JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CIVIL APPEAL NO. 5/98

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE PANTON, J.A. (Ag.)

BETWEEN	CHRISTOPHER BUCKERIDGE	APPELLANT
AND	DONNA SHAW	RESPONDENT

Pamela Benka-Coker, Q.C., instructed by
Verleta Green, for the appellant

Emil George, Q.C., instructed by Gordon Steer,
for the respondent

June 7, 8, 9 and July 30, 1999

FORTE, J.A.

Having read in draft the judgment of Walker, J.A., I agree with his reasoning and conclusion and have nothing further to add.

WALKER, J.A.:

This appeal is taken against a judgment of Her Honour Mrs. Neale-Irving, Judge of the Family Court for Kingston and St. Andrew, given on July 24, 1998, whereby it was ordered that the custody, care and control of the two children of the parties should be entrusted to the respondent (the mother) with liberal access to the appellant (the father). In his appeal, the father now

prays that this judgment should be set aside and that the custody, care and control of both children should be vested in him.

The relevant facts are that the parties established a relationship in 1994 with the intention of eventually marrying each other. Some time after this, the mother became pregnant and at the father's invitation she went to live with him at the home of his parents in Mona Heights, St. Andrew. On March 10, 1995, the child, Yendi, was born. Subsequently, on June 6, 1997, and during this period of co-habitation a second child, Christopher Junior, was born to the parties. As it turned out, the parties' plans for marriage did not materialise and, having become restless and impatient, the mother moved out of the house and went to live with her mother at premises nearby. At this time, the mother took the child, Christopher Junior, with her and would also have taken Yendi had she not been prevented from doing so by the father, so she said. The present situation is, therefore, that the parties live separately and apart from each other with the mother having de facto custody of Christopher Junior and the father having similar custody of Yendi. This was also the situation when the trial judge heard the matter. On the evidence before the Family Court, the judge found that both children were shown love and were well cared for in their respective environments. On the father's side, his parents, both retired, and a brother gave a helping hand with Yendi, for whom adequate provision was made in every respect. On the mother's side, she was assisted primarily by her mother in the care

and upbringing of Christopher Junior. The household also consisted of a maternal grand-mother, two aunts and a six year old cousin, all of whom as part of the extended family network gave willing support in caring for Christopher Junior. The accommodation made available to the mother was adequate and the respective homes of both mother and father were conveniently located within the same geographical area of Mona Heights, St. Andrew.

As for the parties themselves, the trial judge found that the mother was an objective, sensitive, mature individual and a good mother. Where the father was concerned, the finding was that he was a good father who willingly and enthusiastically performed his paternal duties to both children. It was in these circumstances that the judge made the order against which this appeal is now directed.

In every jurisdiction to which we have been referred by counsel on both sides, during the hearing of this appeal, the guiding principle to be followed in the resolution of questions pertaining to the custody, care and upbringing of young children is the same. It is that in deciding such questions, a court shall regard the welfare of the child as being of first and paramount importance. But the welfare of the child is not the sole consideration (see ***Re Thain, Thain v. Taylor*** [1926] Ch. 676; [1926] All E.R. Rep. 384, C.A.). In our jurisdiction, the principle is enshrined in paragraph 18

of the Children (Guardianship and Custody) Act (the "Act") which provides as follows:

> "**18.** Where in any proceeding before any Court the custody or upbringing of a child or the administration of any property belonging to or held on trust for a child, or the application of the income thereof, is in question, the Court in deciding that question, shall regard the welfare 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."

In the instant case, the main thrust of the submission of counsel for the father is that the judge of the Family Court failed to accord precedence to the above principle by allowing herself to be unduly, if not wholly, influenced by a consideration of the "mother factor". This, counsel for the father argued, was the irresistible inference to be drawn from the findings of the judge and, in particular, the findings which were expressed in the following terms:

> "That the 'mother factor' i.e. the principle 'that in the ordinary course of nature the right person to have charge of the young children is their mother', is applicable in this case. Accordingly, Christopher should not be separated from his mother who is a good mother.
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> ...
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> That it is not in the interest of Yendi to be brought up and nurtured by a 'mother substitute' when her mother is available and can undertake this role satisfactorily."

The first observation to be made is, I think, the obvious one. It is that from all appearances the judge's reference to the phrase "mother factor" related solely to the child, Christopher Junior who, it must be noted, was at the time of separation of the parties an infant aged 13 months still being breast fed by the mother. But, however that may be, the fact of the matter is that the present application for custody of Christopher Junior which is inherent in this appeal was not seriously pursued. His custody, therefore, causes no difficulty. What we now have to consider is counsel's submission vis-à-vis the child, Yendi, who even now remains separated from her younger sibling pursuant to our order that the status quo should be maintained pending the outcome of this appeal. So, the real consideration concerns the correctness of the judge's order in vesting custody of Yendi in the mother. Where, as here, the subject is a female child, it would seem to be a matter of common sense that the welfare of such a child would be enhanced and best achieved by entrusting her care and upbringing to her biological mother provided that the latter is ready, willing and able to undertake such a responsibility. It cannot, I think, be gainsaid that very often a mother can provide better care for her child than can anyone else. In this regard, my own thoughts appear to coincide with those of Rowe, P., as he expressed them, in ***Edwards v. Edwards*** (unreported) Resident Magistrate's Court Miscellaneous Appeal No. 1/90 in which judgment was delivered on October

4, 1990. In that case, which was also a custody case, the learned President said:

> "It would seem to be self-evident that a young female child should be reared by her mother if that can be accomplished without harm to the child."

And, later on in the same judgment, while treating with the subject matter of the preferred role of the mother, Rowe, P. cited with approval the dicta of Romilly, M.R., in ***Austin v. Austin*** (1865) 55 E.R. 634 (at page 637) wherein the learned Master of the Rolls opined:

> "No thing, and no person, and no combination of them can in my opinion, with regard to a child of tender years, supply the place of a mother, and the welfare of a child is so intimately connected with its being under the care of the mother, that no extent of kindness on the part of any other person can supply that place."

Indeed, the matter was put in proper perspective and the modern approach highlighted in ***Re S (A Minor) (Custody)*** (1991) 2 F.L.R. 388. There, in giving the judgment of the Court of Appeal, Butler-Sloss, L.J. said at page 390:

> "The welfare of the child is the first and paramount consideration. Under the Guardianship of Minors Act 1971, under which this matter is being dealt, there is no presumption that one parent should be preferred to another parent at a particular age. It used to be thought many years ago that young children should be with mother, that girls approaching puberty should be with mother and that boys over a certain age should be with father. Such presumptions, if they ever were such, do not, in my view, exist today. There are dicta of this court

> to the effect that it is likely that a young child, particularly perhaps a little girl, would be expected to be with her mother, but that is subject to the overriding factor that the welfare of the child is the paramount consideration. When there is a dispute between parents as to which parent should take the responsibility of the care of the child on a day-to-day basis, it is for the justices or for the judge to decide which of those parents would be the better parent for the child, who cannot have the best situation since they are not together caring for her. I would just add that it is natural for young children to be with mothers but, where it is in dispute, it is a consideration but not a presumption."

And, in agreement with this judgment, Lord Donaldson, M.R. said at page 392:

> "I only add that I think that the whole question of whether there is a presumption in favour of small children, in particular, small female children, being cared for by their mothers is difficult and may be a matter of semantics as much as anything else. As my Lord, Butler-Sloss LJ, has said, it is natural for young children to be with their mothers. Given that situation, if you take enough cases, you will almost certainly find that, in the majority of them, it is in the interests of the child that he or she should be with the mother. Whether or not that amounts to a presumption, I know not.
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> What is clear is that there is a change in the social order, in the organisation of society, whereby it is much more common for fathers to look after young children than it used to be in bygone days. It must follow that more fathers are equipped to undertake these sorts of duties than was formerly the case. From that it must follow that courts could more readily conclude in an individual case that it was in the interests of a young child that it

> be with its father than they would have done previously. Now, as always, the duty of the court is to consider the welfare of the child, and that is usually the paramount consideration."

Another consideration for the court must be the desirability for children, born of the same parents and whose births closely follow each other, to grow up together in the same environment thus facilitating a bonding between the children. As regards this aspect of the matter, the Australian case of ***In the Marriage of H Husband and H Wife*** (1995) F.L.C. 92 - 599 is, I believe, instructive although, unlike the present case, the parties had been married and were divorced and the children involved were older. In that case, which was heard in the Family Court, an award of custody of a son to the father would have occasioned a splitting of the children. In resolving what he described as a "balancing matter", Nicholson, C.J., in awarding custody of all three children to the mother, said:

> "One matter which would necessarily flow from a decision to award custody to the father in this case is the splitting of the three children. Mr. Wright, when asked to comment concerning this matter, pointed out that, insofar as the children are concerned, it would involve a sense of loss by both sides, that one or other would feel disadvantaged, and that there might be serious long term effects on the children in terms of their own future relationships.
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> In this regard it is of interest to note the comments of the learned authors of an article published in (1991) Journal of Divorce and Remarriage (Vol. 16) (Nos 3/4) - 'Issues of Split Custody; Siblings Separated by Divorce', by Lori Haplan, Linda

Ade-Ritter and Charles B. Hennon. It is an American article, but its comments, I believe, are pertinent to the present situation. At page 254-5 they comment:

> 'Courts are often reluctant to separate siblings based upon the presumption that children benefit from growing up with brothers and sisters and should remain together (Elrod, 1985). Further, to separate them would mean that they would grow up as strangers and "create a household divided against itself" (Schopler, Swarthout, and Dreschler, 1964, pg. 930). A marital break-up is a traumatic event to all members involved and is experienced by siblings individually, and also together as a unit. According to Nichols (1986), there are three conditions which permit formation of a sibling bond; high degree of physical and emotional access among siblings, need for meaningful personal identity, and shortage of parental influence. The most pertinent issue of the three in regards to split custody is that separating siblings after divorce will decrease their access to each other, thereby affecting a previously formed bond, or limiting the formation of a bond.
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> Further, during early childhood, children frequently spend more time interacting with their siblings than with their parents. The frequency of interaction with siblings does not diminish until emancipation in adolescence or early adulthood when the child leaves home (Waters, 1987). Therefore, sibling relationships constitute one of the more common interpersonal relationships of each other's sociocognitive skills, but their relationship can be described as primarily a positive one, with high frequencies of altruistic, affectionate co-operative (Foster,

> 1987) and concerned behaviour (Waters, 1987)'."

In the instant case, the trial judge recognised that an award of legal custody of Yendi to the father would have meant, in effect, splitting the two children. That she gave due consideration to this factor is evidenced by her finding:

> "That the principle, that children of the same parents who are not born far apart should not be separated, but remain together, applies in this case."

In adjudicating upon this case, it is clear that the trial judge came to her decision after a careful, conscientious evaluation of all the evidence presented to the court. There is no warrant for concluding otherwise than that in her deliberations the welfare of Yendi and Christopher Junior was always uppermost in her mind. Hence her expressed conclusion:

> "Accordingly, the court finds the welfare of the children is best served by custody being granted to the respondent with liberal residential access being granted to father on terms to be agreed by the parties." [Emphasis added].

As has already been observed, where the "mother factor" is concerned, it seems to me that the judge considered that principle, if principle it be, in relation only to Christopher Junior. However, even assuming that she did consider that matter in relation to both children, there is, in my opinion, no basis for saying that she accorded to that consideration undue importance

and pre-eminence in such a manner as to distort her judgment having regard to the clear provisions of section 18 of the Act.

There is another facet of this appeal that must be addressed. It is this. At the very outset of the hearing, we acceded to applications by both parties for leave to adduce fresh evidence. We granted these applications and allowed the evidence essentially because the case concerns the welfare of young children. However, having regard to the conclusion to which I have come, I find it unnecessary to refer to that evidence in extenso, or at all. At this juncture, the way forward and the proper tests to be applied are clearly adumbrated in ***M v. M (Minor: Custody Appeal*** (1987) 1 W.L.R. 404; ***Re A (A Minor) (Custody)*** (1991) 2 F.L.R. 394. For present purposes, I need only refer to the headnote of the ***M v. M*** case (supra). It reads as follows:

> "Two girls, aged 12 and 9, remained with their mother, when their parents separated. The elder child subsequently went, with the mother's consent, to stay for a short time with the father. The mother petitioned for divorce and, the elder child not having returned, applied for interim custody, care and control of both children. The court welfare officer, having seen the children, reported that the elder child wished to remain with her father and that counselling would be required before it would be possible for her to return to her mother's care, and concluded that it was in that child's best interests that interim custody, care and control be granted to the father. Thereafter access arrangements broke down and it became clear that the elder child was wholly averse even to access by the mother. The judge granted the mother's application, to take effect in respect of the elder child within four weeks from

the hearing. The father appealed and the Court of Appeal acceded to applications by both parties for leave to adduce fresh evidence.

On the appeal:

Held, (1) that where, on an appeal from an order made in the exercise of a judge's discretion, the Court of Appeal admitted fresh evidence the court should first consider, without reference to the fresh evidence, whether the judge below, on the evidence which had been before him, had been plainly wrong or had misdirected himself in some material respect; that if the court thereupon concluded that the judge had so erred the appeal should be allowed unless, in an exceptional case, the fresh evidence led to a different conclusion; but that if the judge had not so erred the court could allow the appeal and exercise an original discretion of its own only if the facts disclosed by the fresh evidence invalidated the reasons given by the judge for his decision.

Dictum of Lord Diplock in ***Hadmor Productions Ltd. v. Hamilton*** [1983] A.C. 191, 229, H.L.(E.) and ***G. v. G. (Minors: Custody Appeal)*** [1985] 1 W.L.R. 647, H.L.(E.) applied.

(2) Allowing the appeal, that the judge had erred in failing to take account of the elder child's adamant opposition to returning to live with her mother, albeit that she was only 12, and, on all the evidence which he had had before him, had been plainly wrong in ordering that custody, care and control of her should be transferred to the mother within four weeks of the hearing; that the fresh evidence reinforced the conclusion that it was wrong, for the time being at least, to make the order which the judge had made; and that, accordingly, it was in the elder child's best interests that interim custody, care and control of her be committed to the father."

Applying the law so stated, the question that now arises with regard to the instant case is whether on the evidence which the judge had before her, she was plainly wrong or misdirected herself in some material particular in coming to her decision. I do not think so. Having had the advantage of seeing and hearing the mother and father, both of whom she found to be good parents, and having had the assistance of a probation officer's report, the judge applied the correct principles of law and, in the final analysis, decided that the best course to adopt was to award custody of both children to the mother with liberal access to the father. I can discern no error of any sort in the result of the exercise of the judge's discretion which would lead me to a legitimate conclusion that she was plainly wrong to exercise her discretion in the way that she did. Nor can it be said that the judge "exceeded the generous ambit within which judicial disagreement was reasonably possible" in such a way as now to necessitate the intervention of this court (see ***G v. G. (Minors: Custody Appeal)*** (1985) 2 All E.R. 225). Furthermore, I am of the opinion that there are no facts disclosed by the fresh evidence as would serve to invalidate the reasons given by the trial judge for her decision.

Accordingly, I would not interfere with this order for custody but would dismiss this appeal with costs to be taxed or agreed.

Panton, J.A. (Ag)

I too agree and have nothing further to add.