[2016] JMCA Civ 48

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 46/2016

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

IN THE MATTER of an application by **B** and **C**

AND

IN THE MATTER of an appointment of guardianship in respect of the infant child "**A**"

AND

IN THE MATTER of the Children (Guardianship and Custody) Act

BETWEEN	**B**	**1ST APPELLANT**
AND	**C**	**2ND APPELLANT**
AND	**THE CHILDREN'S ADVOCATE**	**INTERESTED PARTY**

Mrs Kerri-Gaye Rushton instructed by Mellish and Rushton for the appellants

Mrs Debbie-Ann Livingstone-Edwards for the interested party

30 June, 12 July and 28 October 2016

BROOKS JA

[1] We heard this appeal on 30 June 2016 and, after hearing the submissions of counsel, made the following orders:

> "1. Appeal allowed.
>
> 2. The order of the Supreme Court made herein on 21 April 2016 is hereby set aside.
>
> 3. [The appellants]…are hereby appointed legal guardians of [A], an infant born on...."

At that time, we promised to put our reasons in writing. Subsequent to making those orders, we harboured some reservation about them and sought further assistance from counsel by way of additional submissions. We received both written and oral submissions (the latter on 12 July 2016) and, at that time, reserved our decision.

[2] The appeal mentioned in the order was from a decision of a judge of the Supreme Court who refused an application by the appellants, B and C, to be appointed guardians of their granddaughter, A. All names and unique details of the parties have been omitted in order to protect the child's identity. The appellants complain that the learned judge's refusal was based on her view that she had no jurisdiction to make an order for guardianship where the biological parents of the child were alive and were not, themselves, the applicants.

[3] The main issue in this appeal is whether the Supreme Court of Judicature of Jamaica has the jurisdiction to make an order for guardianship in such circumstances. An outline of the evidence will place the issue in context.

The evidence

[4] A is three years old. Her biological parents are not married and do not live together. A's father brought her to his parents' home when she was just over a year old. She has lived with them ever since. The father's parents (father is B and mother, C) are the appellants herein. Although the father also lives at their home, he is "frequently absent from the home" (paragraph 7 of the affidavit of the appellants). There is no evidence as to A's mother's involvement, if any, in her life.

[5] A is now of the age where the issue of schooling has become relevant. The appellants have, therefore, decided that they "need to take charge of [her] life and upbringing". They have decided that they should be legally recognised as having that responsibility. They wish to be appointed her guardians so that they will be able to represent her in respect of her primary schooling, health matters, and her higher education. They also wish for her to travel overseas with them. She will be, they say, a part of their family.

[6] From their description of their circumstances, it seems that they will be able to provide adequately, if not generously, for A, in material terms. Their residential address is in one of the more affluent communities of the parish of Saint Andrew and although details were not given to the learned judge in the court below, additional evidence, which was provided to us by way of fresh evidence discloses that:

(a) their house consists of four bedrooms and three and a half bathrooms;

(b) it has the usual amenities;

(c) the appellants and one of A's uncles reside at the house; and

(d) B earns a significant salary from his employment.

[7] The fresh evidence also indicates that A's emotional and educational needs are also addressed. The following were among the facts disclosed:

(a) B is, in addition to his employment, also a minister of religion and the appellants take A with them to church on Sundays and also take her to Sunday school;

(b) a typical day for the child sees her physical, emotional and educational needs being attended to in a positive way by both appellants;

(c) although A is not suffering from any serious disability or chronic illness or from the effects of any such illness, she has a paediatrician, whom she sees for medical check-ups on a regular basis;

(d) the appellants are committed to be responsible for the expenses of A's food, clothing, transportation, education, health care and social upbringing; and

(e) she is scheduled to begin attending basic school in the next school year.

[8] Although the appellants are in their mid-sixties, they assert that they are in generally good health and able to manage the rigours of raising a young child.

The appeal

[9] The appellants filed their appeal on 29 April 2016. They urged this court to set aside the learned judge's decision and to order that they be appointed A's legal guardians. The notice of appeal contained the following grounds of appeal:

> "(a) That the Learned Judge erred as a matter of Law in applying the wrong principles of Law in refusing the application of the [appellants].
>
> b) The Learned Judge erred in Law by failing to take into consideration the provisions of Section 27 of the Judicature (Supreme Court) Act [whereby] the Supreme Court of Judicature of Jamaica has the authority to make Orders regarding the legal guardianship of children within its jurisdiction.
>
> c) That the Learned Judge erred as a matter of Law by not recognizing the authority of the Supreme Court of Judicature of Jamaica as having an inherent **parens patriae** position in relation to all children within its jurisdiction.
>
> d) That the Learned Judge erred in Law in failing to consider the case of **Panton v Panton SCCA No. 21 of 2006, page 3**, where it was held that '*the power of the Court of Chancery as parens patriae to all children, which is now exercisable by the Supreme Court, compels such a court to be slow to decline to exercise such power whenever the occasion arises, because of its all-encompassing interest in the welfare*

of the child. This power is exercisable by the court, despite the wishes of the respective parents.'

e) That the Learned Judge erred in Law by failing to consider the provisions of Section 20 of the Children (Guardianship and Custody) Act which expressly states 'Nothing in this Act contained shall restrict or affect the jurisdiction of the Supreme Court to appoint or remove guardians'." (Emphasis and italics as in original)

The submissions on behalf of the appellants

[10] Mrs Rushton, appearing for the appellants, emphasised the jurisdiction of the Supreme Court as exercising the traditional jurisdiction of the Sovereign, as *parens patriae*. This Latin term literally means "father of the country", she submitted. It referred to the Sovereign's traditional entitlement and duty to act as guardian over persons, including children, who were unable to care for themselves.

[11] Learned counsel pointed to the Court of Chancery as the entity which normally exercised that jurisdiction on behalf of the Crown. She relied on the statutory provisions that established the Supreme Court of Judicature as exercising the jurisdiction that the Court of Chancery possessed. That jurisdiction, she submitted, is a part of the inherent jurisdiction of the Supreme Court. Learned counsel argued that the jurisdiction is expressly recognised and retained by the Children (Guardianship and Custody) Act.

[12] That inherent jurisdiction, Mrs Rushton submitted, allows the Supreme Court to make orders in the best interest of any relevant child, regardless of the wishes of the biological parents. It permitted, learned counsel argued, the learned judge to have made the orders sought by the appellants, which orders were in A's best interest.

[13] Learned counsel cited a number of cases in support of her submissions. These included: **The Queen v Gyngall** [1893] 2 QB 232, **Re R (a minor) wardship: medical treatment)** [1991] 4 All ER 186, **Richards v Richards** Claim No 2007 M 00756 (delivered 2 September 2008) and **Panton v Panton** SCCA No 21/2006 (delivered 29 November 2006). Mrs Rushton also cited several first instance judgments in which the Supreme Court had made orders in respect of guardianship of children.

The intervention of the Children's Advocate

[14] The Children's Advocate, who did not appear in the court below, is named as an interested party to the appeal. A single judge of this court, by way of case management orders made in this case, had invited the intervention of the Children's Advocate. The Children's Advocate is a Commission of Parliament established by section 4(1) of the Child Care and Protection Act. The remit of the Children's Advocate includes intervention in court proceedings involving children. Paragraph 14 of the first schedule to that Act speaks to the nature of that intervention. It states in part:

> "14.–(1) Subject to the provisions of this paragraph, the Children's Advocate may in any court or tribunal–
>
> (a) …
>
> (b) intervene in any proceedings before a court or tribunal, involving law or practice concerning the rights or best interests of children.
>
> (c) act as *amicus curiae* in any such proceedings.
>
> (2) …"

[15] The Children's Advocate filed very detailed written submissions in respect of the relevant issues in this case, and Mrs Livingstone-Edwards, representing the Children's Advocate, supplemented those with oral submissions. They will be referred to, in part, below.

The submissions by the Children's Advocate

[16] Mrs Livingstone-Edwards' submissions were in line with those advanced on behalf of the appellants. She argued that the inherent power of the Supreme Court to appoint and remove guardians of a child "not only [existed] where parents were deceased, but wherever the **necessity or welfare of the child** requires such an appointment or removal" (emphasis as in the written submissions, paragraph 14).

[17] Learned counsel relied on several cases, emanating from various jurisdictions, in support of her submissions. These included **In re McGrath (Infants)** [1893] 1 Ch 143, **In re "N" (Infants)** [1967] 1 Ch 512 and **E (Mrs) v Eve** [1986] 2 SCR 388.

[18] Mrs Livingstone-Edwards also made submissions on the issue of the court exercising its jurisdiction in the best interest of the child. She argued that the court's decision may be made despite the wishes of the biological parents, although those wishes should not be disregarded. For this point, she relied on **F (MA) v Southeast Child and Family Services** [2000] 10 WWR 479 (CAN), **Re K (a minor) (wardship; adoption)** [1991 1 FLR 57 and **Gillick v West Norfolk and Wisbech AHA et al** [1985] 3 WLR 830. She submitted that this court could substitute its judgment if it is of

the view that the judge at first instance "plainly got the wrong answer" (extract from **G v G** [1985] 2 All ER 225, 228).

The jurisdiction of the Supreme Court

[19] The Supreme Court does have an inherent jurisdiction to appoint and remove guardians for children. The jurisdiction of that court, in this context, has a rich history. That history includes the history of the Court of Chancery, which had exclusive jurisdiction in equity, providing relief where the common law offered no remedy. It is a history that is not without some uncertainty, but the more accepted view, in this context, is that the jurisdiction of the Court of Chancery, over children, was founded on the prerogative of the Crown as *parens patriae*.

[20] The term *parens patriae* is defined in the ninth edition of Black's Law Dictionary as meaning:

> "...parent of his or her country'…The state regarded as a sovereign; the state in its capacity as provider of protection of those unable to care for themselves…"

Based on that doctrine, the Sovereign was regarded as having the right to make decisions concerning people who were not able to take care of themselves.

[21] The Crown's prerogative was delegated to the Lord Chancellor in England, who, at that time, was the King's Chief Minister. The prerogative eventually came to be exercised by the Court of Chancery. In this jurisdiction, there was also a Court of Chancery. Its status and powers in relation to children were very similar to its English counterpart. Its operation was concisely set out in **Mackintosh v Mackintosh** (1871)

Eq J B Vol 2 p 113 (reported in Vol 1 of Stephens' compilation of Supreme Court decisions of Jamaica and Privy Council decisions 1774-1923, at page 1068). In that case, Lucie Smith VC said, at page 1069 of Stephens' compilation:

> "...In this Island the judicial business of the Court of Chancery is by virtue of local enactment transacted by the Vice-Chancellor, and the records show repeated instances of the jurisdiction in cases of infants having been exercised by my predecessors. When letters of guardianship come to be granted they will be issued by the Chancellor under the broad seal, which is in his custody, but the question of the individual to be chosen as guardian is a judicial question, to be determined by the Vice-Chancellor in due course of law and practice."

[22] The Court of Chancery existed as a separate entity in England until the promulgation of the Judicature Acts 1873-1875. The Court of Chancery was then merged with other courts into the High Court of Justice, which, along with the Court of Appeal, constituted the Supreme Court of Judicature of that country.

[23] That merger was replicated in this jurisdiction in 1880, by the Judicature (Supreme Court) Law. One of the reasons for the merger in England, as in this jurisdiction, was the difficulty litigants encountered with the separate jurisdictions of the various courts. For example, if it was found that a litigant had commenced an action in the wrong court or that the relief that he sought was not available in that court, he would be obliged to commence a new action in another court, if he was still within time. One of the major examples of differences in the available relief manifested itself in the conflict between common law and equity. The merged court was expected to resolve such difficulties.

[24] The common law and equitable jurisdictions of the merged court, in this context, was described by Lord Esher MR in **The Queen v Gyngall**. He explained, at page 239, that the equitable jurisdiction allowed the court to supersede a parent's common law rights, where they were in conflict with the best interest of the child:

> "…I take it that at common law the parent had, as against other persons generally, an absolute right to the custody of the child, unless he or she had forfeited it by certain sorts of misconduct…. **Where the common law jurisdiction was being exercised, unless the right of the parent was affected by some misconduct or some Act of Parliament, the right of the parent as against other persons was absolute**.
>
> But there was another and an absolutely different and distinguishable jurisdiction, which has been exercised by the Court of Chancery from time immemorial. That was not a jurisdiction to determine rights as between a parent and a stranger, or as between a parent and a child. It was a paternal jurisdiction, a judicially administrative jurisdiction, in virtue of which **the Chancery Court was put to act on behalf of the Crown, as being the guardian of all infants, in the place of a parent, and as if it were the parent of the child, thus superseding the natural guardianship of the parent**." (Emphasis supplied)

The merged court was authorised to exercise the jurisdiction which was most appropriate in the circumstances.

[25] In **The Queen v Gyngall**, the court refused to order the delivery up of a female child to her biological mother. The girl was, at the time, under the actual guardianship of strangers. It was held that it was in the best interest of the child that she remained in the situation in which she was, rather than being turned over to her mother. Equity

prevailed over the common law, and the role and responsibility of the Court of Chancery prevailed over the wishes of the mother.

[26] **In re McGrath** is another of the cases that demonstrated the nature of the jurisdiction emanating from the role of the court as *parens patriae*. In **In re McGrath**, Lindley LJ addressed, at page 147, the role inherited from the Court of Chancery:

> "There was at one time an attempt to throw some doubt upon the jurisdiction of the Court of Chancery over the guardians of children who had no property; but all doubt on this point was set at rest by Lord *Cottenham's* decision in *In re Spence* (1), and **it is clear that the old Court of Chancery had, and that the High Court has, jurisdiction to interfere with and to remove a guardian of a child who has no property on proof of misconduct on the part of the guardian towards the child, or upon proof that it is for the welfare of the child that the guardian should be removed**. But it is obvious that the jurisdiction of the Court is very limited in such a case. The child having no property under the control of the Court, the Court cannot provide any scheme for the child's maintenance or education. All that the Court can do is to remove the guardian and appoint another, if another can be found, to take care of the child. This limited jurisdiction being however established, **it follows that the exercise of such jurisdiction can be invoked on behalf of any child by anyone who is willing to come forward on its behalf and to act as its next friend**." (Emphasis supplied)

[27] The Court of Chancery, therefore, had jurisdiction over the child, whether or not that child had property. It exercised that jurisdiction in seeking to advance the welfare of the child. The court may appoint guardians for the person of the child or for his estate, or for both (**Rimmington v Hartley** (1880) 14 Ch D 630 at p 632). Lucie Smith VC in **Mackintosh v Mackintosh**, at page 1071 of the report of the case, set out the

practice that then prevailed, concerning the appointment of a guardian of the estate as well as of the person, versus a guardian of the person only. He stated:

> "So also in Daniell (5th ed. Vol. 2, p. 1296): 'Where there is no suit pending which will enable the Court to take upon itself the management of the infant's property, a guardian of the estate as well of as the person, may be appointed on summons, but where such suit is pending a guardian of the person only will be appointed'."

[28] In **Panton v Panton**, this court recognised the power of the Supreme Court of Judicature of Jamaica to exercise the jurisdiction once held by the Court of Chancery. Harrison P, in his judgment, at page 3, stated that the Supreme Court should be "slow to decline to exercise such power whenever the occasion arises, because of its all-encompassing interest in the welfare of the child".

[29] The power, of which Harrison P spoke, is set out in the Judicature (Supreme Court) Act. Three specific sections of that Act assist in identifying the jurisdiction of the Supreme Court. Firstly, section 4 of the Act stipulates which courts had been merged:

> "On the commencement of this Act, the several Courts of this Island hereinafter mentioned, that is to say–
>
> The Supreme Court of Judicature,
> The High Court of Chancery,
> The Incumbered Estates' Court,
> The Court of Ordinary,
> The Court for Divorce and Matrimonial Causes,
> The Chief Court of Bankruptcy, and
> The Circuit Courts,
>
> shall be consolidated together, and shall constitute one Supreme Court of Judicature in Jamaica, under the name of 'the Supreme Court of Judicature of Jamaica', hereinafter called 'the Supreme Court'."

Secondly, section 27 describes the jurisdiction of the merged court:

> "Subject to subsection (2) of section 3 the Supreme Court shall be a superior Court of Record, and shall have and exercise in this Island all the jurisdiction, power and authority which at the time of the commencement of this Act was vested in any of the following Courts and Judges in this Island, that is to say–
>
> The Supreme Court of Judicature,
> The High Court of Chancery,
> The Incumbered Estates Court,
> The Court of Ordinary,
> The Court for Divorce and Matrimonial Causes,
> The Chief Court of Bankruptcy, and
> The Circuit Courts, or
> Any of the Judges of the above Courts, or
> The Governor as Chancellor or Ordinary acting in any judicial capacity, and
> All ministerial powers, duties, and authorities, incident to any part of such jurisdiction, power and authority."

Finally, section 49 sets out certain consequences of the merger. The relevant portion states:

> "With respect to the law to be administered by the Supreme Court, the following provisions shall apply, that is to say–
>
> (a) …
>
> (i) In questions relating to the custody and education of infants the rules of equity shall prevail.
>
> (j) Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail."

[30] Against the background of that jurisdiction, inherited from the Court of Chancery, Parliament introduced, in 1957, legislation which specifically treated with the guardianship and custody of children. That legislation, the Children (Guardianship and Custody) Act (hereinafter referred to as "the CGCA"), expressly allows, in section 4, biological parents to appoint a testamentary guardian. Sections 3 and 4(4) of the Act also allow the court, where one of the biological parents has died, to appoint a guardian to act along with, or in place of, the surviving biological parent.

[31] In addressing the jurisdiction of the Supreme Court in respect of children, the CGCA, it could be said, codified an aspect of that jurisdiction, by providing for the removal, by the court, of testamentary or court-appointed guardians, and the appointment of other guardians in their stead. Those provisions are contained in section 8 of the Act.

[32] No provision of the CGCA specifically allows for any person to apply to the Supreme Court for the appointment of a guardian, where both biological parents are alive. Importantly, however, section 20 of the CGCA expressly states that the Act does not affect the inherent jurisdiction of the Supreme Court with regard to the appointment and removal of guardians of children. The section states:

> "Nothing in this Act contained shall restrict or affect the jurisdiction of the Supreme Court to appoint or remove guardians."

[33] It is apparent, from the above analysis, that the inherent jurisdiction of the court is relevant in a case where a child has living biological parents, but there is a need, for

whatever reason, to appoint a guardian for that child. The Supreme Court, in exercising either its inherent or statutory jurisdiction, is entitled to make a decision concerning the person who is best able to take care of the child. It is to be noted that section 18 of the CGCA stipulates that, in contemplating that decision, it is the welfare of the child that should be paramount.

[34] Based on the above analysis, the Supreme Court, as part of its inherent jurisdiction, had the jurisdiction to appoint guardians for A. There remains, however, the question of in whose favour should the court exercise its jurisdiction in circumstances where the child's parents are alive, the manner in which it may be done, and the consequences of exercising that jurisdiction.

In whose favour will the court exercise its jurisdiction?

[35] The person who is likely to benefit from the court's exercise of its jurisdiction of the court to appoint a guardian for a child, is undoubtedly someone, whom the court would find, has such a close relationship to the child to warrant that person's intervention. Lindley LJ made that point in **In re McGrath**. Preference is given to "the nearest blood relations" (**In re Nevin** [1891] 2 Ch 299, 303) but other persons are not excluded. The parents are usually given priority in the decision of who should be appointed the guardian of the child. Other persons may, in unusual circumstances, be preferred over a parent. There have been cases in which a parent has been removed from guardianship of a child. It has been noted above that by section 4(4) of the CGCA, the court may appoint a guardian in preference to a biological parent. The power to

appoint someone a guardian in preference to a biological parent, was also exercised as part of the inherent jurisdiction of the court.

[36] **In re Besant** (1879) 11 ChD 508 is cited as authority for the proposition that the court could appoint a guardian other than a parent. It that case, it was the mother's custody, from which the court removed the child. The court of appeal disapproved of her morals and contemplated that they would have had a negative effect on the child. It granted custody to the child's father, despite his separation agreement, by which the mother of their child was to have custody and control of her for 11 months of the year. The court, in its *parens patriae* jurisdiction (the child being a ward of court) decided that the mother's lifestyle made her unfit to have custody of the child.

[37] Despite the passage of the years since **In re Besant**, the learned editor of the 21st edition of Stephen's Commentaries on the Laws of England (1950) opined at page 522 of volume 2 of that work, as follows:

> "...Moreover, apart from all statutory provisions, the Chancery Division of the High Court, in the exercise of its general jurisdiction over infants has power in extreme cases to take away from a guardian, **and even from a father**, the custody of his child, and to commit it to fit and proper persons, when such a course is for the benefit of the child...." (Emphasis supplied)

[38] The principle set out in that extract may be seen in practice in **In re D (an infant)** [1943] Ch 305. In that case, the court held that it had the power to appoint guardians for a child, who had no property, but were in need of protection, and whose parents were thought to be alive, but were outside of England (in a concentration camp

in Italy). Bennett J relied, in his decision, on **Johnstone v Beattie** (1843) 10 Cl & F 42; (1843); 8 ER 657, in which it was said that the jurisdiction of the court "being indisputable, the exercise of it in particular cases becomes a matter of discretion and expediency, depending on the peculiar circumstances of each case..." (page 146; 696).

[39] Despite that learning, there is one authority that causes some hesitation as to the nature of the order that may be made. In **Ex parte Mountfort** (1809) 15 Ves Jun 445; 33 ER 822, a petition was presented for the appointment of a guardian for an infant in place of his father, whose negligence, it was alleged, threatened the security of the infant's estate. In his judgment, Eldon LC identified restrictions on the circumstances in which a guardian may be appointed, where the parent is alive. He made the following statement at page 447:

> "I have no doubt, that in certain cases the Court will, upon petition, without a Bill, appoint, not a guardian, which cannot be during the father's life, but a person to act as guardian; though in modern times the Court has professed to be very cautious upon that..."

That opinion was approved by Lucie Smith VC in **Mackintosh v Mackintosh**, at page 1070 of Stephens' compilation. It is not clear, however, whether the restriction, to which the learned Lord Chancellor referred in **Ex parte Mountfort**, was the absence of a Bill or the existence of the father. The learned editor of A Treatise on the Law and Practice relating to Infants, 4th edition (1926), seems to suggest that it was the absence of a suit that created the restriction. He said at page 166 of that work: "In two cases, however, a person to act as *curator* in place of the father has been appointed without a

suit" (italics as in original). **Ex parte Mountfort** was one of the two cases to which reference was made.

[40] In **Johnstone v Beattie**, which was later than **Ex parte Mountforte**, Lord Campbell, although in the minority in respect of the decision of the House of Lords, made, in the opening remarks of his opinion, a statement which was not controverted by any of the other Law Lords. He said at page 687:

> "I do not doubt the jurisdiction of the Court of Chancery on this subject, whether the infant be domiciled in England or not, The Lord Chancellor, representing the Sovereign as *parens patriae*, has a clear right to interpose the authority of the Court for the protection of the person and property of all infants resident in England, even where testamentary guardians have been appointed, **and even where the father is alive and actually himself resident in England**. If it be for the benefit of any infant that the Court should appoint guardians, to become officers of the Court, and to take care of the person and property of the infant under the superintendence and control of the Court, there can be no doubt of the power of the Court to do so. Although this jurisdiction was probably very rarely exercised till the abolition of wardship with the military tenures, and the great increase of personal property in modern times, I have no doubt that it existed at common law." (Emphasis supplied)

In that case, both the child's parents were dead, but the learned Law Lord's statement was undoubtedly a correct outline of the relevant law.

[41] Based on that learning, it is permissible for the court, even during the lifetime of the biological parents, to award guardianship of a child to a person who is not a biological parent of that child. It seems, however, that it is only in extreme circumstances that the court will exercise that discretion.

The best interest of the child

[42] As is stated in section 18 of the CGCA, the court, in deciding the issues of the grant of guardianship or custody of the child, will treat the interests of the child as paramount. The section states:

> "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 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."

[43] The concept of the welfare of the child was considered in **In re McGrath**. Lindley LJ, at page 148 of the report of that case, explained the concept. He said:

> "…The dominant matter for the consideration of the Court is the welfare of the child. 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 can the ties of affection be disregarded."

[44] Several of the decided cases stress the court's recognition of the bond between parent and child and the reluctance to interfere with that bond. That bond was considered to be an important factor in securing the best interest of the child. **Ex parte Mountfort**, where the father was given preference, was one of those cases. Similarly, in **De Manneville v De Manneville** (1804) 10 Ves Jun 52; 32 ER 762, a father was

not deprived of custody of his child despite the Court's less than approving view of his religious leanings, or lack thereof, and his politics.

The child as a ward of court

[45] There is one other major principle to be considered in assessing an application for the grant of an order appointing a guardian for a child. It is the issue of the child becoming a ward of court. The term 'ward of court', as will be seen from a quotation in A Treatise on the Law and Practice relating to Infant, below, "properly means a person under the care of a guardian appointed by the Court".

[46] In **E (Mrs) v Eve** [1986] 2 SCR 388, La Forest J, who delivered the judgment on behalf of the court, addressed the origins of the concept of wardship. He said at paragraphs 34 and 35:

> "34. Wardship of children had a quite separate origin as a property right arising out of the feudal system of tenures. The original purpose of the wardship jurisdiction was to protect the rights of the guardian rather than of the ward. Until 1660 this jurisdiction was also administered by the Court of Wards and Liveries which had been created for the purpose.
>
> 35. When tenures and the Court of Wards were abolished, the concept of wardship should, in theory, have disappeared. It was kept alive, however, by the Court of Chancery, which justified it as an aspect of its *parens patriae* jurisdiction; see, for example, *Cary v. Bertie* (1696), 2 Vern. 333, at p. 342, 23 E.R. 814, at p. 818; *Morgan v. Dillon* (Ire.) (1724), 9 Mod. R. 135, at p. 139, 88 E.R. 361, at p. 364. In time wardship became substantively and procedurally assimilated to the *parens patriae* jurisdiction, lost its connection with property, and became purely protective in nature. Wardship thus is merely a device by means of which Chancery

> exercises its *parens patriae* jurisdiction over children. Today the care of children constitutes the bulk of the court's work involving the exercise of the *parens patriae* jurisdiction."

[47] The authorities suggest that the child will, upon the application being made, automatically become a ward of court. This was stated in **Johnstone v Beattie**, where the Lord Chancellor stated, at page 674 the following:

> "It is proper that I should state, that according to the uniform course of the Court of Chancery –which I understand to be the law of that Court, which has always been the law of that Court, –upon the institution of a suit of this description, the plaintiff, the infant, became a ward of the Court, -**became such ward by the very fact of the institution of the suit**; and being a ward of the Court, it was the duty of the Court to provide for the care and protection of the infant; and as the Court cannot itself personally superintend the infant, it appoints a guardian, who is an officer of the Court, for the purpose of doing that on behalf of the Court, and as the representative of the Court, which the Court cannot do itself personally…" (Emphasis supplied)

[48] The Lord Chancellor foreshadowed that statement with a statement made during an exchange with counsel. He said at page 671, of the report:

> "**The moment the bill is filed, the Court becomes guardian of the infant, before any inquiry**; and the Master, to whom the Court refers the inquiries, is the deputy of the Court. No one can in the meantime take the, infant out of the jurisdiction without leave of the Court." (Emphasis supplied)

[49] As was mentioned above, the term "ward of court" is explained in A Treatise on the Law and Practice relating to Infants. The learned editor also supports the stance that wardship could result from the filing of the application. He states at page 165:

> "The term 'Ward of Court' properly means a person under the care of a guardian appointed by the Court, but the term has been extended to infants who are brought under the authority of the Court **by an application to it on their behalf, though no guardian is appointed by the Court**. As a general rule, the Court considers it for the benefit of the infant to be made a ward of Court." (Emphasis supplied)

[50] The learned author of Bromley's Family Law 5th edition also opined that the application was a trigger for the child becoming a ward of court. He states at page 400:

> "Until 1949 a child automatically became a ward of court in a number of cases, for example on a petition to appoint a guardian or on payment into court under the Trustee Act of a fund belonging to him or, in fact upon any application made to the court on his behalf…."A child may become a ward of court by several methods. On some occasions, that was not the intended result. As Stamp J said in **In re N (Infants)** [1967] 1 Ch 512 at page 529, "[a]wkward questions sometimes arose whether a child was or was not a ward. **He might have become so almost by accident**…" (Emphasis supplied)

[51] It was anxiety to ensure that A was not "accidentally" made a ward of court that prompted the request for further submissions from counsel in this case.

[52] Both Mrs Rushton and Mrs Livingston-Edwards submitted that the appointment of a guardian did not require a prior application for the child to be made a ward of court. Learned counsel cited in support of those submissions, the cases of **In re McGrath** and **In re N (Infants)**. Both counsel argued that some of the authorities, including **In re N (Infants)**, suggested that the result of the appointment of a guardian was that the child became a ward of court.

[53] It is, however, the application which is the trigger and not the grant. It is true that the learned editor of A Treatise on the Law and Practice relating to Infants, at page 165, in listing the methods by which a child would become a ward of court, includes among them, the situation where "an order is made on a petition for the appointment of a guardian". The case of **Stuart v Bute** [1861] 9 HLC 440; 11 ER 799 is cited in support of that proposition.

[54] In that case the headnote suggests that the appointment of a guardian for a child was taken to have, thereby, made him a ward of the Court of Chancery. The judgment was not, however, so definitive. In his judgment, Lord Campbell LC explained that it was on a petition that the guardians were appointed by Stuart VC. Lord Campbell then said:

> "The infant having been duly constituted a ward of the Court of Chancery…"

The statement does not exclude the interpretation that the child was made a ward by virtue of the application being first made.

[55] **In re N (Infants)**, Stamp J set out the position in England prior to 1949. He said, in part, at page 531, that the result of the order was to constitute the child a ward of court:

> "In my judgment, this court, before 1949, had jurisdiction to make an order for the protection of an infant before any other wardship proceedings had been commenced. **No doubt the effect of such an order usually, if not always, would have been to make the child a ward of the court** and, no doubt, by the effect of the Act of 1949 this will no longer be the result. **Wardship was the result**

> **of and not the ground for the exercise of the jurisdiction** and I am bound to say that in view of the cases to which I have referred…" (Emphasis supplied)

[56] Except for a reference in **Mackintosh v Mackintosh**, there has been no authority brought to this court's attention that indicates what the law in this jurisdiction is, concerning a child being made a ward of court. The description by Lucie Smith VC, in that case, shows that, in regard to the exercise of the inherent jurisdiction of the court, the law is no different from that which applied in England, prior to 1949. He opined that it was the filing of the document invoking the court's jurisdiction that constituted the child a ward of court. He set out the position very clearly at pages 1070-1 of the report on the case:

> "…**By the filing of the Bill the infants have become wards of Court**, and the general principle is thus laid down in so elementary a work as Blackstone:
>
> > '**By the institution also of a suit in Chancery in relation to the estate of an infant, to which he is made a party, he becomes a ward of Court** as it is called, the effect of which will be to place him under the more immediate protection of the Court, which will in that case take the direction of his estate and appoint a guardian for his person only. (2 Steph. Bl. Com. 342.)'" (Emphasis supplied)

Those words are of very similar import to the statement of the Lord Chancellor in **Johnstone v Beattie**, which were cited above but are repeated here for convenience:

> "…upon the institution of a suit of this description, the plaintiff, the infant, became a ward of the Court, -**became such ward by the very fact of the institution of the suit**…" (Emphasis supplied)

[57] It would have been noticed in Lucie Smith VC's judgment, that he mentioned various methods of approaching the court in respect of the appointment of guardians. This jurisdiction no longer has those methods of approaching the court, but it is important to note that the distinction between bills (properly called bills of complaint) and petitions, as it affects the issue of making a child ward of court, was set aside by the Court of Chancery Regulation Act 1851 (Cap 16 of 1852). Section 2 of the Act stated in part:

> "*And be it enacted*, That the court shall have, and exercise in and about any matter so brought before it upon petition, the same jurisdiction, powers, authorities, and discretion, to all intents and purposes, as it could have exercised in a suit for the same purpose instituted by way of bill, or information…and all orders of the court to be made in any such matter may be made in the same manner, whether upon motion, or otherwise, and shall have the same authority and effect…as if the same had been made in a suit so instituted…**and every petition presented under this act shall have the same effect in making any infant a ward of court, as a bill filed in the matter would have had**; and every such petition shall have the same effect as a bill in equity, as well as with respect to general proceedings…" (Emphasis supplied)

[58] Whereas petitions survived the Judicature Acts, bills did not. Eventually, both were condemned to being historical relics, at least for guardianship issues. All originating process that existed prior to 2002, which are relevant to guardianship issues, whereby an approach could be made to the court, including petitions and writs for the commencement of suits, have now been revoked by the Civil Procedure Rules

(2002). Based on that revocation, the current methods of approach, for the appointment of a guardian, would be by either a claim form or a fixed date claim form.

[59] It seems, therefore, that prior to 1949, in both England and in Jamaica it was the filing of the application in court that automatically made the child a ward of court. In 1949, however, the situation changed. The English parliament sought to prevent the uncertainty concerning children being unintentionally being made wards of court. That parliament passed, in that year, the Law Reform (Miscellaneous Provisions) Act 1949. The import of section 9 of that Act was that a child would not be made a ward of court without an express order to that effect. The section stated, in part:

> "(1) Subject to the provisions of this section, no infant shall be made a ward of court except by virtue of an order to that effect made by the court.
>
> (2) Where application is made for such an order in respect of an infant, the infant shall become a ward of court on the making of the application, but shall cease to be a ward of court at the expiration of such period as may be prescribed by rules of court unless within that period an order has been made in accordance with the application."

[60] This country did not promulgate any similar legislation. As was held to be the case in Barbados, in **P v P** (1977) 30 WIR 8, there was no restriction placed on the Supreme Court of Jamaica, as was placed on the English courts, by the 1949 legislation. Williams CJ (Ag) said at page 11 of the report in **P v P**:

> "…there is no question of the court being precluded from exercising its inherent powers since the 1949 provisions are not law in Barbados…."

[61] Based on the above analysis, the principle to be extracted from those authorities, for these purposes, is that the filing of an application for a grant of an order for guardianship, whether it be by claim form or fixed date claim form, in this jurisdiction will result in the child being made a ward of court. The court may, if it decides to refuse the application, release the child from its jurisdiction as its ward. The appointment of a guardian, would mean that the child remains a ward of court until the child either attains majority, or until further order of the court. The guardian, upon appointment as such, becomes an officer of the court, for the purposes set out in the appointment.

[62] The result of the status of wardship was also briefly described in **In re N (Infants)** at page 530. There, Stamp J said:

> "…**the effect of the infant becoming a ward of court was that he or she could not be taken out of the jurisdiction without the leave of the court and could not marry without the leave of the court**; and I have no doubt whatsoever that many infants were married and taken out of the jurisdiction of the court without their parents being aware that a contempt of court was being committed…." (Emphasis supplied)

In addition to those restrictions, the court is also obliged, where the child has property, to ensure that the circumstances of the child and the plans for the child's future must be carefully set out and monitored. Those obligations must not be undertaken lightly or blindly.

The appropriate order to be made

[63] Having set out those principles, it is necessary to return to the peculiar circumstances of this case. The appellants' application to the Supreme Court to be appointed guardians for A was commenced by way of a fixed date claim form. That method was properly used by them, given that, the parents approved of the application and there was no one who would foreseeably have objected to the application. The result, however, is that A was, by the filing of the application, automatically made a ward of court.

[64] It is unlikely that when they filed that application, the appellants contemplated that A would have become a ward of court and that she and they would face the restrictions which have been described in **Mackintosh v Mackintosh** and **In re N (Infants)**. It is noted, for instance, that the appellants have indicated that overseas travel is one of their aspirations for A. It is unlikely that the court would refuse an application for temporary visits abroad, but it appears an application would properly have to be made to the court for permission to do so. In the fifth edition of Bromley's Family Law, the learned author states at page 402 that there was a general relaxation in allowing visits abroad. He states:

> "…But by the middle of the [19th] century the courts were coming round to the view that a ward might be taken out [of the jurisdiction], at least temporarily, if sufficient reason were shown, for example for the sake of his health or to rejoin his family, provided that his return could be ensured if the court demanded it. This wider rule was gradually extended and by the end of the century it was accepted that an application should be granted whenever it was shown to be for the ward's benefit. **It must now be extremely**

> **common for wards to be taken abroad for holidays and the court may give general leave for temporary visits abroad if the other party does not object**…." (Emphasis supplied)

[65] In the circumstances, it may be best for the case to be remitted to the Supreme Court, with the guidance of this judgment, for it to reconsider the application if the appellants are minded to pursue it. If the application were to be withdrawn, the court may be inclined to direct that A would be removed from its direct protection and she would no longer be a ward of court.

[66] If the appellants pursue the application and the court decides to appoint them guardians, the court will decide whether they will be appointed guardians for her person only, if there is no estate, which is relevant for consideration. Where the court is inclined to grant the application, the words of Stamp J in **In re N (Infants)**, concerning the restrictions on the child and the guardians appointed, are apposite.

[67] The fact that it has not been said that A has any property, which needs to be administered, would suggest that the wardship would be in respect of her person only. If there is no estate, the court will have restrictions placed on the orders it may make. These were identified in **In re McGrath**. They were cited above, but are repeated below for convenience:

> "But it is obvious that the jurisdiction of the Court is very limited [where the child has no property]. The child having no property under the control of the Court, the Court cannot provide any scheme for the child's maintenance or education."

[68] It only remains to be determined whether the order that was made on 30 June 2016, after the court heard counsel's initial submissions, may be countermanded.

Altering the original order

[69] As was mentioned in paragraph [1] above, an order was made at the end of the hearing of submissions on the first occasion that this case came before the court. Having had the benefit of further research and the useful submissions of both counsel in this case, it seems prudent that a different order should be made. It is important, for these purposes, to note that the order originally made was not perfected. This was at the specific request of the court, based on the learning that additional research had provided.

[70] A court has the power to amend its order at any time before that order is drawn up. This court adopted that stance in **San Souci Ltd v VRL Services Ltd** SCCA No 20/2006 App No 8/2009 (delivered 2 July 2009). Smith JA cited, with approval, a decision of the English Court of Appeal in **In re Harrison's Settlement** [1955] 2 WLR 256. The court in **In re Harrison's Settlement** had approved the following statement, which was made by Farwell J in **Millensted v Grosvenor House (Park Lane) Ltd** [1937] 1 All ER 736 at page 740:

> "It is now well settled that, until an order made by a judge has been perfected, by being passed and entered, there is no final order, and, consequently, the judge may, at any time until the order is so perfected, vary or alter the order which he intended to make."

[71] Smith JA approved of that statement as being an accurate statement of the law. He applied the principle to the circumstances of this court. He said at paragraph 25 of the judgment, that the statement by Farwell J:

> "...is consistent with the [Civil Procedure Rules'] overriding objective which is applicable to appeals, see R1.1(10)(a) CAR [Court of Appeal Rules]. In ***Stewart v Engel and Another*** [2000] 3 All ER 518 it was held that the jurisdiction to reopen until the Court's Order has been perfected, if 'exercised very cautiously and sparingly, served, as a useful purpose fully in accord with the CPR's overriding objective of enabling the Court to deal with cases justly. Thus the jurisdiction might justifiably be invoked for example, where there was a plain mistake on the part of the Court...or where a party could argue that he had not been given fair opportunity to consider an application which had taken him by surprise'."

[72] The court may, in the circumstances where the order has not been perfected, hear further evidence or submissions. In **Charlesworth v Relay Roads Ltd and Others** [2000] 1 WLR 230, Neuberger J correctly stated the applicable law. He said at page 238:

> "However, although it might be seen by some as to be a somewhat technical point, it can be said that, by allowing further evidence after judgment, but before the order is drawn up, which results in the judgment being effectively reversed, the judge is not technically depriving the other party of any order in his favour: **the whole reason why the judge has jurisdiction to hear the further evidence is because there is no order drawn up, and he is therefore not functus officio....**" (Emphasis supplied)

[73] Based on that learning, this court may vary or revoke its order which has not yet been perfected. **San Souci Ltd v VRL Services Ltd** is also authority for the variation

of an order even where that order has been perfected. It is unnecessary to dilate on that situation in this case.

Summary and conclusion

[74] The analysis of the history of the jurisdiction of the Supreme Court demonstrates that that court, in its jurisdiction of *parens patriae*, was entitled to make an order appointing guardians for A despite the fact that both her parents are alive. The learned judge was therefore in error in deciding that she had no such jurisdiction to consider the application or to make the order sought.

[75] The exercise of that jurisdiction does, however, have significant consequences for the child and the persons appointed as guardians. One of the consequences is that the child, by virtue of an application for the order for the appointment of a guardian, became a ward of court. That status places severe restrictions on the child and, where the order is made, on the guardian. The disregard of those restrictions, even innocently, may place them, or either of them, in the position of having committed a contempt of court.

[76] It is unlikely that those consequences were contemplated by the appellants when they filed their application, and since such an order also places a burden on the Supreme Court, it is best that the case be remitted to that court for the appellants to make an informed decision as to whether they wish to pursue the application and, if they so decide, for the application to be considered there.

[77] The order that was made at the initial hearing of the case, not having been perfected, may properly be revoked and should be revoked. The order to be made should be:

1. The order made herein on 30 June 2016 is hereby set aside.

2. Appeal allowed.

3. The order of the Supreme Court refusing the application of the appellants is set aside.

4. It is hereby declared that the Supreme Court has the jurisdiction to hear and decide the application.

5. The application is remitted to the Supreme Court to be heard at a date and time to be fixed by the registrar of that court.

6. No order as to costs.

[78] Gratitude must be expressed to both counsel for their very helpful submissions in this unusual matter.

SINCLAIR-HAYNES JA

[79] I have read in draft the judgment of my brother Brooks JA. I agree with his reasoning and conclusion and have nothing further to add.

P WILLIAMS JA (AG)

[80] I too have read the draft judgment of Brooks JA and agree with his reasoning and conclusion.

BROOKS JA

ORDER

1. The order made herein on 30 June 2016 is hereby set aside.

2. Appeal allowed.

3. The order of the Supreme Court refusing the application of the appellants is set aside.

4. It is hereby declared that the Supreme Court has the jurisdiction to hear and decide the application.

5. The application is remitted to the Supreme Court to be heard at a date and time to be fixed by the registrar of that court.

6. No order as to costs.