameika are concerned. As Mr. Romany submitted it is rare to find a case where the parents are almost identical when assessed. What in his view tipped the balance in Shuric's favour was the fact that he was quite capable of taking care of Faith and he has assumed full responsibility for her.

[30] Ms. Liburd saw the scales tipping in Tameika's favour not only because she is capable but she has not been shown to be irresponsible or incapable. She did abandon Faith when she left the Merchant's home but had left her there because it was convenient because of her work schedule. She argued that Tameika was being prevented from being a part of Faith's life although I cannot see any evidence which support that finding. She relied on **Stephens v Stephens**¹⁶ to submit that all things being equal the scales should tip in favour of Tameika as Faith's mother.

[31] At the conclusion of his submissions, Mr. Romany indicated to the court that it could an order for joint custody with care and control to Shuric with liberal access to Tameika. Ms. Liburd held throughout for sole custody to Tameika.

[32] In joint custody, both parents have equal rights and powers and in case where they do not get along, exercising those rights and powers can easily lead to upheaval in their child's life. Simple

¹⁶ Supra. Note 6

matters are in many instances blown out of proportion, decisions are to the choice of school see the parents in full battle cry. I will only mention that in evidence Shuric and Tameika each indicated different school that they wished Faith to attend. Joint custody works best when the parents get along, Shuric and Tameika do not get along and there are many matters on which they do not agree. Awarding joint custody would not be an appropriate order in this case.

[33] In the final analysis, with so many factors being almost equal my decision turns on two issues: the desirability to maintain continuity in Faith's life and the fact that although I believe that both of her parents would be willing to facilitate and encourage and her relationship with the other parent, one of them will be less able to.

[34] For most of her short life so far, Faith has lived in the stable environment of the Merchant's home and I think that it should continue. There is a benefit to be gained from leaving her in the environment to which she has become accustomed.

[35] The more important factor is the second one however. I am satisfied that because of very strong dislike that Mrs. Williams holds for Shuric Tameika would not be able to easily facilitate Faith's relationship with him, while they are under her roof. Shuric's evidence that during an incident at Mrs. Williams' property, she attempted to throw a stone at him remains uncontroverted. When she gave evidence, Mrs. Williams' disdain for her granddaughter's father was clear. Tameika is welcome at the Shuric's home but he is not welcome at hers. I find it hard to see that if how those circumstances would not impact negatively on his relationship with Faith.

CONCLUSION

[36] When a relationship breaks down child custody can quite easily be said to be one of the most emotional issues. If the parents are not married it further complicates the matter. The Sheriff at first instance in **Brixey**¹⁷ observed that decisions in custody case involving children of tender years are Solomonic in their difficulty and I agree entirely. Like him I "lay no claim to Solomon's traditional wisdom".

¹⁷ Supra at Note 7

[37] However, after considering all the relevant facts and having given both Shuric and Tameika the same consideration and with the paramount consideration being Faith's welfare and general wellbeing, I have concluded that sole custody should be given to Shuric.

[38] Although I have awarded sole custody to Shuric, and he has the legal right to make all the decisions that affect Faith, I hope that he as a matter of courtesy will inform Tameika of any important matters relating to Faith, which would include the choice of schools, her medical treatment and travels out of the jurisdiction. I urge Shuric and Faith to continue to share in the joys of raising a daughter who it is clear that they both love

ORDER

[39] In light of the foregoing, I make the following order:

1. Shuric Merchant, the natural father of the female child Faith Tamoya Nathanya Williams Merchant born on the 24th day of April 2007 of the body of Tameika Williams is granted sole custody of the said child.
2. Tameika Williams as the natural mother of Tamoya Nathanya Williams Merchant is to have liberal access to the said child, including but not limited to:
 - a. Every other weekend from 5.00 p.m. on Fridays to 6.30 p.m. on Sundays; and
 - b. On Tuesdays and Thursdays from 5.00 p.m. to 6.30 p.m. of the next day of every week where the she does not have weekend access to the said child.
3. There is no order as to costs.

Ianthea Leigertwood-Octave
High Court Judge