JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT MISCELLANEOUS APPEAL NO. 1/90

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

BETWEEN	MADGE HORTENSE EDWARDS	APPELLANT
AND	JEFFREY ADOLPHUS EDWARDS	RESPONDENT

Jack Hines for Appellant

Keith Smith for Respondent

July 30, October 4, 1990

ROWE P.:

The wife appellant is a 43 year old Teacher and the husband respondent a 45 year old Optometrist and farmer. Both live in the town of Mandeville and both are of the Seventh Day Adventist religious pursuasion. Their marriage which was celebrated in Canada in December 1975 was dissolved in Florida in 1986. At the hearing of the application for custody out of which this appeal arises, counsel for the wife mildly probed the basis of jurisdiction of the Florida Court to grant a decree of divorce but left the matter very much up in the air. Two children came of the union: Melanie born October 16, 1976 and Averil-Mae born May 10, 1981.

In January 1985 the respondent left the matrimonial home at Devon Place, Mandeville where he had lived with his wife and daughters. Then in June 1985 he took the younger child "Averil-Mae" then 4 years old to live with him, in circumstances described by the appellant's counsel as amounting to kidnapping. There was nothing on the Records to substantiate

this complaint. An agreement was signed between husband and wife on July 1, 1985 in respect of custody of both children and also related to "other matters" not disclosed in evidence. Under that agreement custody of Averil-Mae was given to the respondent. The appellant has repudiated that agreement on the ground that although she had independent legal representation, she was induced to make the agreement under threats from her husband that he would cease paying rent for the Nevon Place home. At that time she had no source of income other than maintenance provided by her husband. Significantly, the wife said she did not disclose to her attorney-at-law the fact of the threats or their effect upon her although the agreement was signed at a lawyer's office in the presence of her attorney. In cross-examination the wife maintained that it was her intention in July 1985 to pursue legal action for custody notwithstanding the written agreement. Formal application for custody was made in September 1987.

In that application the appellant alleged that:

(a) the child Averil-Mae was separated from her sister to whom she was closely attached;

(b) the father spent little time with the child;

(c) the child was being deprived of emotional support and proper maternal care.

An affidavit in support gave some details. When the father was away from home, which was said to be from early morning until late in the evening, Averil-Mae was left in the custody of a paid domestic helper. Further, it was alleged that the father's female companion would visit the home to the child's knowledge and would sometimes sleep in the same bed with father and daughter. There was an allegation that the

separation of the two girls caused "loneliness and depression" but it was unclear from the affidavit, which child suffered the loneliness and depression. From what appears in subsequent responses of the mother it can be inferred that Melanie, in respect of whom there are no legal proceedings, is the child more affected by the separation. However, the learned Resident Magistrate proceeded on the basis that the child Averil-Mae was emotionally disturbed.

Only the two principal parties gave evidence. The husband said that he had re-married, that his new wife was at home in the days while he was away at work, that he provided adequate accommodation for Averil-Mae who attended Church and was doing well at School and that there was a satisfactory arrangement for access. Melanie would stop at his home on her way from School on Wednesdays where the sisters could be together and on Sundays he took Averil-Mae to her mother's home where she remained from 11.00 a.m. to 6.00 p.m. On none of these facts was there disagreement but the mother said that Averil-Mae's hair was unkept and had fallen off considerably and on one occasion she had to request the respondent to apply a mild deodorant to the child's personal hygiene.

Two Social Enquiry Reports prepared by the Department of Corrections were made available to the learned Resident Magistrate. In the first one dated April 2, 1987, under "General Observation", the Senior Probation Aftercare Officer for Manchester wrote:

> "Both parents enjoy a similar standard of living. Averil-Mae is taken to spend each weekend at her mother's home and she is also taken to spend time, whenever her father has to be out of town or off the island.

> "Assessment
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> The foregoing information indicates that the environments under scrutiny are physically similar in nature, and are both conducive to the proper upbringing of the child. Arrangements have also been made so that the child is exposed to both situations. Thus, should custody be granted to Mrs. Edwards, only the social and emotional aspects will be altered."

At best this Report was non-committal. On January 7, 1980 the Probation Aftercare Officer presented a second Report. The respondent had re-married and had a stable family situation. The appellant, however, complained that the respondent had reduced Averil-Mae's visits to her thus alienating the child from her and that as Melanie had gone to a Secondary School entailing longer hours at School and more home-work she saw less of her sister. Two significant additional complaints were that:

> (i) the elder child was becoming emotionally disturbed over the "tug-of-war" and felt unloved as she was not being fought for; and
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> (ii) the elder child continued to express her anxiety at wanting her sister to live with her.

The Officer merely noted that the respondent said his family was a closely-knit one and that both his wife and daughter shared a very close relationship.

When the matter came before this Court eighteen months had passed since the last Social Enquiry Report. In response to the Court's request for a recent evaluation of the family situation, the Probation Aftercare Officer produced a final Report dated July 19, 1980. At that time Averil-Mae and her sister Melanie were in Canada spending the summer holidays with their father's relatives.

The Report showed that in the interview with Mrs. Edwards all the earlier complaints were repeated and in addition Mrs. Edwards was dissatisfied with the access provisions which she described as haphazzard. The appellant complained too that the child's personal hygiene was below standard which indicated neglect on the part of the step-mother. Mr. Edwards, on the other hand, dismissed all the complaints as unsupportable and opined that the appellant's real purpose in securing the custody of Averil-Mae was to obtain added financial benefit.

"Eulalee" the domestic helper of the respondent and his wife, gave a revealing picture of life at the home of the respondent. She is reported as saying that when she started working at the Edwards' home two years before, she did not realise that Averil-Mae was not the present Mrs. Edwards' daughter. This said Eulalee was due to the amicable relationship which existed between Averil-Mae and her step-mother. That relationship had remained wholesome.

I set out the July 1990 "Conclusion" of the Senior Probation Aftercare Officer for Manchester. He said:

> "The information received has indicated that nine year old Averil-Mae Edwards is comfortable at her father's home. It also appears that her moral, religious and educational development is proceeding at a very acceptable rate. Whether moving her to live with her mother will improve her general situation, is an unknown quantity. Thus, the possible implications of changing the status quo will have to be considered carefully, before the learned Court makes a decision with its collective wisdom."

The Investigating Officer did not wish to seem to be usurping the functions of the Court but the fair inference to be drawn from the above "Conclusion" is that the welfare of the child Averil-Mae is being adequately satisfied in her present

home. The appellant, a Teacher, was confident that under her personal supervision the School Grades of Averil-Mae could be improved in line with that of Melanie who had then placed first in her Form. On inspection of Averil-Mae's School Reports for 1988-89 and 1989-90, it became clear that she is an "A" student who has also placed first in her Form and in addition excels in music above her older sister. Notwithstanding that the girls live in separate homes, Mr. Edwards' opinion of their relationship is that they were "inseparable."

It was a difficult decision which faced the learned Resident Magistrate. Prima facie, both parents were devoted to both children and behaved as ideal parents in every respect. There was no appreciable difference in the standard of living of either parent, or of the socialization of the children in the separate homes. The family unit had broken down irretrievably and in the early days of the disruption the husband and wife had entered into a written agreement for the custody of the children. There was no insistence then on the part of the appellant that the younger female child should live with and be cared for by her. Then she had her own independent legal representation and yet she did not seek her attorney's assistance to counteract the alleged threats made by her husband.

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 of course if all the siblings could live under the same roof and share the same degree of discipline as well as care this would enure to a healthy and cohesive family. Romilly M.R. spoke of the preferred role of mothers in Austin v. Austin (1865) 55 E.R. 634 at 637:

> "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."

The preferred role of the mother enunciated by Romilly M.R. is not a rule of law but rather a rule of common-sense. This was exemplified in the case of Re K. (Minors) [1977] 1 All E.R. 647. There the mother of a boy aged 4 years and a girl aged 1 year began to commit adultery to the great distress of her husband an Anglican Clergyman who refused on religious grounds to divorce her. The adulterous wife remained in the matrimonial home for the sake of the children but the extremely ugly scenes between husband and wife began to affect the son. The wife who wished to desert the matrimonial home to live with her lover, sought a custody order from the Court. The husband countered by causing the children to be made wards of court and applied to the Court for an order that the care and control of the children be committed to him. The trial judge while ordering that the children remain wards of court during their minorities, granted care and custody of the children to the mother on the ground that she was the natural guardian and protector of very young children. On the justice of the case the judge was inclined towards the father but having regard to the ages of the children gave a preference to the mother. His decision was upheld on appeal. In the course of his concurring judgment Sir John Pennycuick said at page 647:

> "Having taken this and all other relevant factors into account the judge, in his most careful and thoughtful judgment, reached the conclusion that the welfare of these children requires that they should be in the charge of their mother who, not as a matter of law but in the ordinary course of nature, is the right person to have charge of young children."

The Australian Courts are not quite as tender towards mothers of very young children. In Raby v. Raby [1976] 12 A.L.R. 669 the Court held that the suggested preferred role of the mother was not a principle, a presumption, a preference or even a norm, but it is a factor to be taken into account where relevant. As the Australian Court said in Gronow v. Gronow 29 A.L.R. 129 per Mason and Wilson JJ.:

> "In discharging this responsibility the Family Court will give weight to the mother factor with other features of the particular case. The precise weight to be given to that factor will necessarily depend on the particular circumstances. The structure of the family, the respective roles of the parties within the family relationship, the personality of the parents and of the child."

In the instant case, the mother had surrendered the custody of the young girl Averil-Mae to the father as evidenced by the written agreement of July 1987. The mother factor would shrink in importance during the intervening two years and this passage of time would impact upon the trial judge.

Leighton Jackson in his Book "The Law Relating to Children in Jamaica" [1984] at page 70 refers to the effect of change of environment upon the welfare of the child. He says:

> "This forms an extremely important consideration in the deliberations of the Courts today, and in competition with an unimpeachable parent, this consideration usually sways the balance in favour of the person who already has custody of the child."

The probable effect of a change of environment upon the child was a consideration very much in the minds of the Probation Aftercare Officer and of the Court below and it would appear was indeed a determining factor.

The relationship between an appellate tribunal and a trial judge who has a power to exercise a discretion in custody matters was considered by the House of Lords in G. v. G. [1985] 2 All E.R. 225 at 227. Lord Fraser of Tullybelton summarised the appellant's argument and gave his opinion thereon in the following passage:

> "[Her contentions] fall into two parts.
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> The first is that when an appellate court is exercising its jurisdiction in cases concerned with children, in which the welfare of the children has been declared by Parliament to be the first and paramount consideration ... . special rules apply. Second, it was said that in such cases the only proper way in which an appellate court can assess whether the judge of first instance has exercised his jurisdiction correctly is to carry out the same balancing exercise between the various factors in favour of and against each party as the judge at first instance had done, and if it reaches a different conclusion from him as to what is in the best interest of the child it must allow the appeal. The argument which I have thus crudely summarised was of course expanded and elaborated, and was very persuasively presented, but I am of opinion that it is unsound. I entirely reject the contention that appeals in custody cases, or in other cases concerning the welfare of children, are subject to special rules of their own. The jurisdiction in such cases is one of great difficulty, as every judge who has to exercise it must be aware. The main reason is that in most of these cases there is no right answer. All practicable answers are to some extent unsatisfactory and therefore to some extent wrong, and the best that can be done is to find an answer that is reasonably satisfactory. It is

> "comparatively seldom that the Court of Appeal, even if it would itself have preferred a different answer, can say that the judge's decision was wrong, and unless it can say so it will leave his decision undisturbed."

His Hon. Mr. Sang recognized that the crucial point for his determination was whether the welfare of the child Averil-Mae necessitated her being removed from her father. He understood, against the weight of the evidence, that Averil-Mae was emotionally disturbed, but did not attribute this to the separation from her mother and sister and her being resident with her father, step-mother and step-sisters. He clearly did not accept the appellant's evidence on this issue. The learned Resident Magistrate obviously considered the weight to be given to the "mother factor" but he balanced this against the environmental dislocation and concluded that the welfare of the child did not require him to "pluck" her from the settled home of her father. In my view this was one of the practicable solutions to which the Resident Magistrate could legitimately arrive on the evidence and applying the principle in G. v. G. (supra), it would be wrong for this Court which neither saw nor heard the parties to come to an opposite conclusion.

For these reasons I was of the opinion that the appeal should be dismissed. However, the appellant is entitled to very generous rights of access. As there was no agreement between the parties as to the terms of access in the light of the order of the Court for custody in the father, the Court declined to make a detailed access order. To enable the Court to retain supervision over access, liberty to apply was granted.

GORDON J.A. (AG.)

I have read the judgment of Rowe P and I agree with the reasons given and conclusion arrived at. One factor that cannot be overlooked is that Averil-Mae has developed emotional attachment to her two sisters born of her father and step-mother. These children, both girls, are under three years old and were born in the home while Averil-Mae lived there. The trauma of a separation from this attachment cannot be estimated and undoubtedly the learned Resident Magistrate considered that the welfare of Averil-Mae is best served by maintaining the status quo.

MORGAN, J.A.:

Hodge, a teacher, and Jeffery Edwards, an optometrist, were married in 1975 and lived in Canada up to 1983 when they transferred their matrimonial home to Mandeville, Jamaica.

The union produced two girls -

Melanie born 15.10.76

Averil born 10.05.81.

The girls are four years and eight months apart. In January 1985, Mr. Edwards left the matrimonial home and went to live in St. Elizabeth as the marriage had "broken down". In June 1985 he took away Averil-Mae, then four years old, from the matrimonial home to his home. The evidence of the mother is that she agonized and prevailed on him, she pleaded with him to return the child but he refused. The child was attached to her and her natural mother feeling to the child took hold. She sought legal advice immediately. He threatened her that he would cease paying the rental for the matrimonial home, then $900 per month, if she did not agree to let him continue to have custody of Averil-Mae. On July 1 she signed the agreement as she then had no source of income. She had been a housewife, who remained home to look after the children, and had not secured any employment since coming to Jamaica in 1983. It may be that the economic survival of Melanie and herself weighed heavily on her decision to agree. Thereafter, Averil-Mae was taken to her mother's home to spend each week-end and also on occasions when father was out of the parish or the Island. This access was reduced to a visit on Sundays between 11:00 a.m. and 6:00 p.m. In September 1987 the mother became dissatisfied and concerned about the physical care of the child and her emotional support and filed an application

for custody in the Resident Magistrate's Court, Manchester. I note that both parents gave evidence that a prior applicat. came before the Court in 1986. This fact is supported by the inclusion, in the record, of a Welfare Report dated April 2, 1987, prepared at the request of His Honour Mr. Sang with title "re child Averil-Mae - 5 yrs. old". The outcome of that application is not known but an application for custody under the Children (Guardianship and Custody) Act was filed in September 1987. Between the application of 1986 and the completion of the hearing of this application, Mr. Edwards (hereinafter called the father) had divorced Mrs. Edwards (hereinafter called the mother), had re-married and commenced a new family consisting of himself, a wife and two baby girls, now ranging from ages one to two years.

The application for custody was heard before His Honour Mr. L. V. Sang between May 5, 1988 and December 14, 1989, when it was refused with reasonable access to the mother.

On the 26th March, 1990, we heard an appeal against the Resident Magistrate's decision and by a majority it was dismissed with the question of access reserved with liberty to the parties to return to the Court if there was no agreement. I have the misfortune here to differ in opinion from both my brethren as well as from the learned Resident Magistrate and will, therefore, endeavour to state my own view of the matter as fully as possible.

The mother's complaint, as her affidavit in support shows, is as follows:

> "3. That I believe that the father of the child who is JEFFERY A. EDWARDS is not a fit and proper person to exercise care and control of the child for the following reasons:-

" (a) The child's domestic needs are provided for by a paid domestic Helper with whom the child is alone when the father is away.

(b) The father leaves his house early in the morning and returns late in the evening and consequently spends insufficient time with the child to give her proper guidance and parental support.

(c) The child is aware of the presence of the father's visiting female companion who sometimes sleeps at the house, a situation which is not conducive to a proper upbringing of a female child.

(d) The child is separated from her older sister, Melanie, to whom she is closely attached which causes her loneliness and depression which could adversely influence her upbringing.

4. That I believe I am in a better position to take care of the child and the arrangements I have made for the child are as follows:-

(a) The child will reside at my three-bedroom two-bathroom house with her sister, myself and my cousin.

(b) Her domestic needs will be supervised by myself as I have ample time to spend with my two daughters.

(c) That the child will be schooled, will attend Church regularly and will have ample arrangements for recreation and play under the supervision of myself."

In her evidence, she said that she now lives alone with Melanie. Averil lived with her and the family from birth until June 1985, and was very attached to her. She now teaches at Manchester High School, a graduate teacher earning

$1,200 per month and both Melanie and herself ride to school with a friend and return by taxi. Her hours are 8:00 a.m. to 2:40 p.m. - when she goes directly home, leaving enough time for her children. Melanie is doing very well at school and attends West Indies College Church (Adventist) with her. When the father lived at home he maintained them at a fairly good level. His work pattern was to leave at 7:30 a.m. and return sometime after 7:00 p.m. and on occasions would go out again. He conducted his practice in Santa Cruz in St. Elizabeth, May Pen in Clarendon and had a forty-six acre farm in St. Elizabeth, some seventeen miles from Santa Cruz. After he left home he had a visiting girlfriend.

Averil, she said, was very attached to her mother, and to Melanie with whom she enjoyed a close and amicable relationship. When the child first left home she would see her. The child was very emotionally disturbed because she was away from home, her physical appearance was deteriorating, she often expressed her desire to come back to her sister. The father had taken her to his home in Hampton Court where she, the mother, had visited and found Averil unsupervised and left in the care of helpers, of which there had been changes (five in all). The child expressed that she was very upset with how she was treated, with her father's relationship with his girlfriend, and complained that she would get awake from her sleep and find the girlfriend sleeping between herself and her dad. She asked her mother to pray that her father would bring her home. Since leaving home, Averil's hair, also, has been falling out and was unkempt and on an occasion she had to write the father asking him to apply a mild deodorant to her as she detected body odour on Averil which was

unsatisfactory. The child had now grown and gained weight and her standard of living is no less and no more than before

Her proposals for Averil are to send her to the same school and Church that she now attends and she would be taken to school and transported home by one of the teachers. She would request maintenance for the child and would have no reservation in granting access to the father.

At the time of giving evidence, the mother resided at the matrimonial home but a further Welfare Report states that since then she had removed to another rented modern three-bedroom house in the suburbs of Mandeville with modern facilities including hot water. Each bedroom being properly furnished and Averil-Mae would have a room of her own. Proposals then for the child's accommodation, educational and spiritual welfare are adequate.

The father said that while at the matrimonial home he left home at 7:00 to 7:30 a.m. and after leaving work at 2:00 p.m. he would spend an hour or two at the farm but since he left he could not recall any situation causing him to return home after 7:00 p.m. - "it would be unusual". He was, however, hazy and could not recall if, in the two years prior to remarriage, when he lived alone, he came home after 7:00 p.m. He admitted that he did have a girl friend who visited him but she was not the girl to whom he got married and that during the period he had had five different helpers.

Averil, he continued, was doing very well at school and her report, which was shown to the Welfare Officer, attested to that. A helper takes Averil to and from school in a taxi and she attends Church each week. She "relates well" to his new wife, who stays at home, he said, and she is attached to her baby half-sister, with

whom she shares a room and there is, also, a vacant room. She is in excellent health, happy and attached to him since birth. Averil sees Melanie and her mother on Sundays and again on Wednesdays when Melanie, on her way from school, stops at his house. He said that Melanie accompanied them to Canada for his wedding and he thinks that what he is doing for Averil is the best for her. There followed a bit of cross-examination from which it emerged that, in giving his attorney-at-law instructions to file proceedings (which proceedings were discontinued), he gave false information that (a) Averil-Mae was residing in the United States of America (b) that he was resident in Florida for more than six (6) months prior to the filing of the Petition. At first he said he could not recall signing any such document but when confronted with the document he admitted it.

The learned Resident Magistrate, after quoting Section 7(1) and Section 18 of the Act and listing the "thrust" of the mother's arguments and the "opposition" of the father, stated:

> "The crucial issue herein is whether the welfare of the child necessitated her being removed from the father. The Petitioner did not adduce any evidence to show that the respondent or his new wife were not fit persons to have care and control of Averil. No independent evidence has been adduced in support of Petitioner's application to show that the emotional disturbance of Averil was as a result of living with the father and his new wife or separation from her sister.
>
> I find that the evidence given by the petitioner in support of her application does not compel me, bearing in mind the welfare of the child, as being the first and paramount consideration to pluck the child from the settled home of the father."

Counsel for the appellant sought and was granted leave to argue two supplemental grounds of appeal but Ground 1 was abandoned as it was evidentially incorrect. Ground 2 was: That the learned Resident Magistrate erred in his application of the principle that the welfare of the child is of the first and paramount consideration in that his application of that principle to the facts of this case was too narrow.

He argued that, in considering the welfare of the child, the Resident Magistrate did not consider the conduct of the father, that, as the child developed and advanced, certain factors would be better resolved if she were living with her natural mother and that it would be in her best interest if she was returned to her natural mother and sister.

In reply, Counsel for the respondent argued that, except for the physical location, nothing else in the child's life would be changed and, though it is accepted that a natural mother should have access to her girl child, where such a child has been with a father for eight years (sic) (85 - 90) actually five years) the status quo should be retained.

The Resident Magistrate had before him two Welfare Reports from the Probation Officer, one submitted prior to the marriage of the father and one after the marriage dated January 1988. Two full years elapsed before the matter came before the Court of Appeal and on the Order of this Court we had before us an up-to-date report dated July 1990. Nothing seems to have changed materially since the hearing. Unfortunately, in none of these reports does it appear that Averil's step-mother was interviewed and neither did she give evidence at the hearing. Her thoughts

on her responsibilities as a parent-substitute are absent and unknown. This, in my view, is very very unfortunate. The last report speaks of a brief interview with the domestic helper, who said that the relationship existing between the child and step-mother was wholesome and amicable and that when she started working two years before she did not realise that Averil was not the step-mother's daughter.

The view expressed by the Welfare Officer was that he felt that the moral, religious and educational aspects of the child's life were equal in respect of mother and father.

This matter came before the Court under the Children (Guardianship and Custody) Act. Section 18 of the Act sets out the principles on which custody etc. of children are to be decided. I quote:

> "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."

This section is similar to the United Kingdom legislation - Section 1 of the Guardianship of Infants Act.

In **J v. C** (1969) 1 All E.R. 788 at page 820, Lord McDermott, in considering the construction of this section and in particular referring to the scope and meaning of the words "shall regard the welfare of the infant ("child"

above) as the first and paramount consideration", said:

> "Reading these words in their ordinary significance, and relating them to the various classes of proceedings which the section has already mentioned, it seems to me that they must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interest of the child's welfare as that term has now to be understood."

It is these clearly defined principles that the Courts have always followed in these cases.

The Resident Magistrate achieves this by exercising his/her discretion and this Court is not at liberty to substitute its own exercise of discretion for the discretion already exercised by the Judge, except in certain circumstances. Sir Joscelyn Simon, P. in **B (B) vs. B (M)** (1969) 1 All E.R. 901, quoting from Viscount Simon L.C.'s speech in **Blunt vs. Blunt** (1943) 2 All E.R. 76, articulated what should be the proper attitude of the Court in reversing such an Order. In summary, he said it can be reversed (1) if the Court acted under a mis-apprehension of fact in that it either gave weight to irrelevant or unproved matters that are relevant. Also, (2) if this Court reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight has been given to relevant considerations in considering the "best interest" of the child.

In this case, I am firmly of the view that the learned Resident Magistrate failed to take into account

relevant matters which he ought to have taken into account and has failed to give weight to matters relevant to the "best interest" of the child.

The words of Stamp, L.J. in **Re K (Minors)** (1977) 1 All E.R. 647 at page 649, are worthy of note and I cite them:

> "It is that although one may of course be assisted by the wisdom of remarks made in earlier cases, the circumstances in infant cases and the personalities of the parties concerned being infinitely variable, the conclusions of the court as to the course which should be followed in one case are of little assistance in guiding one to the course which ought to be followed in another case."

Each case brings its own problems in arriving at "best interest" and, in this case, apart from the normal problems of (1) accommodation (2) education (3) spiritual needs and economic situation (4) the effect of a change of environment in removing the child, one has to consider the matter of (5) a parent-substitute (6) separating young children of the same parents (7) assessment of future parental behaviour as to character, behaviour, stability (8) child's wishes. There is a duty on a Judge to have regard to all the circumstances that are relevant in each case and give effect and weight to them.

A finding that there was no evidence in support to show that the emotional disturbance of Averil was as a result of living with the father and his new wife or separation from her sister, was incorrect.

There was no allegation by the mother that her emotional disturbance was caused from living with the father and his new wife. The evidence from the transcript, with respect to this, was in this context:

> "Have seen Averil since she was taken away. At first she was emotionally disturbed having been away from home. She has often said she wants to be back with her sister .... She is saddened over the separation from me her mother."

Clearly, in the context of the evidence, the inference is that the emotional disturbance comes from leaving her home where her mother and sister live. There is no independent evidence as to the effect of separation from her sister but, in a situation where a mother's access to her young child is reduced to once per week on a Sunday from 11:00 a.m. to 6:00 p.m., there could hardly be need for any supporting evidence as to emotions. The chances are that there being a long period in between visits the situation could be emotional, and since it is a short visit it would be intimate, each making the most of the time at their disposal. The absence of independent evidence ought not to weigh against the appellant. A witness, though helpful, is not necessary. The Judge must put what weight he thinks fit on such evidence as he has. In **Re F (an infant)** (1969) 2 All E.R. 766, Megarry, J., in dealing with a similar application, said:

> "There is a limit to the extent to which the Court can fairly be expected to expound the process which leads to a conclusion, not the least in the weighing of imponderables. In matters of discretion it may at time be impossible to do much more than ensure that the judicial mind is brought to bear, with a proper emphasis, on all that is relevant to the exclusion of all that is irrelevant."

It is not, therefore, sufficient to say that there is no supporting evidence and dismiss it out of hand. Rather, such evidence must be approached with a judicial mind.

I come now to the examination of relevant matters to which, in my view, no effect or weight was given.

Education

The Welfare Officer was satisfied that accommodation, spiritual and educational needs were equal in both households though the mother, being a teacher, as years go on and the school work becomes more difficult, would be better able to assist the child and would certainly have more time and be more available than the father, who farms after working hours and sometimes comes in late. The educational ability of the step-mother is not known and it cannot be assumed that she can or will help. So education should not be regarded as equal in the households. The mother's home has an advantage.

Economic situation

The father is undoubtedly in a much better position to tend to all of Averil's material needs as he earns more than four times the mother's earning and has so far been able to send the child on trips abroad. It is accepted, however, that the welfare of the child is not measured by money nor by physical comfort. A child can be contented and happy in a rich home as in a poor home. It is the love, care and emotional support that count and are necessary in the child's best interest. There is nothing to indicate that her material needs - sans luxuries - could not be adequately met by the mother.

Parent-substitute

This is of the utmost importance but was not considered. Averil has already been exposed to seven (7) mother-substitutes, five helpers, a girlfriend and a step-mother, each no doubt with varying influences. It is a common Jamaican situation in middle class families that

helpers attend to children while mothers go out to work. But at the end of the day mother comes home and is welcomed as mother. There is mother's help, but no mother-substitute in these circumstances. The demands of a girl child on a mother-substitute will always be heavy, the female having been created not like the male. This present mother-substitute is now the proud owner of two young children who need her constant attention. As Averil grows older and goes through the delicate and difficult stages of teenage, adolescence, puberty, will the mother-substitute be able to cope with, make the time for or be willing to attend to the needs and give the emotional support that Averil will undoubtedly require? We have not had the benefit of her thoughts so the matter has to be viewed in a practical way. A mother is the person with whom a girl child, as she grows up, cuddles up with in bed, expresses her thoughts, feelings and problems and receives in return assurance, advice, kisses, hugs and love which helps to make her into a loving healthy child. Averil knows she has a mother-substitute, will she feel free to do this, will the mother-substitute, already over-stretched with two young ones (and the numbers may increase), have enough time or even care in accommodating her along with her job of making a new home with a husband? What has she to say? Does she accept her as a child of her husband in order to maintain a peaceful married life or does she accept her with the love and tenderness as one of her own children? All these very relevant and vital questions are left unaddressed and unanswered. Will Averil in the future, through jealousy or otherwise, become resentful of this new family causing a tremendous strain on her? These are the imponderables that must be weighed. In this case, is it in the best interest to expose

Averil-Mae to such a risk of deprivation and strain, now and in the future, when her own natural mother is available, has the time (at home 3:00 p.m.) and all the love and the emotional support the child needs? I think not.

Mother, in her evidence, pointed to lapses discovered in the child's physical care - unkempt hair, body odour, deterioration in the child's hygiene, all inferring that Averil was not receiving the attention that a girl child of that age requires help with, and, also, should now commence to be taught to do. Father may well care for Averil but apart from supplying all her material needs he is no substitute for a mother in these circumstances and common sense dictates that, of the restricted time he has at his disposal after work, priority attention would be given during that time to building his new family which he has started. In these circumstances, the general rule that a girl should be with her mother should be applied.

Mother's rights

A natural mother has consistently been considered to be the best person to rear her children. In **Re K (Minors)** (supra), it was held that whether or not a parent was unimpeachable, if the interests of the child required that custody should be awarded to one parent the Court had to yield to the child's interest. In this case, the wife of a Parish Priest, who refused to divorce her, left him and was living with her lover in an adulterous situation. At the hearing for custody of the children it was held that, not withstanding her adultery, in all the circumstances she was considered, in the interest of the children, the person to have custody.

An adulteruous woman is certainly regarded as an unfit person but so strong is the recognition of the importance of the mother's care that she was not prevented

girls who had lived happily together for four years before they were torn apart. The girls now enjoy only limited access to each other. I would regard it as a sensible principle that children of the same parents, not born far apart, should not be separated but remain together with one or the other parent unless their separation is unavoidable. Sisters, moreso than brothers, usually develop a special relation when grown together and should be given every chance to do so. Particularly between ages nine to nineteen, they need each other for support, direction and companionship. They need to play and laugh together, share secrets, sort out their pre-teen adolescent and teenage difficulties with the help of each other and, in the case of girls, assist each other during that very difficult period of puberty. This should not be denied them when it is available. The best interest for Averil would be well served being with her sister, Melanie, and because the father has not sought custody of Melanie, Averil's correct place ought to be with her mother where Melanie is.

This seems natural and the Courts have leaned to this view. Stamp, J. (as he then was) in **Re P (infant)** (1967) 2 All E.R. 229, in approving a custody order where the parties had come to terms and agreed that the boy should be with his father and the girl with her mother, said:

> "No Court can view with the least composure the separation of two little children but again the case has features suggesting that this is the least bad course to adopt."

My own interpretation of these remarks is that, unless there are very compelling circumstances, sisters and brothers ought not to be separated. I, respectfully, agree with this observation as to the approach which was never considered

in this case. There were no compelling circumstances found or accepted by the Resident Magistrate. In fact, he accepted that, on the whole, all things were equal. Although this was the report of the Welfare Officer, this report is primarily a guide.

As to assessment of future parental behaviour, everything points to stability in the mother's life. Unfortunately, father, in my view, appears to be someone who is prone to changing position or course at any time, judging from his change of partners from wife, to a girlfriend, then to marriage to another woman. Finally, if Averil's complaint is correct, to have a woman sleeping in the same bed with his young child at a time when he was not yet divorced from her mother shows that he pays no proper attention to morals in exposing a child to such behaviour. Someone who seeks the custody of a girl child of professional parents must be prepared to teach by example and these points should weigh heavily against him. They were relevant matters, in my view, which were not taken into account.

Upheaval in the child's life, which may be caused by removing her from one home to another, is an important consideration in custody matters. However, in this case, Averil would be returning to the bosom of her own natural mother and her sister, with whom she lived for four and one half years, a mother and sister whom she would see at times. She is also well acquainted with the surroundings. Mother says that to return home is a wish Averil had expressed, a wish not considered by the Court. A loving parent and sister and a warm welcome which mother and sister are prepared to give would relieve any difficulty in adjustment. In addition, mother has said that she would have "no reservation" as to access - a clear indication

that she would be very generous in this area. I foresee no difficulty on this aspect.

In my view, Averil's future prospects of development to womanhood are by far better and safer if she were returned to her natural mother. In dealing with the welfare of a child, one is required to look not only on the immediate future but also on the whole of the child's development through the years of her minority. If this is done, in this case, one must conclude that the benefits to be derived, if one acceeded to the mother's application, would considerably outweigh the substantial risks that are inherent in maintaining the status quo.

It is for these reasons that I concluded that the appeal should be allowed and custody granted.

from gaining custody of her children, notwithstanding the fact that she was impeachable.

In support of this point, I quote the remarks of Megarry, J. in **Re F** (supra):

> "Apart from the characters of the individuals concerned, there is a further practical consideration recognised in many cases including **Re L (infants)** (1962) 3 All E.R. and **H v. H & C** (1969) 1 All E.R. 262 that as a general rule it is better for small children and especially little girls to be brought up by their mother, and this, of course, is a consideration of great importance." [Emphasis supplied]

He went on to recognise that the demands of a child on a mother-substitute are heavier than on a father-substitute, that everyone should be concerned and aware of the importance of the child's links and of her own parents and the need to avoid any sort of replacement of them with others. He found, in the circumstances of that case, that, as between the father and mother, the mother had the greater advantage and went on to further remark that when it comes to parent-substitute the mother had an advantage.

I respectfully adopt all these remarks as I find them applicable in every respect to this case. To separate a child from her natural mother - a good mother, a stable mother, a blameless mother - there ought to be very compelling reasons. The Resident Magistrate pointed to no such reason, and in determining "the best interest" of the child, none of these relevant matters, which weighed heavily on the side of the mother's application, was considered.

Separation of children

Another relevant factor which was not taken into account concerns the separation of the children - two little