JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 107 OF 2001

BEFORE:	**THE HON MR. JUSTICE FORTE, P.** **THE HON MR. JUSTICE HARRISON, J.A.** **THE HON MR. JUSTICE SMITH, J.A.**	
BETWEEN:	**HAROLD MORRISON**	**DEFENDANT/APPELLANT**
AND	**NOELIA SEOW**	**PLAINTIFF/RESPONDENT**

Raphael Codlin for appellant

Gordon Steer for respondent

January 13, 14, and March 13 2003

HARRISON, J.A:

This is an appeal against the judgment of Harrison, J, on July 20, 2001, in which he ordered:

> **"1.** Custody of the child DARIEN QUINN MORRISON born on 20th day of November 1992 to the applicant.
>
> **2.** The child shall continue to reside with the applicant who shall have care and control of him.
>
> **3.** The respondent shall have reasonable access to the said child.
>
> **4.** The respondent do pay by way of maintenance of the said child the sum of One Thousand United States Dollars (US $1,000.00) per month plus all educational, medical, dental and optical expenses until the child attains the age of

> eighteen (18) years with effect from the 1st day of August, 2001. The respective sums itemized for "aftercare at school and sitter" and "extracurricular activities" should be paid directly to the school that the child attends by the respondent.
>
> **5.** The costs of and incident to this application be borne by the respondent.
>
> **6.** There shall be liberty to apply".

We heard the arguments of counsel for the parties and allowed the appeal in part. We affirmed paragraphs Nos. 1, 2, 3 and 5 and varied paragraph No. 4. We substituted the sum of US$1,500.00 per month for the sum of US$1,000.00 ~~and ordered~~ deleted ~~from~~ paragraph No. 4:

(a) the word "plus" and substituting therefor the words "inclusive of" ;

(b) all the words from the words "The respective sums" to the end of the said paragraph.

As promised these are our reasons in writing.

The grounds of appeal are:

> **"1.** The learned judge misdirected himself by ordering that payment should be made by the appellant in United States currency when the defendant/appellant is entitled to make payment in Jamaican currency, which is the legal tender under Jamaican law.
>
> **2.** The sums that the defendant/appellant has been ordered to pay, are manifestly excessive and oppressive, having regard to all the circumstances of the case.
>
> **3.** The learned judge had, himself, found that there was no evidence supplied by the

plaintiff/respondent to support her allegation that the defendant/appellant earns a million dollars per month and that he has seventy million dollars invested. Indeed, in cross-examination, the plaintiff admitted that she could not substantiate either allegations.

4. The learned judge misdirected himself in making an award against the defendant/appellant when His Lordship, himself, admitted there was no evidence to support the allegations of the plaintiff/respondent and thus to satisfy Section 7(3) of the Children (Guardian and Custody) Act.

5. The learned judge misdirected himself when he stipulated acts to be performed by the defendant/appellant in a foreign jurisdiction where the defendant/appellant does not live and where it might not be lawful or possible for the defendant/appellant to perform those acts in a foreign country. And where the defendant/appellant does not know when and how to perform those acts are the person or persons in whose favour those must be performed.

6. The learned judge misdirected himself by failing to give any or any adequate reasons as to the effect of the plaintiff admitted disposal of the admitted sum of US$200,000.00 (approximately J$8,000,000.00 which the plaintiff received from the defendant."

The relevant facts are that Noelia Seow, the respondent in this appeal, met the appellant, Harold Morrison, a businessman and architect in 1990, and thereafter they entered into an intimate relationship. The appellant was then already married.

The respondent said in cross-examination:

> "In August 1990, Mr. Morrison went with me to Miami packed my stuff and I went back to Jamaica."

On November 20, 1992, the respondent gave birth to a child Darien Quinn in the state of Florida, U.S.A. The appellant is the father of the child.

The respondent resides in the state of Florida, U.S.A. The appellant resides at 10 Durie Drive, Russell Heights, in the parish of St. Andrew. Both parties are Jamaicans.

During the period of their relationship, the respondent became pregnant. Because the appellant was already married, and in order to protect his marriage, they agreed that the respondent would go to the United States of America to reside and to have the child. The learned trial judge found on page 44 of the record, referring to the appellant that:

> "He has found himself in a dilemma. He is a married man and in order to protect his marriage he had arranged for the applicant to have this child abroad and for them to reside there as well. He seemed to have accepted his responsibilities at the time and spent lavishly in the maintenance of the applicant and child when the going was good".

The respondent, in cross-examination, at page 48, said:

> "The respondent had asked me to go to the Unites States to have the child. I did not elect to go to the States."

The respondent was of the belief that she would be "returning to Jamaica after the child was born."

After the relationship began, the appellant paid the respondent's house rental in Jamaica. After she became pregnant and went to the United States of America, the appellant paid her mortgage, "sometimes", as he admitted in cross-examination. He also admitted, that:

> "I was giving the applicant money in America but not supporting her."

The respondent had stated that:

> "... prior to the birth of the child (he) supported me and after the birth of the child he supported the both of us to the extent of United States Dollars $3,000.00 per month."

The ~~relationship broke~~ down between the parties in about May 1994. The appellant reduced the amount he sent to the respondent for the support of the said child and ceased supporting the child in July 1999.

Consequently, by originating summons dated October 09, 2000, the respondent sought custody and maintenance payments for the said child.

Between November 1992, and December 1998, the appellant sent to the respondent a total of about US$135,000.00. She admitted that she could have received US$200,000.00, cumulatively, but she did not have any money saved for the child.

The appellant also sought custody of the child Darien.

At the trial before Harrison, J, the respondent detailed the monthly expenses for the support of the child as US$2,100.00. She stated that the

appellant earned a monthly income of Jamaican $1,000,000.00 and had investments in excess of Jamaican $70,000,000.00. However, in cross-examination the respondent stated that she was in fact seeking an order of US$1,500.00 for the support of the said child. The child attended the Embassy Creek Elementary School and the Saint Bartholomew Roman Catholic Church in Miramar, Florida, was healthy, had his own room at a house bought by the respondent and was happy living with his mother. She asked for custody of the said child Darien.

The appellant did not deny the extent of his earnings and assets as claimed by the respondent. He however claimed that he had sent to the respondent money in excess of US$184,000.00 from 1992 to 1998, which sum they had agreed would be an endowment fund in the form of a trust earning interest. The appellant, in paragraph 6 of his affidavit dated March 16, 2001, said:

> "That such payments of US$3,000.00 per month that I made to the plaintiff, was done solely on our agreement that having regard to our respective situations, especially mine, I would give her these monthly sums to be held in trust for the subsequent maintenance, care and upbringing of the child."

It was stated that from this sum the respondent should have withdrawn monies periodically to support the child until adulthood. Consequently, no order for maintenance should be made requiring any payment by him.

The respondent denied the existence of any such agreement or trust and sought custody of the child and maintenance.

Harrison, J, accepted the evidence of the respondent, and on the contrary, found that the credibility of the appellant was one which he could not accept.

In custody proceedings the welfare of the child is of paramount importance. Section 7(1) of the Children (Guardianship and Custody) Act reads:

> "7-(1) The Court ~~may~~, ~~upon~~ the application of the ~~father~~ or mother of a child, make such order as it may think fit ~~regarding~~ ~~the~~ custody of such child and the right of access thereto of either parent, having regard to the welfare of the child, and to the conduct of the parents, and to the wishes as well of the mother as of the father."
> (Emphasis added)

The "welfare of the child" is further emphasized in section 18 of the Act, which, inter alia, reads:

> "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 ..." (Emphasis added)

The Status of Children Act provides, in section 2 that "child" includes a child born out of wedlock, and in section 3(1), inter alia, provides:

> "... the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other ..."

Such a child is therefore covered by the provisions of the Children (Guardian and Custody) Act, including the maintenance provisions therein. Section 7(3) of the said Act reads:

> "(3) Where the Court ... makes an order giving the custody of the child to the mother ... the Court may further order that the father shall pay to the mother towards the maintenance of the child such weekly or other periodical sum as the Court, having regard to the means of the father, may think reasonable."

The "Court" in section 2 of the Act embraces the Supreme Court and also the Family and Resident Magistrate's Courts, indicating the concurrent jurisdiction conferred. However, whereas the jurisdiction of the latter two Courts depends on:

> "... where the respondent, or any of the respondents, or the applicant, or the child to whom the application relates resides ..."

in the area relating to such Courts, the Supreme Court's jurisdiction has no such limiting access. Under that Act, therefore, the residence of the "respondent" is necessary to give jurisdiction to the Family and Resident Magistrate's Courts.

In the instant case the learned trial judge found that the Supreme Court had jurisdiction to hear the application for maintenance and custody of the child. He found that "both parents are ... Jamaican". We

agree with the learned trial judge in that respect based on the evidence led before him. The respondent had the right to make her said application in the Supreme Court, she being a Jamaican. Furthermore, it is anticipated that a child the subject of a custody order may well at times be out of the jurisdiction. In some circumstances a court would countenance the child being out of Jamaica or permit the child to be out of Jamaica.

In furtherance of his point Mr. Codlin argued that a person residing in the United States of America wishing to obtain and enforce a maintenance ~~order should~~ seek an order in the United States of America and resort to the Maintenance Orders (Facilities for Enforcement) Act, in keeping with the reciprocal arrangements between states. He maintained that the lex loci was the United States of America.

The latter statute contemplates the prior existence of a maintenance order. Section 4 of the said Act reads:

> "**4.- (1)** Where –
>
> (a) a maintenance order has been made by a court in a reciprocating state and such order is provisional only;
>
> (b) the Minister has received a certified copy of the order , together with the depositions of witnesses; and
>
> (c) it appears to the Minister that the payer is resident in Jamaica,

> the Minister shall send the documents referred to in paragraph (b) to the proper officer of the appropriate court in accordance with section 5, with a request that a summons be issued calling upon the person to show cause why that order should not be confirmed ..."

In the instant case, no prior order was in existence in the United States of America. The respondent had the undoubted right to invoke the jurisdiction of the Court. The case of ***Riley v Riley*** (unreported) S.C.C.A. 2/90 delivered November 26, 1990, relied on by counsel is not therefore relevant to the instant case. The respondent, as we observed was entitled to bring the proceedings within this jurisdiction. She chose to do so. This argument of counsel in respect of grounds 1, 2, 5 and 6, therefore fails.

There is no virtue in the complaint of the appellant that the learned trial judge erred in ordering payment in foreign currency. The appellant had desired and consented to the child being in the United States of America and made payments towards its support. The respondent is entitled to continue to receive payment in the currency of the United States of America. There is no existing restriction on a father to send from Jamaica foreign currency for the maintenance of his child in a foreign country, nor is there any legal bar to receive such sums. The court's reluctance to make orders for payment in a foreign currency has long since been abandoned. (See for example in contract, ***Miliangos v George Frank (Textiles) Ltd***. [1976] 3 All E.R. 599).

The learned trial judge rejected the contention that a trust had been created. He found that there was no such agreement. I agree. There was no evidence to support this stance of the appellant, by either documentary proof or credible oral evidence. On the contrary, the appellant made payments to the respondent for the support of the child without any such limitation or condition for the period, November 1992 until December 1998. The receipt by the respondent of the monies over a period of approximately six years and its unchallenged expenditure, in support of the child is further ample explanation why no funds remained capable of being construed ~~as establishing the~~ basis for a trust. The monthly payment of US$3,000.00 is referable, mainly towards the ongoing current expenses to be met monthly for the maintenance of the child, as opposed to the accumulation for the establishment of a trust fund. That contention of the appellant also fails.

The learned trial judge rejected the evidence of the respondent that the quantum earned by the appellant was $1,000,000.00 per month and that he had invested assets exceeding $70,000,000.00. The appellant, as I observed earlier, did not challenge these amounts. Nor did the appellant lead any evidence as to his earnings and assets, in contradistinction. The learned trial judge observed that the appellant was "a businessman and architect by profession," and "took into consideration" all the circumstances and ordered that the appellant pay

a sum of US$1,000.00 per month. We found that the said judge could properly do so. We did not agree however with the learned trial judge that:

> "... the sum for Health, Dental, Insurance and Medical expenses ought not to be quantified monthly ..."

but should be payable;

> "when these expenses arise".

We think it to be more prudent and convenient that these expenses be quantified monthly and paid to the respondent. We find that a sum of US$1,500.00 per month is an appropriate sum for maintenance payable by the appellant. We substituted this amount for the sum of US$1,000.00 ordered by the learned trial judge, mindful of the claim for aftercare, health, dental, insurance and medical expenses and extra curricular activities which amounted to US$710.00.

In granting custody of a child to one of two competing parents, the court is directed not to consider:

> "... whether .... the claim of the father ... is superior to that of the mother, or the claim of the mother is superior to that of the father;"

section 18 of the Children (Guardianship and Custody) Act.

The child, Darien, was happily settled with his mother, was healthy and attending school and church. We saw no reason to deny custody to his mother, the respondent, in whose proper care and control he has

always existed and continues to exist. The welfare of the child Darien, on the evidence, is sufficiently safeguarded, for custody to be granted to the respondent.

Curiously, the appellant in seeking custody of the child said in paragraph 18 of his affidavit dated March 16, 2001:

> "I humbly pray that the Honourable Court will order that I be granted custody of the said child, and I say that should I be granted such custody, I would make arrangements for the child to attend such preparatory school as is necessary and ultimately Munro College, one of the finest In Jamaica."

He failed to disclose any arrangements made in relation to the residence for the child in Jamaica, his religious upbringing, recreational activities or day-to-day care. Certainly, the intention of a father "ultimately" to send his child to a principal boarding school, such as Munro College is, somewhat removed from the father's residence and influence in the Corporate Area, should hardly be the highpoint and main focus of a father. His concern should also be for the welfare of his child, namely his "maintenance care and upbringing".

For the above reasons we made the order that we did.

FORTE, P.

I agree.

SMITH, J.A.

I agree.