JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 51/08

BEFORE: **THE HON. MR. JUSTICE PANTON, P.,**
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE MORRISON, J.A.

BETWEEN	**B P**	**APPELLANT**
AND	**R P**	**RESPONDENT**

Ransford Braham and Mrs. Suzanne Risden-Foster, instructed by Livingston, Alexander & Levy for the appellant

Ms. Jacqueline Cummings and Aon Stewart, instructed by Archer Cummings and Co., for the respondent

2nd, 3rd, 4th, 5th, March; 3rd April & 30th July, 2009

PANTON, P.

1. On April 3, 2009, we ordered as follows:

   i. The appeal is allowed.

   Ii The parties are to have joint custody, with care and control to the mother.

   iii. The mother is allowed to leave the jurisdiction with the relevant child to reside within the Republic of Trinidad and Tobago.

   iv. The father is forthwith to return to the mother the relevant child's passport.

v. The father shall have access to the relevant child one half of all major school holidays, or at any other time as agreed by the parties.

vi. The father is to pay the sum of US$1,000.00 per month to the mother for the maintenance of the relevant child.

vii. The father is to provide the relevant child with a health card.

viii. The mother is to pay the relevant child's educational expenses.

ix. Costs of the appeal to the appellant to be agreed or taxed.

2. The reasons for our decision are contained in the judgment that has been written by our learned brother, Harrison, J.A. I have nothing to add thereto except to say that the opinion of Dr. Wendel Abel weighed with me. It was not available to the judge in the Court below. Hence, he cannot be faulted for the decision he arrived at. Having admitted the evidence of Dr. Abel, it seems to me that we had no choice but to find that it is in the best interest of the child that his mother be permitted to leave the jurisdiction with him.

HARRISON, J.A.:

1. This is an appeal by BP (the Appellant mother) from a decision of Marsh J., contained in judgment dated April 16, 2008. Two (2) applications were heard by the learned judge on May 16, 2007. In the first application the Appellant sought inter alia, an order for permission to be granted to her to relocate with the child "N" to Trinidad and Tobago. RP (the Respondent father) had also applied to vary an order previously made by Beswick J, which awarded joint custody to both parents with care and control to the mother. Both applications were refused by the learned judge and he ordered that the status quo of the child, that is, the order for joint custody with care and control to the Appellant, should remain in place.

The Background to the Applications

2. The Appellant is Trinidadian but has lived in Jamaica since her marriage to the Respondent in 2002. She is a Communications Consultant by profession and is doing further studies. She was registered in 2005 as a part-time student at the University of the West Indies, and was reading towards a PhD degree in Communication Studies.

3. The Respondent is Guyanese by birth to a Jamaican father and a Guyanese mother. He holds a MSc degree in Geophysics and is also an Information Technology Consultant and Music Producer.

4. The parties met in Trinidad and Tobago in July 2001 and by early 2002, the Appellant moved to Jamaica. They got married on May 25, 2002. "N" the only child of the marriage, was born in Jamaica on September 10, 2002. He has lived all his life in

Jamaica and is currently attending school at Mona Preparatory School. He has a sister, G. (the Respondent's child) who is thirteen years old and is the child of a previous marriage.

5. In November 2002, the Appellant gained employment in Jamaica. She was employed with the Caribbean Institute of Media and Communication (CARIMAC) as a part-time project consultant and/or part-time lecturer.

6. However, the marriage broke down and by May 2003 the parties separated. Proceedings for dissolution of the marriage commenced thereafter. On May 28, 2003 an ex-parte order was made granting custody of the child "N", to the Respondent but by June 2003 a joint custody order was made with care and control of the child to the Appellant. There were subsequent orders varying maintenance in respect of the child. The marriage was finally dissolved on December 15, 2006.

7. On February 22, 2007 the Appellant made an application to the Supreme Court and sought an order to remove the child from the jurisdiction. She deponed inter alia:

(a) She believes that a move to Trinidad would be in the best interest of the child because the Respondent was short paying the child's maintenance and was constantly in arrears;

(b) The standard of living that the child was exposed to had deteriorated because of the Respondent's disobedience of the maintenance court order;

(c) She had agreed to accept a reduced sum per month towards the child's maintenance;

(d) That she could no longer support the child on the reduced sum and under the living conditions she had to resort to;

(e) It was therefore impossible for her to sustain a basic level of middle class living that she was used to;

(f) That she had found a job in Trinidad and Tobago that would allow her to provide for the growing and longer term needs of her son and herself;

(g) That she had an immediate and extended closely-knit family in Trinidad who were willing and ready to aid in the child's emotional and physical welfare.

The Proposed Arrangements

8. The following arrangements were proposed by the Appellant in respect of the child if she were permitted to take him to Trinidad:

(a) the child 'N' would live in a two bedroom apartment in Trinidad and would have his own room.

(b) He would attend Briggs Preparatory School and would receive "his religious teachings" at Our Lady of Perpetual Help, a Roman Catholic Church.

(c) The father would be asked to contribute the sum of One Thousand United States dollars for the child's maintenance as well as to provide for the said child 'N' a regionally accepted health card. Other expenses in relation to the child would be the mother's responsibility.

(d) The father would have access to the child during one half of all major school holidays. Christmas and New Year's days would remain "alternated", and any other time that could be agreed by the parties.

The Fresh Evidence

9. At the hearing of this appeal, the Appellant applied for and was granted leave to adduce fresh evidence. A General Medical and Psychiatric Report (The Report) which

was obtained from Dr. Wendel Abel, was admitted into evidence. Dr. Abel is a Consultant Psychiatrist and Lecturer in the Department of Community Health & Psychiatry at the University Hospital of the West Indies. The Report states inter alia:

> "...
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> Relationship with her child
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> BP described herself as a committed mother who has dedicated herself to raising her child. During the interview she stated, "My child has never eaten Gerber processed bottle food under my care." My son is always happy with me, "I maintain two part time jobs in order to give me the flexibility I need to attend to my child". She explained that her ex husband is a musician and as such his schedule may be erratic. She feels that this would result in her child being raised mostly by a helper. She expressed great discomfort with this possibility saying "I would be devastated to leave my child behind to be raised by a helper as he is not accustomed to that." She reported that she only employs a day's worker to wash and clean as she prefers to do all the cooking and homework with her son. She also reported that in Trinidad her son would have an extensive family support system spearheaded by her mother who does not work as well as extended family members and close friends. This network would also enable her to live up to her full potential career wise knowing that her son would be taken care of by family while she is at work.
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> In keeping with the fact that she is prepared to do whatever is in her child's best interest, BP reported that for ten months prior to the matter being brought before the court her ex husband was not consistent with his court ordered maintenance payments and despite this she did not deny him access to his child.
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> Her adjustment in Jamaica
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> BP reported, "I am not happy living in Jamaica, I have never felt integrated living in Jamaica as all my support system is in Trinidad. I came to Jamaica to be a part of a family and now that the marriage has irretrievably broken down, I feel so isolated and alone". "I also do not feel that I will ever be in

the state of mind to have meaningful long term relationship in Jamaica".

BP also reported that her father was diagnosed with a critical illness in February 2007 and subsequently died in February 2008. She reported that her ex husband denied her the opportunity of visiting her father with her son on the two occasions that her son was on holidays from school; Easter and Summer 2007. As a result, she was not able to spend any extended period of quality time with her father in the year before his death. Her father was not granted his dying wish to see or bond with his grandson during his final year alive. She stated that given the fact that she was not able to be with her father during his last months, this was very traumatic for her and she has been left with unresolved guilt and pain.

BP is desirous of repatriating to Trinidad where she feels that she will be able to move on with all aspects of her life. That is where her roots, family and childhood friends reside. Her mother resides in Trinidad and she is desirous of participating in the care of her mother, who was recently diagnosed with Major Depression and who is still grieving over the death of her husband and he indicated that she is trapped and condemned to an unhappy life in Jamaica as she is not prepared emotionally or otherwise to leave Jamaica without her child.

Mental state examination

At the time of interview, the patient appeared her stated age and she was appropriately attired. She presented as quite a pleasant and intelligent lady with good verbal and communication skills.

She admitted to being very concerned about the wellbeing and future of herself and her son. She questioned the ability of the father to function as the primary caregiver of their son given the fact that she had played a critical role in his development and that the maternal bond between herself and her child was a particularly strong one. He is her only child.

Currently she does not display any feature compatible with Major Depression. She is however deeply concerned and worried and reported that she experiences severe anxiety

and feelings of extreme sadness when she contemplates the possibility of being separated from her son.

Opinion and recommendations:

Based on the interview with BP and a review of the affidavit, BP is represented as a very caring and nurturing mother who has been very committed to the upbringing of her son. She has played a pivotal role to date in the upbringing of her son and has been a very dedicated mother. She appears to have been in a marriage that did not give her enough scope for personal growth, development and self actualization and will be clearly happier in Trinidad where she is more socially connected as evidenced by the fact that she has a strong support system there.

Based on both the research evidence (Schen, 2005, Hock et al, Miranda) as well as an evaluation of BP, it is my opinion that separation of the child in question from his mother could have devastating psychological consequences for both mother and child.

Given the close relationship and bond with her son, a separation could be very devastating emotionally and mentally to a mother who has committed herself to the upbringing and care of her son.

It was also evident during the interview that the child is strongly attached to his mother.

It was also observed that the child is displaying externalizing behaviour. Should this be confirmed, separation from his mother would only serve to aggravate this condition.

In addition, the child is likely to have long term adjustment problems and emotional issues were he to be separated from a mother who has been very committed, played the major nurturing role in his life and been pivotal in his socialization. This is supported by attachment theories".

There was also evidence that the appellant was remarried. Her present husband, also a Trinidadian is now working in Jamaica but at the conclusion of his contract he will return to Trinidad and Tobago.

The Authorities

10. There are a number of leading authorities on the subject matter of taking the child out of the jurisdiction. Some of these cases were referred to and discussed by both Counsel during the hearing of this appeal. However, I do not intend to go through all of them.

11. The decision of the English Court of Appeal in **Poel v Poel** [1970] 1 WLR 1469 sets out the general principles which have been broadly followed in subsequent decisions. The headnote reads as follows:

> "In an undefended divorce suit, a mother of a two year old boy obtained a decree nisi and was granted custody of the boy with reasonable access to the father. Subsequently she remarried and was expecting a child by her second husband. The father saw the boy regularly for about two and a half hours each week and contributed to his maintenance. The boy was happy with the mother and her second husband and the custody arrangements were working satisfactorily. The mother and her husband proposed to emigrate to New Zealand where her husband had good prospects. The judge refused the mother's application for leave to take the boy out of the jurisdiction on the ground that it would cut the boy off from contact with his father.
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> On the mother's appeal:-
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> Held, allowing the appeal, that on an application for leave to take the child out of the jurisdiction the primary consideration being the welfare of the child and whether it would be in the child's best interests to grant the application, regard had to be had to the welfare of the parent who had custody, since if he or she became unhappy it might adversely affect the child, and, therefore, there should be no interference with any reasonable mode of life selected by the parent having custody unless it was absolutely essential (post, p. 1473B-D, D-E, G-H), and that since the judge had not considered the effect of a refusal of leave on the mother's new life he had come to an erroneous decision and leave would be granted

> to take the child to New Zealand subject to the usual undertaking to return the child to the jurisdiction if called upon by the court and to the deposit of £100 for payment of the child's fare back if his return becomes necessary (post, pp. 1472A-B, 1473G).

Winn LJ said, at p 1473:

> "I am very firmly of the opinion that the child's happiness is directly dependent not only upon the health and happiness of his own mother but upon her freedom from the very likely repercussions, of an adverse character, which would result affecting her relations with her new husband and her ability to look after her family peacefully and in a psychological frame of ease, from the refusal of the permission to take this boy to New Zealand which I think quite clearly his welfare dictates."

Sachs LJ said, at p 1473:

> "When a marriage breaks up, a situation normally arises when the child of that marriage, instead of being in the joint custody of both parents, must of necessity become one who is in the custody of a single parent. Once that position has arisen and the custody is working well, this court should not lightly interfere with such reasonable way of life as is selected by that parent to whom custody has been rightly given. Any such interference may, as my Lord has pointed out, produce considerable strains which would not only be unfair to the parent whose way of life is interfered with but also to any new marriage of that parent. In that way it might well in due course reflect on the welfare of the child. The way in which the parent who properly has custody of a child may choose in a reasonable manner to order his or her way of life is one of those things which the parent who has not been given custody may well have to bear, even though one has every sympathy with the latter on some of the results."

The judgment of Thorpe LJ in **Payne v Payne** [2001] Fam. 473 is also instructive. He said at page 485:

> "31 Logically and as a matter of experience the child cannot draw emotional and psychological security and stability from the dependency unless the primary carer herself is

emotionally and psychologically stable and secure. The parent cannot give what she herself lacks. Although fathers as well as mothers provide primary care I have never myself encountered a relocation application brought by a father and for the purposes of this judgment I assume that relocation applications are only brought by maternal primary carers. The disintegration of a family unit is invariably emotionally and psychologically turbulent. The mother who emerges with the responsibility of making the home for the children may recover her sense of wellbeing simply by coping over a passage of time. But often the mother may be in need of external support, whether financial, emotional or social.

Such support may be provided by a new partner who becomes stepfather to the child. The creation of a new family obviously draws the child into its quest for material and other fulfilment. Such cases have given rise to the strongest statements of the guidelines. Alternatively the disintegration of the family unit may leave the mother in a society to which she was carried by the impetus of family life before its failure. Commonly in that event she may feel isolated and driven to seek the support she lacks by returning to her homeland, her family and her friends. In the remarriage cases the motivation for relocation may well be to meet the stepfather's career needs or opportunities. In those cases refusal is likely to destabilise the new family emotionally as well as to penalise it financially. In the case of the isolated mother, to deny her the support of her family and a return to her roots may have an even greater psychological detriment and she may have no one who might share her distress or alleviate her depression. This factor is well illustrated by the mother's evidence in this case. As recorded in Miss Hall's note she said:

> "Things happen and I think I can't stand it. I've got to go home. But then I see Sophie and I calm down and I think I can't leave her ... I would give it a really good try to be a mother to Sophie here but in my heart of hearts I think I would not be able to do it."

32 Thus in most relocation cases the most crucial assessment and finding for the judge is likely to be the effect of the refusal of the application on the mother's future psychological and emotional stability".

In **A v. A** [1980] 1 FLR 380 Ormrod L.J stated inter alia, that:

> "It is always difficult in these cases when marriages break up where a wife who as this one is, is very isolated in this county feels the need to return to her own family and her own county... the test which is often put on the basis of whether it is reasonable for the mother to return to her own country with her only child, I myself doubt whether it provides a satisfactory answer to this question. The fundamental question is what is in the best interest of the child: and once it has been decided with so young a child as this that there really is no option so far as care and control are concerned, then one has to look realistically at the mother's position and ask oneself the question: where is she going to have the best chance of bringing up this child reasonably well? To that question the only possible answer in this case is Hong Kong. It is true that it means cutting the child off to a large extent - almost wholly perhaps from the father; but that is one of the risks which have to be run in cases of this kind. If it is wholly unreasonable, as I think it is in this case, to require the mother to remain in England, assuming even the Court ought to put her in the position of choosing between staying very unhappily and uncomfortably in England and going home to her own country, then I still think the answer is that where she can best bring up this child is the proper solution to this case".

The Analysis

12. It is my considered view that this is a very difficult case, but in resolving the problems between the parties, the court should have regard primarily to the welfare of the child. The question which arose was, of course, a matter very much for the discretion of the learned judge to whom the applications were made. But, this court can, of course, interfere with the exercise of that discretion only if satisfied that that exercise of discretion was wrong. The decision of the learned judge was finely balanced but at the end of the day, as I have said before, it is the child's welfare that is the primary consideration for this Court.

13. The basis upon which Marsh J. refused the Appellant's application is clearly seen in his judgment when he said:

> 'It is clear from the evidence of the Applicant that the prime reason for wanting to take the child from this jurisdiction is financial. Her desire to see and be with relatives seems to be a lesser motive for wanting to leave Jamaica'. (page 19 of the judgment)

14. The judge then went on to balance whether the application succeeded or failed on the welfare test. He said:

> "I have to assess the reasonableness of the proposals, how the exercise of my discretion will affect the Applicant and how a refusal of the application will affect the child. The decision is (sic) this case is at best a very difficult one. I accept that the Applicant is seeking to return with her child to her native land from a country in which she has resided since 2002, because of the obligations of a marriage which is now at an end. She has no relatives in Jamaica. She has however stated that she is prepared to remain in Jamaica if the Court refuses her application. The circumstances of this particular case are typically difficult. The child is currently thriving in an environment of some regulation and working inter parental contacts. He resides with the Applicant but spends very extended periods with the Respondent. He has regular contact with and close relations with his paternal grandfather and his only sibling G. He is, admittedly very bright and sociable, balanced and well rounded. He is attending Mona Preparatory School, considered by the Applicant "a very good school, where he is doing well." Apart from his academic work, he also does karate and swimming. His father participates in every aspect of his life - this is attested to by the Applicant in cross examination. This is important that the relationship between the child and his father continues. The child has friends at his school. It is the opinion of the Applicant, expressed in her answers in cross examination that "the environment in Jamaica has been conducive to N's excellent development". I am not convinced that the excellent development of this child should be altered in any way. I sympathise with the Applicant's situation but when I consider all the factors which I have been reminded

> by Dame Butler-Sloss, (supra) I should, in a case of this sort, I am not of *the* view that it is in the child's best interests for him to leave the only environment he knows and which environment has so contributed to his excellent development. However, nothing in the evidence before me propels me to the view that the father should have sole care and control of the child, while he remains in Jamaica (even if the Applicant mother remains here). I am not of the opinion that the child's Trinidadian Passport be delivered to his father. The status quo remains and the orders sought by the Applicant mother and Respondent father respectively are hereby refused. (pages 19-21 of the judgment)

15. Of course, the appellant's re-marriage is another important factor to consider. It is clear that the motivation for the move to Trinidad and Tobago was not based upon her re-marriage although it is a factor which falls within the equation. A most crucial assessment which the court must bear in mind when considering the best interest of the child is: what likely effect would the refusal of the application have on the mother's future psychological and emotional stability? The learned judge made it clear in his judgment that where an Applicant seeks permission to leave the jurisdiction with the child, the application has to be reasonable and, to be reasonable, it had to be genuine, practical and not motivated by any desire on the Applicant's part which can be described as inappropriately selfish. He also recognized that the mere fact that a proposal to move abroad has been shown to be reasonable does not automatically mean that permission to leave the jurisdiction would be granted. The Court, he said, must consider whether or not such a move would be in the best interest of the child.

16. The learned trial judge did not have the opportunity of examining Dr. Abel's Report but it now forms part of the evidence which this court has to consider. It speaks of the Appellant's psychological state which was likely to be exacerbated by a refusal of

the Court to allow mother and child to be relocated. Of course one would also have to weigh the consequence of relocation which could result in the loss of relationship between father and child. But, Dr. Abel spoke of the child's strong attachment to his mother and that the consequence of separation would be devastating to both mother and child.

17. The question therefore, is whether or not a move to Trinidad would be in the best interest of the child. I would favour allowing the appeal. I adopt the words used by Winn LJ in **P (L M) (otherwise E) v P (G E)** [I970] 3 All ER 659 at 661 (e) when he said: "It is not because of any defect of the father, but merely for the sake of the child's own welfare and future..."

18. It is for these reasons why I agreed that the appeal ought to be allowed and the decision of the learned judge set aside.

MORRISON, J.A.

I agree with the reasons for judgment written by Harrison, J.A. and have nothing to add.