[2018] JMSC Civ 106

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

FAMILY DIVISION

CLAIM NO. 2015 M 32353

BETWEEN	**MR. D**	**PETITIONER**
AND	**MRS. D**	**RESPONDENT**

Consolidated with

CLAIM NO. 2017 HCV 02427

BETWEEN	**MRS. D**	**CLAIMANT**
AND	**MR. D**	**DEFENDANT**

IN CHAMBERS

Miss Jacqueline Cummings instructed by the Kingston Legal Aid Clinic for the claimant/respondent

Miss Marjorie Shaw & Miss Carleen McFarlane instructed by McNeil & McFarlane for the defendant/petitioner

Heard: August 24, September 6, 14, 22, November 13, 22, December 20, 2017 and January 23, 2018

Family Law –custody of children –application to vary of order – change in circumstances – custodial parent no longer resident in the jurisdiction

SIMMONS J

[1] The parties in this matter were married on December 22, 2005. At the time Mr. D was a Pilot and Mrs. D, a student. The union produced two children; a daughter

D, who is now nine years old and a son **DA**, who is now 4 years old. Both children and Mr. D are also Canadian citizens.

[2] Their relationship deteriorated and they separated in 2015. Mrs. D who had Canadian resident status removed with the children and went to live in another parish. She subsequently decided to migrate to Canada and took the children with her without the knowledge of her husband. Mr. D sought and obtained the assistance of the Canadian Courts and the children were returned to Jamaica. He later brought proceedings for custody in this Court. The application was heard by Tie J and was resolved in his favour.

[3] This is an application by Mrs. D to vary the order made by Tie J made on the 9th December 2016. By that order, the respondent, Mr. D was awarded custody, care and control of the two children. The other terms of that order are as follows:-

(i) The mother is to have electronic access to the children,including telephone calls Mondays to Thursdays between the hours of 6:00 p.m. and 7:30 p.m. and on Fridays to Sundays between the hours of 5:30 p.m. and 7:30 p.m.

(ii) The mother is to have supervised access in Jamaica as follows:-

(a) The last two weeks in July between the hours of 1:00 p.m. and 5:00 p.m. The first two weeks in August between the hours of 10:30 a.m. and 5:00 p.m. The mother was also required to pay the travel and associated expenses of the nanny who would accompany the children.

(b) There was also provision for the mother, who then resided in Canada to have supervised access outside of the school holidays whenever she travelled to Jamaica.

(iii) The father is to advise the mother any time he wished to take the children out of the jurisdiction or if he changed residence.

[4] Mrs. D stated in her affidavit sworn to on the 17th January 2017 that she learnt that Mr. D planned to relocate outside of Jamaica permanently. In a later affidavit she stated that he planned to relocate to Dubai as he was finalizing his contract with Emirates Airlines.

[5] It is common ground that Mr. D has in fact, relocated to Dubai and would like the children to join him there.

[6] It is against that background that Mrs. D has filed the application to vary the order of Tie J. The application which was amended seeks the following orders:-

(i) That the parties be granted joint custody of the children;

(ii) That the mother be given care and control of the children with residential access to the father on alternate weekends;

(iii) That the children be permitted to resume their studies at the Sts. Peter and Paul Preparatory School.

[7] The ground on which the application is based is that there have been material changes in circumstance since the order was made. The changes as particularized by Mrs. D are as follows:-

(i) Mr. D is no longer resident in Jamaica;

(ii) The circumstances surrounding the children's care, control, education and accommodation have changed for the worst;

(iii) Mrs. D has undergone counselling as recommended by Dr. Samms-Vaughn;

(iv) The children are being abused by Mr. D and their caregiver Miss C.

(v) Mr. D is unable to satisfy the emotional and day to day needs of the children; and

(vi) Mr. D is deliberately interfering with Mrs. D's access to the children contrary to the order of Tie J and has not encouraged a stable and healthy relationship with their mother, Mrs. D.

[8] The application is supported by the affidavit of the applicant sworn to on August 18, 2017. She has also relied on the following affidavits:-

(i) Affidavit of Urgency of Mrs. D filed on January 20, 2017;

(ii) Further affidavit of Mrs. D filed on January 31, 2017;

(iii) Affidavit of Mrs. D in response to affidavit of Mr. D filed on February 24, 2017;

(iv) Affidavit of Urgency of Mrs. D filed on May 22, 2017;

(v) Further Affidavit of Mrs. D filed on June 1, 2017;

(vi) Affidavit of Mrs. D in response to affidavit of Mr. D filed on February 24, 2017;

(vii) Further Affidavit of Mrs. D in response to affidavit of Mr. D filed on July 3, 2017;

(viii) Affidavit of Mrs. D filed on July 25, 2017;

(ix) Affidavit of Mrs. D in response to affidavit of Miss C filed on July 25, 2017.

[9] In her affidavit filed on the 18th August 2017, the applicant states that she believes that Mr. D will not return the children to Jamaica if he is given the opportunity to take them out of the jurisdiction. She indicates that he currently lives in Dubai, United Arab Emirates which is not a signatory to the Hague Convention and as such, any order of this Court could not be enforced.

[10] She has alleged that Mr. D has breached the order of Tie J by denying her access to the children. She stated that it is her belief that he will continue to disregard the orders of the court. She has also stated that she is unable to afford the cost to seek the return of the children to Jamaica from Dubai or elsewhere.

[11] Mrs. D has also stated that she believes that if the children are taken to Dubai, the difference in culture, environment, language and schooling will "further traumatize and magnify the maladjustment of the children since March 2016".

[12] In her affidavit filed on January 20, 2017 Mrs. D states that since the making of the custody order Mr. D has changed seven (7) nannies. She also states that if the children are taken out of the jurisdiction she will be cut out of their lives.

[13] Mr. Fritz Bailey in his affidavit stated that in his opinion, Miss C, the children's caregiver is a "sickly old woman" who "does not do well under pressure/stress and can snap". In his opinion, she is not fit or competent to care for the children. Miss C is the deponent's mother-in-law.

[14] Mr. D in his affidavit filed on the 17th February 2017 has asserted that if Mrs. D is given unsupervised access to the children she may remove them from Jamaica without his knowledge as she did in the past. He also states that he has always been a pilot and is fully responsible for the financial needs of the children.

[15] He asserts that he sought to put the best arrangements in place for them when he was leaving Jamaica to take up employment in Dubai. He says that Miss C is his second mother and knows the children well. He also stated that his sister resides in Hanover. The children also have cousins in that parish. The children's Paediatrician lives close by and the children attend church with Miss C. The daughter also does piano lessons on Wednesdays.

[16] Mr. D has also asserted that Mrs. D has chosen not to visit or contact the children on a regular basis. He stated that he has no difficulty facilitating Mrs. D's

reasonable access to the children if they move to Dubai as she is entitled to be part of their lives.

Applicant's submissions

[17] Counsel submitted that the application ought to be granted as there has been a material change in the circumstances which obtained at the time when the matter was heard and determined by Tie J.

[18] The change in circumstances as outlined by counsel are as follows:-

Mrs. D has relocated to Jamaica;

i.) She now lives in Kingston 6 and is a sole practitioner with her own legal practice;

ii.) Mr. D has left his job in Jamaica and has taken a contract to work in Dubai;

iii.) Mr. D wants to take the children to live there in spite of his previous statement to the court that he wanted them to grow up in Jamaica;

iv.) The children no longer attend Saints Peter and Paul Preparatory School but now attend Hanover Preparatory School since April 2017;

v.) The children no longer live in Kingston or Saint Andrew with Mr. D and are now resident in Hanover with his 64-year-old step-mother, Miss C.

[19] Counsel identified the issues as being:-

(b) *Whether the original order for sole custody to Mr. D should be disturbed; and*

(c) If so in what way;

(d) Whether Mr. D should be granted permission to take the children with him to live in Dubai;

(e) Should care and control of the children be granted to Mrs. D.

[20] Miss Cummings submitted that a variation of the order would be in the best interest of the children as the circumstances which now obtain are quite different from those which Tie J had considered when making the order. She also stated that had the learned Judge been privy to fact that Mr. D intended to migrate and remove the children from the school to which they were accustomed, she may have arrived at a different conclusion.

[21] She stated that custody orders are never considered to be final and can be amended, varied, repealed or discharged at any time if such action is in the best interest of the children. Reference was made to section 7(1) of ***The Children (Guardianship and Custody) Act*** (***the Act***)which states:-

> *"The Court may, upon the application of the father or mother of a child, make such order as it may think fit regarding the custody of such child and the right of access thereto of either parent, having regard to the welfare of the child, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this Act; and in every case may make such order respecting costs as it may think just."*

[22] Counsel also referred to section 18 of ***the Act*** which states:-

> *"Where in any proceeding before any Court the Principle any property belonging to or held on trust for a child, or to custody, the application of the income thereof, is in question, the Court in deciding that question, shall regard the welfare children of the child as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father".*

[23] Miss Cummings directed the court's attention to paragraph 18 of the judgment of Tie J where the learned judge referred to Mr. D's evidence that:-

> *"It was never his intention for the children to relocate to Canada at this time as he wanted them to grow as Jamaican children with Jamaican experience. The decision for them to obtain Canadian citizenship was to give them the option to live and study in Canada once they were ready to attend University or high school"*[1].

Mr. D also indicated to that court that *"Jamaica is the best place for the children to be raised as it has the environment that the children are familiar with and have a settled life".*

[24] Miss Cummings also directed the court's attention to paragraph 78 of the judgment where Tie J said:-

> *"I have observed that the evidence of the father is that he is now permanently employed which enable him to be based in Jamaica. It therefore affords greater stability as compared to when he was moving from contract to contract."*

[25] Reference was also made to paragraph 100 where she stated:-

> *"…father is in a settled job and is financially stable but mother is employed on a part time basis…children are enrolled in a recognized preparatory school in Jamaica but mother had presented no independent evidence to establish ``that her plans towards the education of the children…".*

Tie J also stated that Mrs. D's relocation plans were not well thought out and found that *"there were glaring gaps in her proposed arrangements for the children".*

[26] Counsel stated that when the Court made its determination, it did so under the pretext that the children were residing in a comfortable home in Jamaica, attending the school that they had been familiar with for approximately five (5) years, and were in the direct care of their father who worked and was resident in Saint Andrew, Jamaica. At the time, Mrs. D was still residing in Canada.

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[1] Mr D v Mrs D [2016] JMSC Civ 222 at paragraph 18

[27] Miss Cummings submitted that this is an appropriate case for the court to exercise its discretion to vary the custody order as the parties' circumstances have changed. Reference was made to the case of ***N F v C B*** [2016] JMSC Civ 22 in support of that submission.

[28] Miss Cummings stated that the children have had very little contact with their mother who has moved back to Jamaica since January 2017 in order to be with them. She also stated that Mr. D does not have direct care and control of the children as he has left them since late April 2017 in the care of his step mother, Miss C in Hanover. He began living and working in Dubai since May 7, 2017.

[29] In these circumstances, she argued a variation of the order in the terms being sought, would be in the best interest of the children. Miss Cummings also stated that in matters concerning children, the court should adopt a non-adversarial posture. She submitted that the court should not be "clouded by the strict rules of evidence" in its determination of what is in the best interest of the two children. This assessment, she said, cannot be made by employing an objective approach and ought to be treated subjectively.

[30] Reference was made to the case of ***In re McGrath(Infants)*** [1893]1 Ch. 143,where Lindley L.J. said:-

> *"The dominant matter for the consideration of the court is the welfare of the children. But the welfare of a child is not to be measured by money only nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor the ties of affection be disregarded."*[2]

[2] Page 3 – Forsythe v Jones SCCA # 49/99

[31] Counsel also stated that when considering what is in the best interest of the children the court should have regard to the following:-

> *"Every matter having relevance to the welfare of the child should be taken into account and placed in the balance. Other matters, which may not directly relate to the child's welfare but are relevant to the situation, may be proper to be taken into account and given such weight as the court may think fit, subject always to the welfare of the child being treated as paramount. The interests, wishes and conduct of parents and of other members of the child's family and, indeed, of other persons, may fall under either of these heads."*[3]

The court's attention was also directed to the case of ***In R v Gyngall*** [1893] 2 QB 232 where Lord Esher M.R. said:-

> *"The court has to consider, therefore, the whole of the circumstances of the case, the position of the parties, the position of the child, the age of the child, the religion of the child, so far as it can be said to have any religion, and the happiness of the child… Again, it cannot be merely because the parent is poor and the person who seeks to have the possession of the child as against the parent is rich, that, without regard to any other consideration, to the natural rights and feelings of the parent, or the feelings and views that have been introduced into the heart and mind of the child."*

[32] Counsel also referred to the report of Professor Samms-Vaughan, in which she indicated that D expressed the desire to live with her mother and to visit with her father. Miss Cummings urged the court to take D's wishes into account notwithstanding the fact that she is a child of tender years.

[33] Where Mrs. D's past conduct is concerned, Miss Cummings directed the court's attention to the Privy Council's decision in the case of ***McKee v McKee*** [1951] 1 ALL ER 942, in which the court stated that where a parent committed a breach of

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[3]**Re L. (Minors**) [1974] 1 W.L.R. 250 at 263 cited in S.C.C.A 61/92 **Roland Thompson v Judith Thompson**

a court order, that is one of the factors that are to be considered by the court in its determination of the matter. The welfare of the child was of paramount importance and the conduct of the father in that case, was one of the factors to be taken into account in the decision making process.

[34] Counsel opined that Mrs. D was granted supervised visitation as a result of the perceived risk that she would remove the children from the jurisdiction.

[35] Miss Cummings submitted where an application if made by the custodial parent to remove children from the jurisdiction their welfare is still the paramount consideration. However, this has to be balanced with the rights of the custodial parent. Reference was made to the case of ***Poel v. Poel*** [1970]1 WLR 1469, in support of that submission**.** Sachs LJ stated:-

> *"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."*

[36] This principle was adopted in the unreported case of ***Moodey v Field***[4] in 1981 by Ormrod LJ when he said:-

> *"The question therefore in each case is, is the proposed move a reasonable one from the point of view of the adults involved? If the answer is yes, then leave should only be refused if it is clearly shown beyond any doubt that the interests of the children and the interests of the custodial parent are incompatible."*

[37] Counsel also referred to the case of ***Payne v Payne*** [2001] EWCA Civ 166 where Thorpe LJ stated at paragraph 26:-

> *" In summary a review of the decisions of this court over the course of the last thirty years demonstrates that relocation cases have been consistently decided upon the application of the following two propositions:*
>
> *(a) the welfare of the child is the paramount consideration; and*
>
> *(b) refusing the primary carer's reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children. Therefore her application to relocate will be granted unless the court concludes that it is incompatible with the welfare of the children.*

[38] In that case Thorpe LJ suggested that the court adopt the following approach in the determination of those applications:-

> *"(a) Pose the question: is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life. Then ask is the mother's application realistic, by which I mean founded on practical proposals both well researched and investigated? If the application fails either of these tests refusal will inevitably follow.*

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[4] Unreported but quoted in Payne v Payne [2001] EWCA Civ 166

(b) If however the application passes these tests then there must be a careful appraisal of the father's opposition: is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future relationship with the child were the application granted? To what extent would that be offset by extension of the child's relationships with the maternal family and homeland?

(c) What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal?

(d) The outcome of the second and third appraisals must then be brought into an overriding review of the child's welfare as the paramount consideration, directed by the statutory checklist insofar as appropriate".[5]

[39] Miss Cummings stated that in determining the issue of whether a custodial parent should be permitted to relocate with the children out of the jurisdiction, the courts have considered four scenarios. They are:-

a) The applicant has remarried and their new spouse either lives abroad or has a job or business which is overseas;

b) The applicant has been offered employment abroad;

c) The applicant wishes to return to live in their native country or to emigrate to a county where the family has settled;

d) The applicant wishes to emigrate to a foreign jurisdiction on the ground that the foreign jurisdiction offers a better way of life than their jurisdiction.

[40] She said that Mr. D falls within category (b).

[41] Counsel highlighted two cases in which the Court refused a parent leave to remove with the children. They are ***Bevan v Bevan*** [1974] 4 Fam Law 126 and ***Re T*** (1996) 2 FLW 352.

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[5] Paragraph 40

[42] In ***Bevan v Bevan*** (supra) the applicant (mother) was now married to an American. The father had regular access to the two children aged 16 and 11 who were devoted to him. The husband was recalled to America. The mother was refused leave, and the custody given to the father.

[43] In ***Re T*** (supra), the applicant (mother) who had formed a relationship with a Frenchman made an application to remove the child to France. The father who had contact with the child every second weekend feared that her intended move was partly motivated by a desire to bring an end to his contact. The mother's application was dismissed on the basis that it was "*ill considered, ill-prepared and contrary to the interests of the child*".

[44] Counsel submitted that the cases demonstrate that there must be a convincing reason for "uprooting" the children where it would have a detrimental effect on the relationship between the children and the non custodial parent. She stated that in the instant case, both parties are in regular contact with the children and removing them to Dubai would result in Mrs. D having very little contact with them.

[45] The court's attention was directed to the cases of ***Hurwitt v Hurwitt*** [1982] 3 FLR 194 and ***MH v GP*** [1995] 2 FLR 106 where the court refused relocation on the basis that the venture was speculative.

[46] In ***Hurwitt v Hurwitt*** (supra) the applicant (mother) who had custody of four girls wished to emigrate to Australia. It was proposed that whilst seeking employment, she and the children would live at a farm school.

[47] In ***MH v GP*** (supra). The applicant (mother) wished to emigrate to New Zealand with the child aged 4 because she felt that that country *"with its smaller population and ideal of nature offers not only for her but also for D a way of life superior to anything that can be assured him in this jurisdiction"*. The judge found that the maintenance and development of the relationship between D and his father was important to his future welfare and that the proposals of his mother as

his primary carer were incompatible with his welfare. The judge found that the decision *"is likely to be a huge disappointment to the mother and any inroad in her sense of well being and fulfilment is likely to have an adverse affect on D. But parenting is enormously demanding and often requires considerable self-sacrifice".*

[48] Counsel stated that Tie J in refusing Mrs. D's request to relocate the children to Canada, although they had previously lived there with their grandmother stated that *"**there were glaring gaps in her proposed arrangements for the children**"* [6] *For example,* there was no school given where the children would attend and no one named who would assist her to care for them.

[49] Miss Cummings pointed out that Mr. D in his affidavit sworn to on the 16th July 2017 stated at paragraph 25 that *"I say that having been granted sole custody care and control after a trial by a court I believe it is my responsibility to determine what arrangements are suitable for the children until a court determines otherwise.[7]"* At paragraph 26 he goes on to say *"That in accordance with that duty and responsibility when I realized that I had to leave Jamaica for work in Dubai I sought to put the best arrangements possible in place"* for the children.[8]*"*

[50] Counsel stated that there are glaring gaps in Mr. D's application as he has failed to present sufficient evidence that their removal from the jurisdiction is in their best interest. She stated that there is absolutely no evidence presented by Mr. D which indicates where he lives, e.g. size of house or apartment, or which school the children will attend, who will look after the children when he is working, what hours he works and how long is his contract with the airline or how long he plans to remain in Dubai. All he has said is that he is *"in the process of making*

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[6] Paragraph 106
[7] Page 124 of bundle
[8] ditto

arrangements, in anticipation that the children will be able to join me, once the court matter is completed"[9]*.* He has given no further details or plans for the children.

[51] Counsel also stated that Mr. D has never stayed with any airline for more than three years. She asked the question; what then? Are the children to be uprooted whenever his job requires that he live in another country?

[52] She submitted that the material transformation in culture/socialization (environment, language, schooling etc) of Dubai is likely to further destabilize. She stated that if Mr. D is permitted to take the children to Dubai there would be insurmountable obstacles to access for mother as :-

a) She does not have the financial wherewithal to travel to Dubai to see her children.
b) She will now require the necessary travel documentations to travel and enter Dubai and there is no guarantee that such documents will be granted by the relevant embassy or high commission.
c) There is no guarantee that the father will send the children back to Jamaica to visit their mother or rest of the family.

[53] This means that mother is likely to be totally cut off from the children. This she submitted would not be in their best interest and would violate their right to family (The Convention on the Rights of Child 1989)[10].

[54] Counsel stressed that Mr. D has no travel/immigration restrictions that would hinder his ability to visit or move back to Jamaica at his own pleasure. She submitted that he, unlike Mrs. D will not be at a disadvantage where access to them is concerned. This she said is in contrast to the Mrs. D who would have some difficulty if he is allowed to take them to Dubai or elsewhere.

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[9] Paragraph 50 and Page 133 of bundle
[10] Hans Gunter Krainz v Nareen Krainz (Nee Beckford) Claim No 190 of 2003 decided July 18, 2003

[55] Miss Cummings stated that although Mr. D has asserted that Mrs. D is not a fit parent he has presented no evidence which suggests that Mrs. D is not a fit parent. Professor Samms - Vaughan in her report stated that Mrs. D needed to undergo a period of counselling to address anger and other behaviours surrounding the separation and the custody of the children.

[56] She stated that in accordance with that recommendation, Mrs. D has undergone counselling at Family Life Ministries (see report of Vivienne Tomlinson). Conversely, there is no evidence that Mr. D has undergone any independent counselling as recommended.

[57] Counsel also referred to the findings of Professor Samms Vaughan which were set out in Tie J's at paragraph 98:-

> *"i. Both children appeared comfortable and attached to both parents individually. The older child expressed attachment to both parents*
>
> *ii. Both parents adequately cared for the children jointly when living together and individually after separation*
>
> *iii. Both parents demonstrated their awareness of the importance of the children's physical, cognitive and educational needs. Their respective home and environs are adequate.*
>
> *iv. The welfare of the children is best served by having interactions with both parents."*

[58] Miss Cummings submitted that it was in the best interest of the children for them to remain in Jamaica where their mother, their maternal aunt, their paternal aunt, the maternal grandmother and Miss C reside. Those persons she said, although resident in Hanover were close enough to assist Mrs. D should the need arise. Miss Cummings also stated that if custody is granted to Mrs. D they could return to the school to which they were accustomed and resume the life they had known all of their lives.

[59] It was submitted that in assessing the welfare and what is in the best interest of D and A, the court must consider their happiness, moral and religious upbringing, social and educational influences and psychological and physical wellbeing.

[60] Counsel made the point that Dubai is a Muslim country and is quite some distance away. She also stated that that country is not a party to any international convention on the rights of the children does not have any reciprocal enforcement of judgment treaty with Jamaica. In those circumstances, this court will have no further jurisdiction over the children to safeguard their welfare if they are taken to live in Dubai.

[61] She also stated that **D** has made it clear that she is unhappy in her present living situation and wants to live with her parents, in particular her mother. Her grade 4 teacher at Sts. Peter and Paul Preparatory, also made the following observations during the Christmas and Easter term before the children were removed from that school and taken to Hanover:-

> *"At the beginning of the school term, she appeared to be very sad as she would often be seen quietly sobbing. When asked what's the matter, she would sometimes reply, "Nothing Miss" or gave no response at all. I became very concerned and therefore reported the matter to both her dad and the Guidance Dept. Her dad did not appear to be too perturbed about it…"*[11]

[62] Reference was made to the Australian case of ***H v W***[12], where the issue of the importance of a child's wishes in custody matters was extensively discussed. The court stated:-

[11] Page 102 of bundle – Attached to the Further Affidavit of Mrs. D filed on June 1, 2017
[12] Appeal [1995] FAM CA 30

> *"The wishes of children are important and proper and realistic weight should be attached to any wishes expressed by the children."*

[63] Counsel asked the court to give D's wishes serious and careful consideration.

[64] Miss Cummings also asked the court to take note that **D's** report reflects a fall in her academic performance since her return in March 2016, in her father's care. In the comments of the report it indicates that the father is not reinforcing concepts with her at home. This she said, is a significant departure from her grades for the Academic year 2012 – 2015.[13]

[65] In relation to **DA**, the report shows that he is not developing as expected (NDE) in Intellectual Development, Effective Communication and Valuing Culture. **DA** needs special care at home and professionally. It also states that he needs to be engaged in play activities to encourage speech development. Counsel submitted that Mrs. D is better equipped to meet this need and had been doing so in the past.

[66] Counsel referred to the following paragraph of Mr. D's affidavit in which she said, he conceded that D's academic performance was poor over the past year:-

> *"D is stressed over the current situation… D did not have a proper home work routine… There is no doubt that D's confidence has been affected by this entire situation… There is no doubt that D is embarrassed by bad grades…"*[14]

[67] She stated that currently, the children have been residing in Lucea as Mr. D has been living and working in Dubai. He has not been back to Jamaica since, save for July 27 and 28 for the court hearings. He speaks to the children twice each day whilst Mrs. D has been prevented by his step mother from interacting with them.

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[13] Page 105 of bundle– Affidavit of Mrs.D filed on June 1, 2017
[14] Pages 128 – 131 of bundle - Para 38, 39, 41, 43 – Affidavit of Mr. D filed on June 16, 2017

[68] Counsel stated that at the time when Tie J was considering the matter it was not contemplated that Mr. D would have been absent for more than two (2) – three (3) nights per week. This she said, has changed since his move to Dubai. She submitted that in light of the fact that **D** is of tender years and a female, the mother factor is extremely important. In this regard reference was made to ***Re S(A Minor) (Custody)***, where Butler Sloss L.J said:-

> *"...there are dicta of this court to the effect that it is likely that a young child particularly perhaps a little girl would be with the mother, but that is subject to the overriding factor that the welfare of the child is paramount consideration…"*[15]

[69] She stated that Mrs. D is capable of resuming her responsibilities to monitor and ensure positive academic growth of the children. She also indicated that Mrs. D has proposed structuring her work diary around the children's extracurricular activities enabling them to build and maintain the social life they were accustomed to when they were in her direct care and control.

[70] It was submitted that in custody cases, the judgement of the character of the competing parties is fundamental to the decision[16], and that the conduct of the parties must be assessed. Counsel stated that it is evident that Mr. D has intentionally breached and continues to breach the present access order as Mrs. D is not allowed to see or speak to the children often. She also opined that he does not encourage a healthy relationship between mother and the children.

[71] By way of example she stated that Mr. D surreptitiously took the children to Hanover without informing their mother. Mrs. D she said, was forced to seek the assistance of the police to confirm their whereabouts. She also stated that it was Mrs. D's affidavit evidence that initially informed the court that Mr. D was in Dubai

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[15] [1991] FLR, 388 at 399
[16] Per Latham C.J. Lovell v Lovell [1950] 81 C.L.R. 513

during the week of January 23rd 2017 finalizing his employment contract with Emirates Airline. It states:-

> *"D deceived the court as he strongly argued that he had no intention to work outside Jamaica, while he was actively seeking employment in Dubai. I know that D had to go through a three (3) step assessment process which takes approximately six (6) months. For D to be in Dubai January 2017 finalizing his employment, he had to have sought employment during the trial where he fervently denied his desire to venture off to the Middle East."*[17]

[72] Counsel also stated, that after it was revealed that the children did not return to Sts. Peter and Paul Preparatory School since April 12, 2017, Mr. D told Mrs. D by way of letter May 12, 2017 that his reason for moving them was because he owed the school eighty six thousand dollars ($86,000.00) for school fees. His affidavit states:-

> *"As recent as January 31st 2017, I received a letter from St Peter and Paul Proprietary School that I owe the sum of Eighty Thousand Dollars ($86,000.00) for* ***D's*** *school fee…"*[18]

[73] Miss Cummings indicated that that was not the reason he gave the school for their removal.[19] She stated that reports from the school revealed that fees were never owed and in fact a sum of one hundred and seventy two thousand dollars ($172,000.000) was reimbursed to Mr. D on May 5, 2017 for summer term fees which had been paid on April 24, 2017[20].

[74] Counsel also submitted that there is a real possibility that the children will not be returned to this jurisdiction if Mr. D is allowed to take them to the United Arab Emirates. She submitted that any order for their return would be unenforceable

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[17] Page 53 of bundle and paragraph 23 – Affidavit of Mrs. D filed on February 24, 2017
[18] Page 45 of bundle - Para 20 – Affidavit of Mr. D filed on February 17, 2017
[19] Page 101 and page 108 of bundle
[20] Page 113 of bundle - Para 17 – Affidavit of Mrs. D filed on June 1, 2017

as that nation is not a signatory to The Hague Convention on the Civil Aspects of International Child Abduction. That she said would not be in the best interest of the children.

[75] She stated that Mrs. D is permanently settled in Jamaica and has been a sole legal practitioner since January 2017. She indicted that Mrs. D has no intention of leaving the jurisdiction and is not a flight risk.

[76] Where the issue of joint custody is concerned, reference was made to the case of ***Hewer v Bryant*** [1969] 3 All E. R. 578, where Sachs L.J. expressed his view of what is meant by custody. He said:-

> *"In its wider meaning the word "custody" is used as if it were almost the equivalent of guardianship" in the fullest sense-whether the guardianship is by nature, by testamentary disposition, or by order of a court....Adapting the phraseology of counsel, such guardianship embraces a "bundle of rights", or to be more exact, a "bundle of powers", which continues until (age of majority)...These include power to control education, the choice of religion and the administration of the infant's property. They include entitlement to veto the issuance of a passport and withhold consent to marriage. They include, also, both the physical control of the infant's personal property until the infant attains years of discretion..."*[21]

[77] Reference was also made to the case of ***Mrs. S v Mr. S*** [2016] JMSC Civ. 224 in which Jackson-Haisley, J. (Ag.) adopted the reasoning of the court in ***Jussa v Jussa*** [1972] 2 All ER 600. In that case Wrangham J said:-

> *"...I recognise that a joint order for custody with care and control to one parent only is an order which should only be made where there is a reasonable prospect that the parties will co-operate. Where you have a case such as the present case, in which the father and the mother are both well qualified to give affection and wise guidance*

[21] Page 585

to the children for whom they are responsible, and where they appear to be of such calibre that they are likely to co-operate sensibly over the children for whom both of them feel such affection, where you have that kind of situation, it seems to me that there can be no real objection to an order for joint custody." [22]

[78] Jackson-Haisley, J. went on to state:-

"[62] From the discussions that follow this pronouncement by Wrangham J, it is clear that such an order is usually viewed as exceptional. Further, that such an order should only be made where both parents are unimpeachable. What is also patently clear is that the welfare of the child is the paramount consideration. If the parties are not on good terms this may militate against the interest of the child if the parties are not able to agree on important matters concerning the children

[73] The evidence demonstrates that both parents love Z and they are concerned for her best interest. The Respondent has not developed a sufficient relationship with the child, largely because of the restricted access and also because he does not live within this jurisdiction… he indicated that he was living in Malaysia but since February of this year he lives in Dubai. He has not lived in Jamaica since 2010 and has no immediate plans to live here in the near future.

[74] This fact has weighed heavily on my mind. He now lives in Dubai which is a day and a half away from Jamaica and nine hours ahead of Jamaica in terms of time, so it may be safe to say when it is day time here it is night time there. If for example an important decision needs to be made within a short space of time, contact with him may not be immediate and it would take him shortest travel time of 24 hours to travel to Jamaica if need be. Children are such that one cannot predict or even speculate on the number and

[22] Page 603

> *nature of events that can take place in their lives. If there were even an emergency with respect to her education or her health he would not be easily accessible. Technological advances have made communication so much easier and I am cognizant of this... Their only communication is via email which although instantaneous, unlike a phone call, is dependent on an individual making the necessary checks to their email account.*
>
> *[75] I have to balance all of those concerns with what is in the best interest of Z… She may have need of a medical specialist at short notice. There are varying number of events that can take place in the life of a child that may affect their health, education and even their religious upbringing… I find the Fish case to be instructive where the father lived in the UK and the mother had deponed that the great physical distance between them precludes joint decision making. The Court made a decision which resulted in a change in the status quo by revoking a consent order for joint custody.*
>
> *[76] In light of what I have expressed I cannot say that I am convinced that an order for joint custody in these circumstances would be in the best interest of Z. In fact I am satisfied on a balance of probabilities that such an order would not be in her best interest."*

[79] Counsel reminded the court that section 7 of the ***Children (Guardianship and Custody) Act*** confers on a mother and father equal rights to custody of a child having regard to the welfare of the child. The conduct of the parties is also relevant.

[80] She asked the court to consider the fact that Mr. D presently lives and works in Dubai which is quite some distance away from Jamaica where Mrs. D resides. She also stated that Mr. D has demonstrated his inability or unwillingness to work harmoniously with her for the children's benefit despite their personal differences.

[81] She stated that the children are accustomed to their father working overseas for long periods and their mother being their primary caregiver. In those circumstances it was submitted that the best decision would be to grant care and control of the children to their mother.

[82] This she said would result in more stability for the children as they would return to the city and school to which they are accustomed. Mr. D could visit and have residential access to bond with them when he is not working.

[83] In the circumstances it was submitted that the welfare of the children will be best served by granting joint custody to both the parents with care and control to Mrs. D with liberal access to Mr. D.

Respondent's submissions

[84] Miss Shaw submitted that in order to justify a variation of the order of Tie J, it must be established that since or from December 9, 2016, there has been a material change in circumstances and that these changes occurred after the making of the Orders. The variation must also be in the best interests of the children.

[85] Reference was made to Sections 7 and 18 of the ***Children (Guardianship and Custody) Act*** which state:-

> *"7(1) The Court may, upon the application of the father or mother of a child, make such order as it may think fit regarding the custody of such child and the right of access thereto of either parent, having regard to the welfare of the child, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this Act; and in every case may make such order respecting costs as it may think just.*
>
> *7(5) Any order so made may, on the application either of the father or mother of the child, be varied or discharged by a subsequent order.*

> *18 Where in any proceeding before any Court the custody or upbringing of a child or the administration of any property belonging to or held on trust for a child, or the application of the income thereof, is in question, the Court in deciding that question, shall regard the welfare children of the child as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father".*

[86] Counsel also relied on the case of ***Kelvin Yeoh v. Liew*** Case 10 HCM [2005] 3 Amr 272, in which the Court had to consider the variation of a consent maintenance order. In that case, the court referred to the text, ***Rayden on Divorce*** where stated that "*the power to vary reflects changes in circumstances subsequent to the date of the Order*"[23] and stated that:-

> *"…the same principles apply to custody orders for which the court has also been given to vary. Indeed the power to vary is even more crucial in matters relating to children, as orders for custody and access are never final and the primary consideration is always the welfare of the child"*[24]

[87] She stated that at the time of the making of the December 9, 2016 Order the following circumstances obtained:-

- Mrs. D resided abroad
- Mrs. D was preparing herself to establish a practice in Canada;
- Mr. D was employed as a Pilot and based in Jamaica;
- Mr. D's job took him away from home for a few days each week
- The children were in the care of Mr. D in Jamaica

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[23] 14th edn. Pg. 847 (parag. 144)
[24] Kelvin Yeoh v. Liew at parag. 2

- Both parties relied upon third parties to ensure for the care of the children;
- Supervised access to the children was deemed the most appropriate means contact for Mrs. D;[25]
- Mr. D was assessed to be the most suitable person to have sole custody, care and control of the relevant children [26]

[88] Mrs. D has alleged that the circumstances have changed as follows:-

- Mr. D no longer resides, or works in Jamaica;
- The circumstances regarding the care, education, health and accommodation have changed as the children are living in Hanover.
- The children were being abused and their health neglected by their caregiver.
- Mrs. D has undergone one session of counseling as recommended by Dr. Maureen Samms-Vaughn.
- The children have been placed in a volatile environment.
- Mr. D is deliberately interfering with Mrs. D's access to the children;
- The children wish to reside with Mrs. D.
- Mr. D has attempted to surreptitiously remove the children from the jurisdiction.

[89] Counsel stated that the issue which this Court must determine is whether, or not, Mrs. D has met the bar to justify a variation of the Order of December 9, 2017.

[90] It was submitted that Mrs. D has not met the established bar,[27] for the following reasons-:

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[25] Report from Professor Samms Vaughn and Dr. Jennifer Wilson
[26] Report from Professor Samms Vaughn and Dr. Jennifer Wilson

- The Order of December 9, 2016 contemplated Mr. D being able to travel outside of the jurisdiction[28];
- The Order of December 9, 2016, contemplated Mr. D residing outside of the jurisdiction with the children.
- Mr. D who has dual nationality was given custody care and control of the children and there is nothing in the Order that prevents him from removing them from the jurisdiction.
- The current situation of the children, if deemed unhealthy and volatile, has been induced by injunctive relief pursued by Mrs. D in her pursuit for joint custody, care and control. [29]
- Mrs. D's affidavit in support is heavily weighed by incidents preceding the Order of December 9, 2016.
- The professional opinions available to the Court still indicate that Mrs. D's psychological state has not improved sufficiently to justify a variation of the Court's Order.
- The expert opinion continues to justify custody, care and control of the children remaining with Mr. D in their best interests.[30]
- Mrs. D has not presented any other expert assessment of herself although she stated that she received counseling.
- The challenges, if any, being experienced by the children were induced by Mrs. D's attempts to re-litigate the issue and are an abuse of process.

[91] Counsel relied on the Australian case of ***In the Marriage of D'Agastino*** (1976) 2 Fam. LR 11, which reinforces the principle that whilst the court has the jurisdiction to vary orders it should resist the inclination of parties to re-litigate the

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[27] N.F v C.B [2016] JMCA Civ. 22
[28] Paragraph 3 & 4 of the perfected Order of December 9, 2017
[29] Reports from Professor Samms Vaughn and Dr. Jennifer Wilson
[30] Report of Dr. Jennifer Wilson

issues. As such, applications to vary are to be restricted to cases where there had been a change in circumstances since the grant of the original order".[31]

[92] She stated that the orders sought in Mrs. D's appeal (filed approximately a month of the making of the December 9, 2016 Order), duplicated the very relief sought in notice of application for court orders which were filed upon the withdrawal of the appeal.

[93] In addition, those same orders were sought in subsequent notices of application filed between January, 2017 and July, 2017. She said that between the filing of the appeal and her last application, Mrs. D filed eight applications to secure and/or extend injunctive relief obstructing and barring Mr. D from exercising his role as the sole custodian of the children.

[94] Reference was made to the case of ***Hewer v. Bryant*** (supra)[32], in which Sachs J outlined the meaning "custody". In addition, to the passage cited by counsel for the applicant, reliance was placed on the following which appears in the same passage:-

> *"It is thus clear that…one of the powers conferred by custody in its limited meaning, ie. such personal power of physical control that a parent or guardian may have."*

[95] Counsel submitted that it was Mrs. D's numerous applications that have prevented the children from their accustomed travel, denied them of access to medical treatment in Canada, driven Mr. D to incur significant legal expenses in Canada and Jamaica and provoked him, as the sole provider of the relevant children, into seeking available employment outside of Jamaica. It was also submitted that Mrs. D, in the interest of the children should not have been allowed by this Honourable Court to mount, or maintain, these applications

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[31] Referred to in Donahue Montgomery Stockhausen v. Valda Willis (unreported) Claim No. 2004/HCV2920 pg.12.
[32] [1969] 3 All ER 578.page 585 D-G

immediately after the granting of the Order in December, 2016. The filing of these applications she said, is an apparent and flagrant abuse of process.

[96] Reference was also made to the case of ***N.F v C.B***[33], in which Morrison J, dealt with an application for a variation of a joint custody order and maintenance award. In that case the application was made approximately one year and three (3) months, after the making of the Order by Mangatal J. In refusing the application for a variation of that Order, his Lordship stated:-

> *"[45] It is against the background of the findings of fact by Mangatal, J that, I now look to the alleged change in circumstance of both parties subsequent to the order. If I may say, without any further preface, B has sought to re-litigate the very issue in his application for a variation of this very order. While I am mindful of the fact that Her Ladyship's order was far-sighted and sagacious in the breadth of its provision of its 'liberty to apply' aspect, yet this cannot be construed to mean that any of the parties were at liberty to re-canvas the very issues of fact on which Her Ladyship's order was based. Clearly, 'a change in circumstance, properly understood, has to be factually determined. In other words, the change in circumstance is limited to events post the order of the Mangatal, J. It must mean that such a party must point to those specific circumstances which affect and impair their ability to give effect to the order of the court due to a material change of circumstance.*
>
> *[46] In light of the above it needs to be said, here and now, that the findings of the facts by Mangatal, J being unchallenged by way of an appeal, shall serve as my guide in helping to determine whether there has been a change in the individual circumstances of each party subsequent to the order."*

[97] Counsel stated that having withdrawn her appeal, Mrs. D cannot now properly rely on the alleged existing scenarios/incidents, created by her various

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[33] [2016] JMCA Civ 22

applications to ground the application for variation based on a change of circumstances.

[98] It was submitted further, that even if Mrs. D has discharged the onus placed on her to show a material change of circumstances, any variation of the order is still subject to the Court's duty to satisfy itself that the best interest of the children would be served by a variation of the Order.

[99] She stated that Mrs. D has not disclosed that she has the financial means to maintain the children or the capacity to accommodate or care for them. There is therefore, no satisfactory evidence that adequate arrangements have been made for the children.

[100] In considering whether there has been a material change of circumstances, the Court must have regard to the expert evidence available to it and to the recommendations in those reports.

[101] Counsel stated that the amended notice of application for court orders filed by Mrs. D is inconsistent with the recommendations in the expert's report and contrary to the best interest of the relevant children.

[102] Where the treatment of expert evidence is concerned, reference was made to Rule 32 of the ***Civil Procedure Rules, 2002*** (***CPR***) which governs the admission of Expert Reports. Counsel stated that the Expert Reports were filed In compliance with the rules and were never challenged. In those circumstances, it was submitted that the court is entitled to rely on them.

[103] Reference was made to the case of ***National Justice Compania Naviera SA v. Prudential Assurance Company Limited*** [1993] 2 Lloyds Report 68 in which the role of the Expert Witness in litigation was summarized by Mr. Justice Creswell. The learned Judge stated:-

> ***"****The duties and responsibilities of expert witnesses in civil cases include the following:*

> *Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (Whitehouse v Jordan, [1981] 1 WLR 246 at p 256, per Lord Wilberforce).*
>
> *An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise (see Polivitte Ltd v Commercial Union Assurance Co Plc, [1987] 1 Lloyd's Rep 379 at p 386 per Mr Justice Garland and Re J, [1990] FCR 193 per Mr. Justice Cazalet). An expert witness in the High Court should never assume the role of an advocate.*
>
> *An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion* ***(Re J sup)."***

[104] These principles she said have been largely incorporated into the Part 32 of the ***CPR.*** The utility of this approach to expert evidence was explained by Lord Justice Simon Brown in ***Mutch v Allen*** (2001) EWCA Civ 76 who stated:-

> *"This new regime is designed to ensure that experts no longer serve the exclusive interest of those who retain them, but rather contribute to a just disposal of disputes by making their expertise available to all. The overriding objective requires that the court be provided with all relevant matter in the most cost effective and expeditious way… "*

[105] Counsel stated that the recommendation of Professor Samms –Vaughn, in her report dated the 8th day of July 2016, on which Tie J relied, [34]stated as follows:-

> *"The Custodial placement that would best serve the interest of the Children regarding their development, health, safety and welfare is Custody, care and control to the father ... at this time .*
>
> *The visitation arrangement with the non custodial parent that would best serve the interest of the child is supervised visitation by Mrs. D*

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[34]Paragraph 97of Tie J's written judgment

> *in the first instance. Supervised visitation is recommended because of the risk of removal of the children……*
>
> *The current recommendation should be reviewed within the next 12 months. If Parental anger regarding separation and custody matters has been addressed within this period thereby removing the risk of removal of the children, access recommendation should be reviewed."*

Counsel also referred to the conclusion and recommendation of Dr. Jenifer Wilson, dated the 15th day of July 2017 was as follows:-

> *"Emotionally, **D** is extremely fearful and anxious, consistently overestimating the dangers and underestimating her ability to cope. Deterioration of **D's** emotional state could be attributed to many factors; such as prolonged physical absence of dad, and inconsistence of mum's pattern of behaviour. Additionally, she is extremely conscious of the need to make both of her parents happy. If this pattern of behaviour is not broken early, it will lead to psychosomatic illnesses or impairment in social and academic performance or in other areas of functioning, as can be currently seen with **D**, i.e. anger, mood swings, fear and sadness.*
>
> ***RECOMMENDATIONS***
>
> 1. *Custodial placement must consider firstly, the emotional security of the children. Mr. D appears to be consistent in addressing the holistic needs of the children. They both feel secure in his presence.*
>
> 2. *Parents must be consistent and transparent in communicating with the children, in order to enhance emotional security.*
>
> 3. *Supervised visitation by mother should be encouraged as **D** loves her mother and should be allowed to interact with her.*
>
> 4. *Family counseling"*

[106] Where the proposed relocation of the children is concerned, counsel submitted that Mr. D as the custodial parent has the right to take them outside of the jurisdiction to reside with him. The only limitation is that proper and adequate arrangements are to be made for their access to Mrs. D.

[107] She stated that access is a right of a child, not a parent.[35] Accordingly, it was submitted, that the court ought not to be concerned with the injury to Mrs. D but rather, the best interests of the children.

[108] In order to make that assessment, the court must take into consideration that as a result of the fettering of Mr. D's custodial rights, the children are currently in limbo. They are effectively not in the immediate care or control of either parent. This situation counsel stated is untenable and will further serve to harm them psychologically. Reference was made to the expert report of Dr. Jennifer Wilson dated July 15, 2017 in support of that assertion.

[109] It was further submitted that in any event, Tie J when she made the order was seized with information regarding Mr. D's occupation, the dual-nationality of himself and the children, the existence of familial ties in Canada, his interest in Canadian reality and his reliance of third persons to assist in his absence from home and or the jurisdiction.

With respect to his absence from the jurisdiction with the children, the learned Judge ruled as follows:-

1. "*Father to advise mother via email of his intention to take the children out of the jurisdiction and the intended duration of same. Father also to advise of any change in residence.*[36]

[110] In the circumstances, it was submitted that Tie J not only contemplated but intended to give Mr. D, the latitude to determine what was in the best interest of the children whether here in Jamaica or overseas. Further, we submit, this is inherent in Mr. D's power when he was awarded ".1*. … custody care and control*

[35] J & Anor v C & others [1969]2 WLR 540 page 13

[36] Paragraph 8 of the Order of Tai, J

to Mr. D." There is therefore, no need on the part of Mr. D to secure a variation of the Order of Tie, J. There may only be a need for clarification.

[111] Counsel submitted that in any event, according to the principles in relocation cases, the conclusion would be the same. She stated that Mr. D should therefore be permitted to relocate to Dubai with the children, once sufficient arrangements are in place to preserve the entitlement of the relevant children to have access to their mother.

[112] Counsel relied on the South African High Court decision of ***Cowell v. Cowell*** 2004 (2) BLR 235, sole custody was granted to the Mother with access to the father. The mother was engaged to be married and intended to leave South Africa with the child to live in the United Kingdom, where her fiancée was employed. The father asked for a variation of the Order on the basis that he would not be able to see his son again.

In refusing the father's application, Gaongalelwe stated:-

> *"The paragraphs extracted from the founding Affidavit …suggests that the Applicant is more, if not solely, concerned with his own convenience of access rather than the best interests of the child…It is trite that if the custodian parent fails to exercise the right of control of the child to the best interest of such child the non-custodian parent must make an application to vary the order. In order to succeed in such application the non-custodian parent must show that it is not in the best interest of the child for the other to continue having custody. In other words, the onus is in the Applicant to show good cause for variation. The fact that the custodian parent may be planning to move out of the jurisdiction of the Court which awarded custody per se does not constitute sufficient cause for variation of the Order.*
>
> *See Theron v. Theron 1939 WLD 355….there is no implication in the general right of access that the children who are the subject of the custody order must be kept within the jurisdiction of the court which granted such custody. There is equally no rule that such child should be necessarily kept within the jurisdiction of the Court which granted such custody. There is equally no rule that such children*

should be necessarily kept within the country of residence of the non-custodian parent simply in order to facilitate easy access. The court as the upper guardian will no doubt interfere with rights of the custodian parent to exercise control over the child only in instances where it is satisfied that such parent is acting contrary to the best interest of the child."

[113] Reference was also made to the case of ***Gordon v. Goertz***[37]**,** in which the mother was granted sole custody and the father generous access of the relevant child. Upon hearing that the mother wanted to move to Australia to study orthodontics, the father applied for custody or alternately an order restraining the mother from removing the child from Canada. Placing much reliance on the trial judge's finding that the mother was the proper person to have the child, the Supreme Court ruled in favour of the mother being allowed to move to Australia.

[114] In that case whilst McLachlin J, stated:-

"Whilst a legal presumption in favour of the custodial parent must be rejected, the views of the custodial parent, who lives with the child and is charged with making decisions in its interest on a day-to-day basis, are entitled to great respect and the most serious consideration. The decision of the custodial parent to live and work where he or she choose is likewise entitled to respect, barring an improper motive reflecting adversely on the custodial parent's parenting ability".[38]

[115] Counsel also referred to the case of ***BP v RP***[39], where joint custody was granted and permission was sought by the parent having care and control, to relocate with the child of the marriage. Permission was denied initially. The Court of Appeal noted that the reason for refusal by the trial judge was that he determined the motive for removal to be primarily financial. The learned trial Judge did not

[37] 1996 } 2 SCR 27
[3838] Paragraph 48
[39] [2016] JMSC civ 22

however have the benefit of evidence of Dr. Abel, which was admitted as fresh evidence.

Harrison JA, who reviewed numerous authorities including ***Poel v. Poel***[40] and ***Payne v. Payne***[41] said:-

> *"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….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….the question is therefore whether or not a move …would be in the best interest of the child".* [42]

The relocation was ruled to be in the best interest of the child and the appeal allowed.

[116] It was submitted that the application made by Mr. D is reasonable and genuine. Counsel also urged the court to find that he has presented sufficient evidence that satisfactory arrangements have been made for the children in Dubai.

[117] In the circumstances, it was submitted that the application of Mrs. D should be refused and appropriate adjustments made with respect to access. The court was also asked to grant the following relief to Mr. D:-

1. *That the Registrar of the Supreme Court of Judicature of Jamaica shall forthwith return the children's passports to him and to permit them to travel, and reside, outside the jurisdiction with* him.

Discussion

[118] The court's jurisdiction to make and vary orders for custody is contained in ***The Children (Guardianship and Custody) Act***. Section 7(1) of the Act states:-

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[40] [1970] 1WLR 1469
[41] [2001] Fam. 473
[42] Para. 15 & 16

> *"The Court may, upon the application of the father or mother of a child, make such order as it may think fit regarding the custody of such child and the right of access thereto of either parent, having regard to the welfare of the child, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this Act; and in every case may make such order respecting costs as it may think just."*

[119] The court's jurisdiction to vary an order may be invoked whenever there has been a material change in the circumstances which were in existence at the time when the order was made. This principle was applied by Morrison J in ***NF v CB*** [2016] JMSC Civ 22. Whilst that case was concerned with an application for the variation of a maintenance order the principle is the same where matters of custody are concerned.

Change in circumstances

[120] The issue of whether there has been a change in circumstances is a question of fact. The determination of that issue is limited to events which arose after the date of the original order and parties cannot re-litigate the same issue. Morrison J in ***NF v CB*** (supra) stated that the party alleging that there has been a change in circumstances *"...must point to those specific circumstances which affect and impair their ability to give effect to the order of the court..."*

[121] This principle was also applied in ***Goertz v Goertz*** in which McLachlin said:-

> *"10 Before the court can consider the merits of the application for variation, it must be satisfied there has been a material change in the circumstances of the child since the last custody order was made...*
>
> *11 The requirement of a material change in the situation of the child means that an application to vary custody cannot serve as an indirect route of appeal from the original custody order. The court cannot retry the case, substituting its discretion for that of the*

> *original judge; it must assume the correctness of the decision and consider only the change in circumstances since the order was issued:* Baynes v. Baynes *(1987), 8 R.F.L. (3d) 139 (B.C.C.A);* Docherty v. Beckett *(1989), 21 R.F.L. (3d) 92 (Ont. C.A.);* Wesson v. Wesson *(1973), 10 R.F.L. 193 (N.S.S.C.), at p. 194.*
>
> *12 What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way: Watson v. Watson (1991), 35 R.F.L. (3d) 169 (B.C.S.C.). The question is whether the previous order might have been different had the circumstances now existing prevailed earlier: MacCallum v. MacCallum (1976), 30 R.F.L. 32 (P.E.I.S.C.). Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. "What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place": J. G. McLeod, Child Custody Law and Practice (1992), at p. 11-5.*
>
> *13 It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order".*

[122] In the instant case Mrs. D has been granted access to the children both electronically and by supervised visits in July and August as well as at other times when she is in Jamaica. Mrs. D now resides in Jamaica. Mr. D no longer resides in the island. If the children are taken to Dubai, the terms of access will be severely impacted as the order specifically states that Mrs. D is to have access to them in Jamaica. She is also required to pay the travel expenses of the person who would accompany the children to see her. The proposed move in my opinion would result in Mrs. D's access to the children being severely curtailed.

[123] In addition, the order of Tie J stipulates that Mr. D is to inform Mrs. D if he intends to take the children out of the jurisdiction and the duration of same. That requirement to my mind does not cover a permanent relocation. I therefore find that there has been a material change in circumstances since the making of the order.

[124] The question which now arises is whether this change is likely to affect the welfare of the children.

Motivation for the relocation

[125] In order to succeed in her application, Mrs. D must prove that the relocation is not in the best interest of the children. In order to make that determination, the court is required to examine the circumstances in order to determine which of the parents is *"...better able to promote and ensure the child's physical, moral, emotional and psychical welfare."*[43]

[126] Among the first matters that are to be considered is the reason or motivation for the removal of the children. Is it *mala fide* or *bona fide*? Where the decision is based on vindictiveness or spite it will clearly be *mala fide* and the application is likely to be dismissed. It is to be noted however, that the court will not interfere with the rights of a custodial parent unless there are compelling reasons to do so. This principle was accepted by the court in ***Goertz v Goertz*** (supra) in which the following passage from ***Young v Young*** [1993] 4 S.C.R. 3 was cited with approval:-

> *"Despite these changes over time with respect to who is regarded as the appropriate custodial parent, the nature and scope of custody itself have remained relatively constant. The chief feature of such orders was, and still is, the implied, if not explicit, conferral of parental authority on the person granted custody. The long-*

[43] McCall v McCall 1994 3 SA 201

> *standing rule at common law is that an order of custody entails the right to exercise full parental authority. In the case of a sole custody order, that authority is vested in one parent to the exclusion of the other.*
>
> *The power of the custodial parent is not a "right" with independent value which is granted by courts for the benefit of the parent, but is designed to enable that parent to discharge his or her responsibilities and obligations to the child. It is, in fact, the child's right to a parent who will look after his or her best interests. . . .*
>
> *It has long been recognized that the custodial parent has a duty to ensure, protect and promote the best interests of the child. That duty includes the sole and primary responsibility to oversee all aspects of day to day life and long-term well-being, as well as major decisions with respect to education, religion, health and well-being".*[44]

[127] This view was also expressed in the Canadian case of ***Kruger v Kruger*** (1979) 25 O.R. (2d) 673 by Thorsa JA. The learned Judge said:-

> *" In my view, to award one parent the exclusive custody of a child is to clothe that parent, for whatever period he or she is awarded the custody, with full parental control over, and ultimate parental responsibility for, the care, upbringing and education of the child, generally to the exclusion of the right of the other parent to interfere in the decisions that are made in exercising that control or in carrying out that responsibility".*

[128] Mr. D has stated that he has always sought to improve his employment opportunities in order for him to provide better support for the children. He stated the position in the following way: *"I had no intention to deceive the Court or cause emotional harm to my children by spiriting them away surreptitiously to any country, but based on the fact that I bear full financial responsibility for them, if opportunity arises for employment which will considerably and substantially*

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[44] Pages 37-38

benefit them and myself and create a more financially stable future, I would consider it". He also confirmed that he tried to get a job in Dubai and had discussed it with Mrs. D. He said that he had wanted to improve the family's financial future but had reservations concerning the children. He further stated: *"I would be very reluctant to destabilize my children at present unless I am convinced that it would be in their best long term interest to relocate or change their circumstances".*

[129] Mrs. D has given evidence that Mr. D has been employed to several different airlines throughout the years. I therefore do not find it unusual for him to have sought employment in Dubai. I am however, not convinced that he was not actively engaged in seeking employment with Emirates Airlines at the time when the matter was being heard by Tie J.

[130] That being said, no evidence has been presented to the court which suggests that Mr. D's job application was motivated by any desire to exclude Mrs. D from the lives of the children. I therefore find that his reason for relocating is *bona fide*.

[131] That is not the end of the matter, as the proposed move must be in the best interest of the children. Other factors such as the over-all well being of the family, the relationship between them and their mother, the wishes of the children, standard of living, educational opportunities as well as the impact of a new environment and culture and moving away from their friends are all relevant.

[132] As was said by Nugent J in ***Godbeer v Godbear****"...the welfare of all children is best served if they have the good fortune to live with both parents in a loving united family"*[45]*.* In the instant case as in ***Godbeer*** the parties have decided to go their separate ways.

[45] 2000 3 SA 976 (W) at 982 C – 983 A

[133] Dr. Maureen Samms-Vaughn, who is a Professor of Child Health, Child Development and Behaviour at the University of the West Indies and a Consultant Developmental and Behavioural Paediatrician at the University Hospital of the West Indies provided an expert report in this matter. The report is dated the 5th December 2017. She was asked to assess the following:-

(i) The impact of the removal of the children from Jamaica to Dubai;

(ii) The environment;

(iii) Change in circumstances; and

(iv) Reduced physical contact with mother.

[134] Dr. Samms-Vaughn interviewed Mr. And Mrs. D, the children and Miss Campbell their caregiver. The report states that Mr. D is desirous of engaging a nanny from Jamaica to take care of the children and that layover flights would keep him away from home for a maximum of four days. At other times he would leave in the morning and return by late afternoon. He also reported that he works seventeen to twenty days per month. Mrs. D is reported to have a flexible work schedule which would allow her to take the children to and from school and their extracurricular activities.

[135] Where school is concerned Mrs. D in her affidavit exhibited documents from Sts. Peter and Paul Preparatory School which indicate that the children have a place there. Mr. Daley in his report to Dr. Samms-Vaughn indicated that they have a place at Kent College of Canterbury which is a United Kingdom based school. It is five minutes away from his home.

[136] Dr. Samms-Vaughn in her report stated that the children have had a *"difficult year".* She also stated that the younger child has bonded with Mrs. Campbell. She also stated that there are concerns about the older child's behaviour and school performance. In addition, *"Structured behaviour assessments completed by her father and teacher identified high normal or clinically significant Withdrawn*

Behaviour and Attention Problems (this is supported by her previous teacher's observation of distraction in the classroom). Additionally, the teacher report identified clinically significant Anxiety/Depression and Thought Problems." She also stated that the onset of these problems suggests that they are not likely to have been caused by the relocation to Hanover. She opined that they were more likely to have been caused by the emotional environment created by parental disagreements and the custody battle.

[137] She also stated that if Mr. D is allowed to take the children to Dubai they would have to be adequately prepared. In addition, they would have to be assured as to the times when they would physically visit with their mother.

[138] Dr. Samms-Vaughn also stated that the children are attached to both parents and *"will have the best outcomes when they maintain high quality, extensive and regular interactions with both parents (lamb & Kelly 2009). Time distribution is important so that each parent has the opportunity to be part of everyday social and nurturing routine activities (e.g. meal times, school, extra-curricular activities, bed times).*

[139] In concluding, Dr. Samms-Vaughn stated:-

> *"Given the geographical distance between Jamaica and Dubai, the children would need to be in one location for school and some holidays, and in the other location for remaining holidays. As indicated in the previous report, it would be best to have the children transition from one parent to the other.*
>
> *The children have had limited physical contact with their mother over the past year. Having structured times when the children can be with their mother in Jamaica would result in increased unsupervised contact periods.*
>
> *Given modern technology (Skype, Facetime), the impact of the children's physical absence from their mother is likely to be lessened. It will be important that contact times be well established and agreed to, especially given differing time zones."*

[140] Where divorce or separation shatters the ideal familial environment of a child, best efforts must be made to ensure that although access by the non-custodial parent has been reduced, contact between that parent and the child is preserved. This view was expressed by the New York Court of Appeals in ***Tropea v Tropea*** 665 NE 2d 145 (NY 1996) in the following terms:-

> *"Like Humpty Dumpty, a family, once broken by divorce, cannot be put back together in precisely the same way. The relationship between the parents and the children is necessarily different after a divorce and accordingly, it may be unrealistic in some cases to try to preserve the non-custodial parent's accustomed close involvement in the children's everyday life at the expense of the custodial parent's efforts to start a new life or to form a new family unit".*

[141] It is however, important to note that the welfare of the child is always of paramount importance. It is my view that if a non-custodial parent's access is terminated by the removal of a child out of the jurisdiction, it is likely that such action would have a negative impact on the welfare of that child. The ideal situation is of course one in which both parents live together and are able to provide the stability that is necessary for the nurturing of young children. Therefore, where parents are separated and access is likely to be curtailed because of relocation, it is important that the relationship between the non-custodial parent and the child is respected and encouraged.

[142] In the instant case, if Mr. D is permitted to take the children to Dubai, the provision for supervised access in the custody order would only be effective when and if the children come back to Jamaica. I have noted that Mrs. D has repeatedly complained that she has been denied access by Mr. D and Ms. Campbell their caregiver. She has even reported having problems accessing them by telephone.

[143] Dubai is thousands of miles away from Jamaica. The time difference is approximately eight hours. This in my view may result in reduced contact by telephone.

[144] It is also a Muslim country with different social norms than those which obtain in Jamaica. Their father may be away from home for up to four days. During that time the children will be in the care of a nanny. Mr. D has stated his intention to get someone from Jamaica. There is no indication that that person has been identified and has the requisite work permit. Mr. D has also not indicated the length of his contract. Will the children be required to relocate in a short period of time?

[145] Mrs. D on the other hand, resides in Jamaica. It is proposed that the children resume their attendance at Sts. Peter and Paul Preparatory. There are however, matters which cause the court some concern. Mrs. D who is a qualified Attorney took the children away from their home in Hanover without the consent of Miss C in June 2017. She had removed the children in 2015 without Mr. D's knowledge when she left the matrimonial home and went to Canada. The Social Enquiry report states that there was no picture of the younger child in her home.

[146] It is clear that both children love their parents. Since 2015 they have had to deal with the separation of their parents and the acrimony between them. Both parents have contributed to the discomfort of these two young children. They have not enjoyed the comfort and security of being in the company of either parent for an extended period since Mr. D took up employment in Dubai in 2017.

[147] Children need stability. The general rule is that the court will not interfere with a custodial parent's relocation out of the jurisdiction unless it is clearly not in the best interest of the child. A situation where a non-custodial parent will not be able to enjoy access is one that has been recognized as likely to have a negative impact on the welfare of a child. In the present case, the children are accustomed to their father being away.

[148] In ***Cowell v Cowell*** (2004) 92 BLR 235, Gaongalelwe J said:-

> *"It is trite that if the custodian parent fails to exercise the right of control of the G child to the best interests of such child the non-custodian parent must make an application to vary the order. In order to succeed in such application the non-custodian parent must show that it is not in the best interests of the child for the other to continue having custody. In other words the onus is in the applicant to show good cause for variation. The fact that the custodian parent may be planning to move out of the jurisdiction of the court which H awarded custody per se does not constitute sufficient cause for variation of the order. See Theron v Theron 1939 WLD 355 where Solomon J at p 362 stated that there is no implication in the general right of access that the children who are the subject of the custody order must be kept within the jurisdiction of the court which granted such custody. There is equally no rule that such children should be necessarily kept within the country of residence of the non-custodian parent simply in order to facilitate easy access. The court as the upper guardian of the minor children will no doubt interfere with the rights of the custodian parent to exercise control over the child only in instances where it is satisfied that such parent is acting contrary to best interest of the child See Segal v Segal 1971 (4) SA 317 (C) and also Laufer v Shawzin 1968 (4) SA 657 (A)".*

[149] The burden is on Mrs. D to prove that the move is not in the best interest of the children. She has in my view discharged that burden. Mrs. D has satisfied me that she will be able to provide the stability that the children need at this time.

[150] She has applied for joint custody. The parties do not get along. They have described each other in less than flattering terms. They also seem to distrust each other. Whilst the court is not precluded from making an order for joint custody where the relationship between the parents is not ideal, there are some circumstances in which it is not appropriate. In ***LMP v MAJ*** [2017] JMCA Civ 37 Brooks JA said that *"..the presence of acrimony between the child's parents did not automatically prevent such orders".* However, the court must be satisfied that there is a reasonable prospect that the parties will be able to cooperate in order

to facilitate the welfare of the children. Such a decision cannot be made based on optimism.

[151] This was discussed by Brooks JA in the above case at paragraph 43 of the judgment. He said:-

> *"Kaplanis v Kaplanis also provides some guidance in respect of the matter of optimism and orders of joint custody. Weiler JA gave that guidance at paragraph [11] of the judgment of the court: "The fact that one parent professes an inability to communicate with the other parent does not, in and of itself, mean that a joint custody order cannot be considered. On the other hand, hoping that communication between the parties will improve once the litigation is over does not provide a sufficient basis for the making of an order of joint custody. There must be some evidence before the court that, despite their differences, the parents are able to communicate effectively with one another. No matter how detailed the custody order that is made, gaps will inevitably occur, unexpected situations arise, and the changing developmental needs of a child must be addressed on an ongoing basis. When, as here, the child is so young that she can hardly communicate her developmental needs, communication is even more important." (Emphasis supplied)"*

[152] In the Social Enquiry Report dated the 14th September 2017, it is stated that Mr. D described Mrs. D as "demented and unfit" to care for the children. He has also said that Mrs. D is "vindictive, constantly lies, teaches the children to be disrespectful and portrays a poor attitude which he does not want their children to adopt". Mrs. D complained that she has been barred from having access to the children on many occasions. She also accused Mr. D of being abusive to the children.

[153] In those circumstances I am not convinced that the parties will be able to put their differences aside and make a joint effort to secure the welfare of the children.

[154] I will therefore not make an order for joint custody.

[155] Bearing in mind the unquestioned love that the parties have for the children and the children's love for both parents, the following orders are made:-

(1) The order of Tie J is varied to award custody, care and control of the children to Mrs. D.

(2) Mr. D is to have residential access to the children for 2/3 of the summer holidays beginning at the start of that period.

(3) Mr. D is to have unrestricted electronic and telephone access to the children.

(4) The children are to spend alternate Christmas holidays with the parties commencing with Mr. D.

(5) The children are not permitted to be removed from the jurisdiction without the permission of the court.

(6) The older child **D** is to continue to attend counselling and the cost is to be borne equally by each party.

(7) The children, their school books and personal effects are to be picked up by Miss Millicent Smikle at the residence of Miss Levita Campbell on Saturday the 27th January 2018 at 1:00 p.m.

(8) Liberty to apply.

(9) The applicant's attorney is to prepare, file and serve order.