[2017] JMCA Civ 37

JAMAICA

IN THE COURT OF APPEAL
SUPREME COURT CIVIL APPEAL NO 92/2015

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**LMP**	**APPELLANT**
AND	**MAJ**	**RESPONDENT**

Kevin Williams and Mrs Suzanne Risden-Foster instructed by Grant, Stewart Phillips & Co for the appellant

Ms Marjorie Shaw, Ms Deneve Barnett and Mrs Terry-Joy Stephenson-Goulab instructed by Brown & Shaw for the respondent

26 September, 18 October and 17 November 2017

BROOKS JA

[1] This is an appeal by Mr LMP, the appellant, against an order by Laing J, delivered on 17 July 2015, in which the learned judge granted custody, care and control of the appellant's son, R, to Ms MAJ, the respondent, who is R's mother. The learned judge also granted the appellant reasonable access to R, along with residential access on alternate weekends (from Friday 2:30 pm to Monday 7:30 am) and half of all major school holidays. Laing J also awarded costs of the claim against the appellant. The names of the parties and of the child have been withheld in order to conceal R's identity and protect his privacy.

[2] The appellant urges this court to set aside the order of Laing J. He seeks an order awarding joint custody of R, to his parents, with care and control to the respondent, and no order as to costs. The appellant also asks that he be granted reasonable access to R, along with residential access on alternate weekends from Thursday 2:30 pm to Monday 7:30 am, plus half of all major school holidays and any other period of access as may be agreed between him and the respondent. He further asks that an order be made preventing the removal of R from the jurisdiction by any one parent, without the written consent of the other parent, such consent ought not to be unreasonably withheld.

[3] The issues to be resolved in this appeal are whether the learned judge erred in:

a. granting sole custody to the respondent;

b. his decision as to the nature and extent of the access granted to the appellant; and

c. awarding costs to the respondent.

The background to the litigation

[4] The parties are not married and have never lived together. They enjoyed a reasonably cordial relationship until R was almost six years old. During that time, the appellant would often visit the respondent's home and interact with R and the respondent's other son H, who is the product of a different relationship. The appellant would also take the boys on trips away from the island.

[5] The present dispute had its genesis in January 2014, when the appellant took R to the United States of America (USA). The respondent alleges that the trip was supposed to have been for a weekend. The appellant asserts that the agreement that

he had with the respondent was that R would remain in the USA until his immigration status was converted to that of a "green card" holder, that is, a permanent resident of that country. The appellant asserted that his status, as a citizen of the USA, allowed him to apply for R to acquire a "green card".

The proceedings before the Supreme Court

[6] When R was not returned at the end of the weekend, the respondent made a number of frantic attempts to contact the appellant and the child, but with only limited success. Eventually, on 26 March 2014, the respondent commenced proceedings in the Supreme Court applying for custody, care and control of R, and for an order that the appellant return the child to the jurisdiction.

[7] An interim order was made by Daye J, on 27 March 2014, in which the respondent was granted custody, care and control of R and the appellant ordered to produce and deliver R to the respondent within seven days of the order. R was not returned to the island until June 2014.

[8] By the time that the case came on for hearing before Laing J, in April 2015, the appellant had also filed a claim in respect of custody on 9 March 2015. Whereas the respondent sought sole custody, care and control of R, the appellant sought joint custody of the child with care and control being granted to him or in the alternative to the respondent. He also sought various stipulations as to the access to the child consequential on the order made with regard to care and control. The orders that he sought are set out below:

> "1. That in respect of the minor child [R], the parties be granted joint custody, with care and control to the [appellant];

2. That the [respondent] be given residential access on alternate weekends Fridays 6pm to Sunday 6pm, plus half of all major school holidays or in the alternative;
3. The parties be granted joint custody with residential access to the [appellant] every weekend Fridays 2:30 pm to Mondays 7:30 am plus half of all major school holidays;
4. That the [appellant] be allowed to access and supervise the said child during those times when the [respondent] is at work, off the island, or otherwise unable to personally supervise the said child.
5. Any other Order that this Honourable Court deems fit."

[9] A number of affidavits had, by the time of the hearing, been filed by each party. In those affidavits, various allegations were made by each of them concerning the negatives said to be associated with the other. Those allegations, together with the dispute concerning the January 2014 trip, were among the issues of fact, which Laing J had to resolve.

[10] No other person filed affidavits, but there were two Social Enquiry Reports which gave a very favourable impression of the appellant. One of those reports was ordered by a judge of a Parish Court. The other was ordered by a judge of the Supreme Court, when the appellant made an interim application for residential access to be given to him, pending the hearing of the respondent's custody claim. In the latter of those reports, the probation officer, in her assessment and recommendation, noted that the communication between the parties "is strained". She formed the view that the appellant is "an exemplary father" and his proposed accommodation for R appeared to be ideal. She also noted that the respondent had no objection to the appellant having access to R, but that orders should be made to prevent him from removing the child from the jurisdiction. R, when he was interviewed by the probation officer, expressed a

preference to live with his father, because the appellant treated him well and he had more fun with the appellant. The interview was conducted as part of the preparation of the report to the court by the probation officer.

[11] The basic circumstances of each party, which were outlined by the evidence, are that the appellant is a married man who lives with his wife and a grown son. He is better off financially than the respondent, who is struggling with a business in which she sells clothing that she buys abroad. He has more flexibility with his time so as to spend time with R and to help R with his homework.

[12] The evidence also showed:

1. The respondent spends long hours at her business and, like the appellant, sometimes goes abroad to purchase goods for her business.
2. She has a domestic helper who stays with the children and sometimes they are sent to their maternal grandmother if the respondent is away from the island on business.
3. Although both H and R were said to have behavioural problems, R was said to be a bright child who did well in school. The boys share a close relationship.
4. The appellant and the respondent have had their fair share of confrontations, including physical fights, which have resulted in at least one intervention by the police.

[13] At the hearing, each party was cross-examined before Laing J.

The decision

[14] In making his decision, the learned judge accepted the respondent's account of how R came to have gone to the USA, and that he was being kept in the USA without her consent. He also found, based on his resolution of the several factual disputes, that R would be better served by the respondent having custody, care and control of him, and with the appellant having reasonable access to him. That access included residential visits on alternate weekends and half of all major school holidays.

[15] Laing J, in reliance on section 18 of the Children (Guardianship and Custody) Act (the Act) and **Dennis Forsythe v Idealin Jones** (unreported), Court of Appeal, Jamaica, SCCA No 49/1999, judgment delivered 6 April 2001, observed that the court when dealing with a matter of custody of a child must have paramount regard for the welfare of the child. He noted, at paragraph [24] of his judgment, that the evidence clearly disclosed that the parties love R and have his best interest at heart. The learned judge found, in reliance on **Robert Fish v Fenella Victoria Kennedy** (unreported), Supreme Court, Jamaica, Claim No HCV 373/2003, judgment delivered 2 February 2007, however, that the current state of their relationship "does not lend itself to an award of joint custody". He arrived at that view in reliance on the respondent's evidence that, "[the appellant] is not a reasonable person and we cannot cooperate in the upbringing of [R]".

[16] In arriving at his conclusion on what best served R's interest the learned judge took into account the fact that R had lived with the respondent for his entire life. The language that the learned judge used was, however, not entirely accurate. He had

opined that his order, with respect to custody care and control, had effectively continued the situation that had existed for R's entire life. That was not in accordance with the evidence, which showed a situation of joint custody, with care and control to the respondent. Laing J, however, explained his position. He reasoned that "[t]he familiarity and stability of those systems and surroundings should enure [sic] to [R's] benefit" (paragraph [27]).

[17] At paragraph [28] of his judgment, Laing J stated that he considered that the appellant is in a better position financially and so has the flexibility to spend more time with R, but that those factors would not outweigh the benefits of R's continued residence with the respondent. The learned judge also stated that he considered R's expression of preference to live with the appellant, but, in the "circumstances of this case and given the child's age", he did not attach any significant weight to such preference in its assessment of what was in R's best interest (paragraph [28]).

The appeal

[18] The appellant, aggrieved by the order of Laing J, filed six grounds of appeal, which may be summarised thus:

(i) the learned judge erred in granting custody, care and control to the respondent in the light of the plethora of evidence which had been before him in support of an order for joint custody;

(ii) the learned judge erred in placing undue reliance on the legal principles regarding joint

custody as enunciated in **Fish v Kennedy**, without sufficient regard to the changing trends and development in the principles emanating from various decisions such as **Caffell v Caffell** [1984] FLR 169;

(iii) the learned judge failed to apply the settled principle that the welfare of the child is the first and paramount consideration in custody matters;

(iv) the learned judge erred when he gave insufficient weight to the unchallenged evidence as to the preference expressed by R to live with the appellant;

(v) the learned judge erred in not granting residential access for longer periods during the week; and

(vi) the learned judge wrongly exercised his discretion in awarding costs against the appellant.

[19] Accordingly, he seeks the orders set out at paragraph [2] above.

[20] The issues to be resolved in this appeal, which were identified at paragraph [3] above, will be dealt with individually, below

The analysis

Issue a. - Custody

[21] In addressing this issue, it is necessary to emphasise two of the principles which guide this court in its proceedings. These concern the manner in which it approaches the matter of findings of fact in the court below and the matter of the exercise of discretion by the judge in the court below.

[22] In respect of the first principle, it is noted that this court has on numerous occasions stated that it will not lightly interfere with a trial judge's findings in respect of findings of fact. The point was also reinforced by the Privy Council in **Beacon Insurance Company Limited v Mahraj Bookstore Limited** [2014] UKPC 21. In that case, their Lordships, in dealing with the issue of giving deference to the findings of fact by a judge at first instance, expressly approved a statement of the relevant principles, which was made in **In re B (A Child)(Care Proceedings: Threshold Criteria)** [2013] 1 WLR 1911. In **In re B**, Lord Neuberger set out the bases on which the appellate court will interfere with findings of fact made at first instance. He said, in part, at paragraphs 52 and 53:

> "**52** ...The Court of Appeal, as a first appeal tribunal, will only rarely even contemplate reversing a trial judge's findings of primary fact.
>
> **53** ... this is traditionally and rightly explained by reference to good sense, namely that the trial judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges. **Consequently, where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an**

> **appellate tribunal will interfere with it.** This can also be justified on grounds of policy (parties should put forward their best case on the facts at trial and not regard the potential to appeal as a second chance), cost (appeals on fact can be expensive), delay (appeals on fact often take a long time to get on), and practicality (in many cases, it is very hard to ascertain the facts with confidence, so a second, different, opinion is no more likely to be right than the first)...." (Emphasis supplied)

[23] Similarly, it has consistently been stated that this court will not disturb the first instance judge's exercise of a discretion given to him or her, unless it is clearly satisfied that the judge has wrongly exercised that discretion due to the misapplication or the non-application of the proper principles. This was stated by P Harrison JA (as he then was), on behalf of this court, in **Forsythe v Jones**. That case involved a consideration as to whether to overturn the trial judge's order awarding custody, care and control of a minor child to the mother. The learned judge of appeal said, in part at pages 8-9 of the judgment:

> "An appellate court examining a decision of the learned trial judge in the exercise of his discretion may not disturb it, on the basis that it would have found otherwise. Any reversal or variation by the appellate court must be based on a wrong exercise of the discretion due to the misapplication or the non-application of the proper principles by the trial judge...."

[24] In the instant case, there is nothing to cause this court to set aside any of the findings of fact made by the learned judge. He saw and heard the parties and was best suited to determine where the truth lay in respect of the disputes of fact.

[25] It must also be said, despite the assertions of the appellant, that the learned judge did not err when he found, based on the strained relationship between the appellant and the respondent, that joint custody would not have been the appropriate

order to have made. This was an exercise of his discretion. There is ample authority to support that finding, including **Fish v Kennedy**, which the learned judge cited in arriving at his decision. He made that ruling in the context of what constituted the best interest of the child. Leaving parties to decide between themselves the best direction in which the child's life should proceed requires a level of civility and co-operation between the parties. The evidence in this case suggested the absence of that level of civility and co-operation.

[26] The law relating to orders of joint custody took centre stage in the submissions of counsel before this court. Learned counsel for the appellant, Mr Williams, relied on a line of cases including **Caffell v Caffell**. The thrust of his submissions was that the learned judge did not give sufficient weight to the line of authorities that suggested that joint custody should be the preferred order made by the court, and that the presence of acrimony between the child's parents did not automatically prevent such orders.

[27] Mr Williams also relied on a judgment of Sykes J in **F v D** [2017] JMSC Civ 9, where the learned judge decided a contest between parents as to which of them should have had custody of their children. The learned judge in a characteristically careful judgment, correctly, outlined the basic principles that should guide the court in deciding such questions. Sykes J, in his judgment, cited the authority of decisions in **In re Thain (an Infant)** [1926] Ch 676, **J and another v C and others** [1970] AC 668, **Re K (minors) (wardship: care and control**) [1977] 1 All ER 647, **S (BD) v S (DJ) (infants: care and consent)** [1977] 1 All ER 656 and **Forsythe v Jones**, in support of those principles.

[28] Ms Shaw, for the respondent, relied on cases including **Jussa v Jussa** [1972] 1 WLR 881; [1972] 2 All ER 600. Learned counsel submitted that **Jussa v Jussa** strongly indicated that orders for joint custody should not be made where the parents are in such an acrimonious relationship that the child's welfare, which is the paramount consideration, is likely to be adversely affected by such that relationship.

[29] The Court of Appeal in **Jussa v Jussa** was tasked with determining whether the first instance judge wrongly exercised his discretion in awarding custody of the relevant children to the respondent mother, with defined access to the appellant father. The father contended that the proper order should have been for joint custody, or in the alternative, custody of the children should have been be granted to him or, in the further alternative, no order should have been made for custody. Wrangham J, on behalf of the court, expressed elation at the fact that the parties admitted "freely and frankly that the other is an admirable parent" (page 883), and either party was well qualified to look after the children. The learned judge of appeal in accessing whether to award joint custody opined, at page 884:

> "...For my part, 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 in which the father and the mother are both well qualified to give affection and wise guidance 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, it seems to me that there can be no real objection to an order for joint custody."

His Lordship did not express the view that joint custody was not the default position. He seemed to suggest that to have some other order, it was necessary to show that an

order for joint custody was not an appropriate order. After referring to **S. v. S. (No. 2)** (1965) 109 S.J. 289, he said at page 885:

> "But there was nothing apparently exceptional about that case, as reported, except for the fact that the children in question, two girls, were on good terms with both their parents, the bond of affection between the father and the younger girl being very close, and that both parents supported the proposal. **In those circumstances, as it seems to me, it would be wrong to say that joint orders for custody should only be made in exceptional circumstances**, unless by that is meant that the circumstances in which both parents can be expected to co-operate fully in making such an order work are themselves to be regarded as exceptional; and that, I hope, as have said, is too pessimistic a conclusion." (Emphasis supplied)

In addressing the concern that the appellant should not be cut out altogether from a voice in his children's future, he said:

> "In my view, when one has two wholly unimpeachable parents of this character, who could, I think, be reasonably contemplated as capable of co-operating with each other in the interests of the children whom they both love, **there can be no serious objection to an order for joint custody**, and many advantages for the children from that order; **and, of course, one comes back always to the point that it is the welfare of the children that is the paramount consideration**." (Emphasis supplied)

The court accordingly allowed the appeal and awarded joint custody to the parties.

[30] In **Caffell v Caffell**, the judge at first instance made an order granting custody of the children to their father, with their mother having the day to day care and control of the children. The mother appealed against the order, and the Court of Appeal allowed the appeal on the basis that the proper order should have been one for joint custody. Ormord LJ, in his judgment, at page 171, opined that the proposition for which **Jussa v Jussa** had come to be cited, that joint custody orders ought not to be granted

unless there was a reasonable prospect that the parties will cooperate, was in many cases "a perfectly sensible proposition". He, however, noted that there were other cases where the party, who did not have the day to day control, would be anxious to preserve his or her contact with the relevant child. In those cases, he said, the court ought to be cognisant of that parent's anxiety to take an active role in the child's upbringing.

[31] Despite the fact that the parties in that case had had an acrimonious relationship, the court granted joint custody in recognition of the father's deep interest in his children, and in the somewhat optimistic hope that it would "at least help him to get over the bitterness which he is bound to feel" (page 171).

[32] Despite the cautionary, if not conditional, words of Omerod LJ, it has been suggested that the cases support separate schools of thought in respect of the issue of joint custody. The juridical situation was considered by the High Court of Hong Kong in **ML v YJ** HCMC 13/2006, judgment delivered 23 May 2007.

[33] In **ML v YJ**, a dispute arose over the custody of the parties two sons. During the course of divorce proceedings, the respondent father sought joint custody of the children. The petitioner, who is their mother, objected to the application and instead sought an order for sole custody. The parties had separated in 2004. Since 2004, the respondent had been living in mainland China, while the children resided with the petitioner in Hong Kong. The petition was filed in Hong Kong. An interim order was made giving the petitioner custody, care and control with reasonable access to the respondent.

[34] In a first instance judgment, the learned recorder, in considering whether to grant joint custody or sole custody, reminded himself (at paragraph 9 of the judgment) that under the relevant statutory provisions (not dissimilar to those in this jurisdiction), the court may make custody orders having regard to the welfare of the child being "the first and paramount consideration". There should also be due regard, the learned recorder stated, to the wishes of the minor, provided he is of an age to form a proper view, and any material information including a social investigation report. Thereafter, the learned recorder embarked upon an examination of the applicable principles starting with **Jussa v Jussa** and then **Caffell v Caffell**. The learned recorder then commented, at paragraph 15 of the judgment, that "[a] question has arisen as to whether *Caffell* and *Jussa* represent two different approaches".

[35] In the course of assessing that question, the learned recorder opined that **Caffell v Caffell** should be viewed against the particular factual background in that case (at paragraph 16), and at paragraph 18, Ormrod LJ in **Caffell v Caffell** did not suggest that **Jussa v Jussa** was wrongly decided, but merely indicated that the ratio in **Jussa v Jussa** made perfect sense in many cases, but the court, in appropriate circumstances, may make a joint custody so as to recognize that a party is anxious to take part in the upbringing of the relevant child.

[36] The opinion of the learned recorder in **ML v YJ** was that **Caffell v Caffell** should not be viewed in contradistinction to **Jussa v Jussa**. That view is, with respect, correct. **Caffell v Caffell** did not overrule or render obsolete the proposition advanced in **Jussa v Jussa**. As the learned recorder said at paragraph 15 of his judgment, the cases, "highlighted two different factors which the Court may take into account when

deciding whether it is appropriate to grant joint custody". It may also be properly said, that the decision in **Caffell v Caffell** turned largely on its peculiar facts and the court's optimism as to the future co-operation of the parties.

[37] It is to be noted also that the facts of **F v D** are distinguishable from the case before this court, as, in that case there was evidence adduced, before the tribunal of fact, from which it could have been reasonably inferred that there was a reasonable prospect that the parties would be able to cooperate to advance the welfare of the children. Firstly, the existing order prior to the case coming on before Sykes J was one for joint custody, and secondly, Sykes J was of the view that the mother in that case, who had been criticised as being the main source of contention, had demonstrated a level of insight and flexibility, which he, no doubt, felt would allow the parties to cooperate. Again, based on the learned judge's assessment of the parties and their situation, there was a level of optimism of future cooperation. There is nothing in **F v D** that warrants interfering with Laing J's decision in the present case.

[38] It is true that Sykes J, at paragraph [119] of **F v D**, did opine that a sole custody order "ought not to be made unless counselling and mediation for the parents have been tried and have failed completely". That cannot, with respect to the learned judge, be an absolute statement. Certainly, Sykes J did not cite any authority for it. It cannot be said that an order for sole custody should be set aside if that route was not followed.

[39] None of the cases cited by Mr Williams demonstrates that Laing J went astray in his approach to considering the circumstances of this particular case. In fact the reasoning in **S (BD) v S (DJ)** somewhat supports Laing J's decision, in that the English

Court of Appeal in that case relied heavily on the benefit to a young child of "continuity of care", which it considered to be one of the most important factors in determining what was in the best interests of a young child. In that case, the children were six and eight years of age.

[40] The principle would apply to R, who was age seven at the time of the hearing before Laing J. Further, it would appear, that the learned judge had this principle in mind when he found (at paragraph [27]) that the best interests of R would be served with custody, care and control being granted to the respondent, who has had "care and control [of him] for effectively, his entire life" and that the "familiarity and stability of those systems and surroundings should enure [sic] to his benefit".

[41] The learned judge did say that the respondent had had effective custody of R. That language was criticised by Mr Williams. It is true that it was somewhat inaccurate but it cannot be said that it was a severe flaw in the judgment.

[42] What may be distilled from the cases cited by counsel for the parties, is that each case is to be considered on its own set of circumstances. This is what was said in **George Kaplanis v Patricia Kaplanis** (2005), 249 DLR (4th) 620, a decision of the Court of Appeal for the province of Ontario, delivered on 17 September 2003. In that case, Weiler JA, in delivering the judgment of the Court of Appeal, said at paragraph [9]:

> "Family law cases are, by their nature, fact-based and discretionary. It is unnecessary to address this court's prior jurisprudence regarding the issue of joint custody to resolve the issue of custody in this appeal."

The principle that each case has to be assessed on its own facts, may reasonably be inferred from **Caffell v Caffell**, where Omerod LJ spoke to the circumstances of particular cases.

[43] **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)

[44] In the present case, the learned judge considered the evidence of the relationship between the parties. He considered the merits of each parent's style of parenting. He was, however, of the view that an atmosphere of civility did not exist to allow the parties to cooperate in making the major decisions in respect of R's upbringing. There was evidence to support his finding. This can be found at the following points in the cross-examination of the parties:

a. The respondent indicated that "Mr. [LMP] is not a reasonable person we cannot co-operate in the upbringing of [R]" (page 339 of the record of appeal).

b. The appellant implicitly accepted that dismal assessment of their relationship. He is recorded, at pages 355-356 of the record, as saying:

> "I agree that the relationship of being able to go to [the respondent's] home has changed. [The respondent] is the aggressive type.
>
> Since January 2014 and now my relationship with [the respondent] is just about the same as it was – it is not a good relationship.
>
> On 27 March, 2015 I took the police to her home because we have a communication problem and to secure myself, - she can't understand.
>
> [The respondent] is uncooperative."

[45] There was also independent evidence, by way of a statement in the social enquiry report prepared in regard to the appellant's application for residential access of R. In that report, the probation officer, in the assessment and recommendation segment of the report, commented that the relationship between the parties "has broken down and communication between [them] is strained".

[46] The learned judge's decision, being so supported, it should not be disturbed.

[47] It is important, for the guidance of these parties going forward, to note that the grant of custody to one party does not entirely deprive the other party of any right to an input in respect of the major decisions to be made concerning the child and the

child's welfare. That used to be the thought concerning orders for custody, but it is an erroneous approach. Ormrod LJ in **Dipper v Dipper** [1981] Fam 31 explained that the correct approach is that whereas in day-to-day matters the party, who is granted custody, is naturally in control, neither parent has a pre-emptive right over the other in major or life changing matters. He said at page 45:

> "It used to be considered that the parent having custody had the right to control the children's education - and in the past their religion. This is a misunderstanding. Neither parent has any pre-emptive right over the other. If there is no agreement as to the education of the children, or their religious upbringing or any other major matter in their lives, that disagreement has to be decided by the court. In day-to-day matters the parent with custody is naturally in control. To suggest that a parent with custody dominates the situation so far as education or any other serious matter is concerned is quite wrong...."

[48] Cumming-Bruce LJ agreed with the view expressed by Ormrod LJ. The learned judge of appeal said that a parent is always entitled, despite his or her custodial status, to be consulted on major matters concerning the child. Cumming-Bruce LJ said, in part, at page 48:

> "As Ormrod L.J. has explained ... it being a fallacy which continues to raise its ugly head that, on making a custody order, the custodial parent has a right to take all the decisions about the education of the children in spite of the disagreements of the other parent. That is quite wrong. The parent is always entitled, whatever his custodial status, to know and be consulted about the future education of the children and any other major matters. If he disagrees with the course proposed by the custodial parent he has the right to come to the court in order that the difference may be determined by the court."

[49] Before leaving this ground, the issue of R's wishes should be addressed. It is accepted that courts should consider the wishes of children, especially older children, when deciding the matter of custody, care and control. The Ontario Court of Appeal in

Kaplanis v Kaplanis, at paragraph [13] commented that "[w]hile a child's best interests are not necessarily synonymous with the child's wishes, the older the child, the more an order as to custody requires the co-operation of the child and consideration of the child's wishes". In that case, the child was only 2 years old, and unable to express her wishes in this regard. The court held that in such circumstances, the assistance of experts should be sought in deciding the issue of custody care and control. Weiler J said, in part, at paragraph [13]:

> "When the child is too young to communicate her wishes, expert evidence may be necessary to enable a judge to determine how the child's psychological and emotional needs would be advanced by the proposed custody order or parenting plan.

[50] In **Re P (A Minor) (Education)** [1992] 1 FLR 316 the English Court of Appeal made its decision based on the wishes of a 14 year old boy. Butler-Sloss LJ said at, page 321, that:

> "We are dealing with the welfare of a 14-years-old boy. Courts, over the last few years, have become increasingly aware of the importance of listening to the views of older children and taking into account what children say, not necessarily agreeing with what they want nor, indeed, doing what they want, but paying proper respect to older children who are of an age and the maturity to make their minds up as to what they think is best for them, bearing in mind that older children very often have an appreciation of their own situation which is worthy of consideration by, and the respect of, the adults, and particularly including the courts…."

[51] Whereas R was able and did express a preference as to the person with whom he wished to live, he cannot be said to be of such an age and maturity that his wishes should have a dominant role in the judge's analysis. Laing J cannot be faulted for not making specific mention of the child's wishes.

Issue b. - nature and extent of access

[52] Once the issue of custody had been determined, there could be no criticism of the learned judge's finding as to the nature and extent of the access. The appellant received the order for residential access that he sought, albeit in the alternative. The order in respect of access that the appellant seeks in this appeal was not the order that he sought before Laing J. The distinction between the two may be demonstrated by repeating the relevant aspects of the notice of application that was before Laing J and the orders sought in the notice and grounds of appeal.

[53] The relevant part of the application before Laing J stated:

> "2. That the [respondent] be given residential access on alternate weekends Fridays 6pm to Sunday 6pm, plus half of all major school holidays or in the alternative;
> 3. The parties be granted joint custody with residential access to the [appellant] every weekend Fridays 2:30 pm to Mondays 7:30 am plus half of all major school holidays;
> 4. That the [appellant] be allowed to access and supervise the said child during those times when the [respondent] is at work, off the island, or otherwise unable to personally supervise the said child."

[54] Laing J granted the appellant access in accordance with paragraph 3 of his application. The learned judge did not address the request in paragraph 4. Those details could, however, properly fall under the rubric of "reasonable access". The relevant part of the order made by Laing J stated:

> "Custody care and control of the Child [R] is granted to the [respondent] with reasonable access to the [appellant] R and the [respondent] is allowed residential access every alternate weekend from Friday 2:30 pm to Monday 7:30 am plus half of all major school holidays."

[55] In his grounds of appeal, the appellant complained that the learned judge should have given a longer period of time during the week for access, but, as mentioned above, he received the grant that he sought, in terms of the time during the week.

[56] The order sought, in respect of access, in the notice of appeal states:

> "3. The Appellant is granted reasonable access to the child [R] and is allowed residential access every alternate weekend from Thursday 2:30 p.m. to Monday 7:30 a.m., plus half of all major school holidays, and for any other period of access as may be agreed between the Respondent and the Appellant."

[57] That order cannot be granted on appeal. The appellant did not ask the court below for access from Thursday. He cannot ask for it in this court. He has not asked in the order sought in this court for "access [to] supervise the said child during those times when the [respondent] is at work, off the island, or otherwise unable to personally supervise the said child". As mentioned above, that detail may be considered as the minutiae of "reasonable access".

[58] This aspect of the appeal must, therefore, fail.

[59] It will be for the parties, in the first instance, to attempt to arrange between themselves what will be appropriate and convenient for all concerned in respect of reasonable access generally and access during all major school holidays. We would recommend, however, that practicality should dictate that the appellant, since he has more flexibility in respect of his time, should be considered for providing R with supervision and guidance when the respondent is at work or otherwise away from home. In the event that reasonable access, or access during all major school holidays,

is not agreed upon, the parties may seek the assistance of the court, by way of further orders by way of variation or otherwise.

Issue c. - costs

[60] Although the appellant is correct in stating that, in custody cases, each party is usually ordered to bear its own costs in cases such as the present, the question of costs was one which lay in the discretion of the learned judge. Regrettably, the learned judge did not state his reason for departing from the customary order. It is therefore for this court to assess the situation to determine whether the usual order ought to apply.

[61] In **Sutton London Borough Council v Davis (No 2)** [1994] 1 WLR 1317, Lord Wilson, having recognised the principle enunciated by Butler-Sloss LJ in **Gojkovic v Gojkovic** (119) Fam 40 that "it is unusual to order costs in children cases", opined thus at page 1319:

> "Where the debate surrounds the future of a child, the proceedings are partly inquisitorial and the aspiration is that in their outcome the child is the winner and indeed the only winner. The court does not wish the spectre of an order for costs to discourage those with a proper interest in the child from participating in the debate. Nor does it wish to reduce the chance of their co-operation around the future life of the child by casting one as the successful party entitled to his costs and another as the unsuccessful party obliged to pay them. The proposition applies in its fullest form to proceedings between parents and other relations;.. But the proposition is not applied where, for example, the conduct of a party has been reprehensible or the party's stance has been beyond the band of what is reasonable."

[62] The foregoing dicta of Lord Wilson was applied by Lady Hale, writing on behalf of the Supreme Court of the United Kingdom, in **In the matter of S (A Child)** [2015] UKSC 20. The learned Law Lord commented that each party appearing before the

court, in respect of a question to determine any matter relating to the upbringing of a child, has a role to play in it "achieving the best outcome for the child". Based on that principle she opined, at paragraph 21 of the judgment, that "[n]o-one should be deterred by the risk of having to pay the other side's costs from playing their part in helping the court achieve the right solution". She also commented, at paragraph 23, that given it is important for the parties to cooperate with each one another in the interests of the child, "[s]tigmatising one party as the loser and adding to that the burden of having to pay the other party's costs is likely to jeopardise the chances of their co-operation in the future".

[63] In the instant case, the learned judge had before him parties who had significantly different material resources and earning power. The appellant sought to emphasise in his affidavits, his better education and financial resources. His efforts were recognized by the learned judge, who said, at paragraph [28] of his judgment:

> "The Court has considered the fact that the [appellant] is in a better position than the [respondent] financially and as a consequence has a greater degree of flexibility with his time and therefore more time to spend with [R]…."

[64] Although he did not specifically state that he had considered the point, the difference in resources is a factor that the learned judge would have been entitled to take into account in making his order as to costs. The "financial position of each party" is one of the factors which the court is obliged to take into account in "[d]ealing justly with a case" (see rule 1.1(2)(a) of the Civil Procedure Rules).

[65] Nonetheless, the usual order has, as part of its rationale, the reduction of the tension between the parties, so that the opportunity is reduced for any of the parties to

crow about being "the winner", or conversely, for any one of them to feel a resentment for being "the loser".

[66] In the circumstances of this case, despite the difference in their financial circumstances, it is best that the usual order applies. The learned judge's order, in this respect, should therefore be set aside.

Conclusion

[67] Based on all the above, I would allow the appeal in part, so as to set aside the order as to costs, but uphold the learned judge's decision and order in respect of custody. I would make no order as to costs in the court below and of the appeal.

SINCLAIR-HAYNES JA

[68] I have read the draft judgment of my brother Brooks JA and agree with his reasoning and conclusion. There is nothing I wish to add.

P WILLIAMS JA

[69] I have had the privilege of reading in draft the impressive judgment of my brother Brooks JA. I am in agreement with his reasoning and conclusion and have nothing useful to add.

BROOKS JA

ORDER

a. The appeal is allowed, in part.

b. The judgment and order of the Supreme Court, made herein on 17 July 2015, in respect of the order for custody and access, is affirmed.

c. The order for costs in that judgment is set aside.

d. There shall be no order as to costs in either this court or in the court below.