

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Family Law Division

2023
No.00377

IN THE MATTER OF P.M. (A minor)

AND

IN THE MATTER OF THE CHILD PROTECTION ACT 2007

AND

IN THE MATTER OF AN APPLICATION UNDER THE CHILD
PROTECTION ACT

BETWEEN

PETER MARSHALL

Claimant

AND

JAMELIA CLEARE

Defendant

Before: The Hon. Madam Justice J. Denise Lewis-Johnson MBE

Appearances: Romauld Ferreira for the Claimant

Tai Pinder for the Defendant

Hearing Date: 24 July 2023, 4 December 2023, 28 February 2024

Child Protection Act S. 21-Custody of minor-Child Protection Act S. 22- Unwed parents- custody

RULING

Introduction

1. By Originating Application filed 20 June 2023 the Claimant seeks custody of six year old “P.M”.

2. By Court Order dated 24 July 2023, custody of the minor child was granted to the Claimant with access to the Defendant.

Claimants Evidence

Peter Marshall

3. That on the 23 January 2020 the Defendant admitted to attacking her mother while the Defendant's mother was holding P.M.
4. That on the 27 January 2020 the Defendant came to Nassau to seek therapy and was subsequently diagnosed with borderline personality disorder.
5. That on 12 June 2020 while P.M was in the custody of the Defendant she was bitten by an insect during the night, resulting in the minor child's eye being swollen.
6. That on the 6 November 2020 the Claimant received a message from the Defendant indicating that P.M had fallen out of the bed resulting in a contusion. That prior to this time, P.M had never fallen out of the bed while she was in his care and the Defendant refused to take the minor child for medical care.
7. That on the 1 November 2021, P.M's grandmother noticed that her genital area was red and swollen. P.M was examined by Dr. Paul Hunt.
8. That on the 10 November 2021 the Claimant was contacted by the Defendant and asked to take custody of P.M as the Defendant was no longer able to care for her.
9. That on 21 November 2021 the hairdresser discovered the minor child had ringworm. That at this time the Defendant was present and indicated that something was wrong with P.M. and the Claimant took P.M to Dr. Hunt.

10. That the Defendant on 3 December 2022 attacked the Claimant and P.M unprovoked. That since he has had custody of P.M, he has not received financial contributions from the Defendant except on two occasions.
11. That on 14 July 2023 the Defendant wanted to spend time with P.M. It was agreed between the parties that the Defendant would return the child the following Sunday. That the child was not returned and when he attempted to contact the Defendant she blocked his numbers.
12. That the parental app on P.M.'s phone was disconnected. That he went to Defendants home accompanied by his sister and the Defendant was not there.
13. That he subsequently learnt that the Defendant and P.M. were not in New Providence. As a result of this, the Claimant stated that he went to CID to make a report. The police were informed that the Defendant and P.M. were on their way to Freeport.
14. That the following morning the Claimant took a flight to Freeport and went to the Defendants job, he was told she had taken vacation, so he made a complaint to the Lucayan Police station.
15. That Social Services became involved and a report was filed. That Inspector Evans then led a group to find the Defendant and the minor child.
16. That they went to a residence on 36 Bahama Reef Blvd where the Defendant lived, but they were told that she had not been there for the past three (3) weeks.
17. That they went to the Defendant's mother's house, where the mother stated that the Defendant "needs help" and she was not the same since becoming pregnant. That the Defendant became physical with her and threatened to kill her. She also told officers that while the Defendant attacked her, P.M was in her hands.

18. That the Defendant has only contributed towards the minor child 16 months over a 24 month period and has never contributed to the minor child school fees and extracurricular activities.
19. That the Defendant refuses to have contact with her mother and that P.M has had no interaction with her grandmother until he stepped in.
20. That the Defendant has a history of mental challenges which brings instability.

Inga Bostwick

21. That I am the mother of the Claimant who advised me that P.M. would be moving in with them as the Defendant could no longer care for her. The Defendant then sent P.M.'s possession to the Claimant.
22. That sometime in November or December of 2021, the Claimant asked her whether the Defendant could move in with them. That initially she said no but later consented.
23. That when the Defendant moved in the home, P.M would not allow the Defendant to dress her, comb her hair or touch her and that when the Defendant tried, P.M. would cry and scream incessantly.
24. That P.M. informed her that the Defendant had deliberately slammed a door on her arm as well as fought the Claimant. She stated that she inquired from the Claimant what had transpired and was informed that the Defendant acted that way because he had expressed to her that he and P.M was moving back into her home without her.
25. That she asked the Claimant to take the Defendant to Dr. Timothy Barrett as she did not think Dr. Thompson could handle the situation the Defendant was faced with.
26. That the Defendant went to see Dr. Barrett.

27. That sometime in April 2023 she and the Defendant spoke and when she told the Defendant that she and the Claimant needed to work together for the benefit of P.M., the Defendant began yelling profanity which ended the call.

Stephanie McCartney

28. That I am the mother of the Defendant. She denied abusing her children and that they were raised in a loving home. That she assisted the Defendant with picking P.M. up from school, feeding, bathing her and putting her to sleep.

29. That when the Defendant came home while she was putting P.M. to sleep, the Defendant would remove P.M. from her chest causing her to cry.

30. That sometime in February 2020, P.M. was complaining of pain so she suggested to the Defendant to take her to the doctor. The Defendant in turn threw P.M. to the ground pushed her to the floor and began attacking her and threatened to kill her.

31. That after this incident the Defendant wanted nothing to do with her and that is when the Claimant intervened, and she resumed with assisting with P.M.

32. That on one occasion while doing school pick up, the assistant teacher indicated that the P.M. stated that her mom beats her. She stated that she questioned P.M. who remained rather quiet and upon arriving at the Defendants house, she told the Defendant what was said to the assistant teacher. That the Defendant responded that it wasn't true and that she only puts P.M. in time out.

33. That on another occasion sometime in October 2021 she noticed a discoloration on P.M genital. She went to retrieve some Vaseline to put on the area and met P.M on all fours in the bed with her hip to the air saying "spank me".

34. She further stated that when she confronted the Defendant about the discoloration the Defendant asked no questions and left with P.M.

The Defendants Evidence

Jameila Cleare

35. That she was diagnosed with Borderline Personality Disorder and needed assistance from the Claimant due to her failing health and that he was aware at all times that once she felt better she would take P.M. back.
36. That she made constant attempts to retrieve P.M. and the Claimant consistently alienated her. She stated that sometime in May 2022, P.M. was scheduled to graduate and she expressed to the Claimant that she wanted to attend. She indicated that the Claimant informed her that P.M. was not attending the graduation but she received a video call later that day with P.M. dressed in her graduation attire. When she asked the Claimant about this, he indicated that it was his decision to make.
37. That in August 2022 she made arrangements to visit P.M. in Nassau and the Claimant intentionally refused to let her see P.M.
38. That in December 2022, P.M. was to have her passport renewed and she mistakenly left the receipt in Freeport. As a result the Claimant withheld P.M. from her.
39. That by virtue of the relationship status between her and the Claimant he has never had legal custody or guardianship over P.M.
40. That that the relationship between her and her mother is very tumultuous, as her mother use to verbally and physically abuse her and her siblings during their childhood and adulthood and she denies ever threatening her mother.
41. That she protected herself from an imminent attack on her from her mother and at that time P.M. was not in her mother's hand and neither was P.M. physically harmed.
42. That she has never bounced around in homes with the exception when she stayed with the Claimant and his family for a brief period in Nassau.

43. That sometime in 2012 she moved into an apartment for 5 years and realized that she would need more space due to P.M.'s arrival and she then rented a space up until 2021 when she began to have challenges which led to her residing with her cousins for a period of time.
44. That in 2022 she relocated with her mother in a home they jointly own with the intention that P.M. would be returned to her by the Claimant and that in July 2022 she realized this was a move to control her and P.M and as a result she moved to another residence where she has been residing ever since.
45. That Dr. Lundy indicated that she was not a threat to P.M.
46. That she has always maintained a steady employment and have adequately provided for P.M. She indicated that she has support from her family members and friends with the exception of her mother.
47. That she acted in the best interest of P.M. and have actively sought therapy from February 2021.
48. That she has set up a bank account for P.M. to assist financially.
49. That P.M. did have a swollen eye and she and the Claimant spoke at lengths about it and that the information provided to her by the Claimant was that P.M. was either suffering from contact dermatitis or an infection of the eyelid. She further stated that the Claimant indicated two days later that the eye looked better.
50. That P.M. fell out of the bed and she immediately contacted P.M.'s pediatrician and the Claimant and that her pediatrician indicated that she will be fine.

51. That there has never been any doctors report indicating that P.M. genitals was red or swollen and avers that she took P.M. for a comprehensive checkup and the doctor confirmed that no abnormalities were found.
52. That she never attacked the Claimant or P.M. and indicted that an argument ensued while at the movies which escalated by the time they arrived at home. That the Claimant told her that he was leaving and that P.M would not be returned to her. The Claimant continued to leave, she grabbed onto his shirt in fear that she would not see P.M again. The Claimant then pinned her down and she noticed P.M. leaving the room by herself and rushed to the door to stop her from leaving or possibly injuring herself.
53. That she made arrangements for P.M., and they both would engage in activities that P.M. enjoyed. That she is in a stable environment and has intention of securing a home when P.M is returned to her.
54. That she has a steady job as a Claims Officer at the Freeport Container Cruise Port for over 19 years and is able to support both her P.M.
55. That P.M.'s education is equally important to her and that when P.M. was in her care for a brief period sometime in July 2023 her education thrived. That she has made inquiries as to P.M. education in Freeport and agrees that P.M should complete her schooling at Queens College for the third semester as she does not want to hamper her development.
56. That she has inquired about a psychiatrist to assist P.M. with transitional difficulties.

Issue

57. The issue to be determined by this Court is whether the Claimant should have legal custody of P.M.

Law

58. Section 21 of the Child Protection Act "CPA" provides:

(2) Subject to subsection (3), the mother of any child born out of wedlock shall have and be entitled to the custody of the said child, until it attains the age of eighteen years.

(3) The mother of any child born out of wedlock may be deprived of her custody under this Act by order of a court where —

(a) such mother has deserted or abandoned the child in such a manner likely to endanger the health or well-being of the child;

(b) such mother is by reason of intemperate or immoral habits, (such as prostitution or drunkenness,) or for any reason, unfit to have custody of the child;

(c) such mother does not exercise proper care and control of the child;

(d) the order depriving her of custody, if made, will be in the best interest of the child, and a social service officer has so confirmed by a written report or in evidence before the court;

(e) the court is satisfied that there exists some other circumstances not provided under paragraphs (a) to (d) which render the mother unfit to exercise the rights and assume the duties of custody.

(4) Without prejudice to subsection (3) the father of a child born out of wedlock may in the course of any proceedings for a maintenance order or in other proceedings make application to any court for custody of the child and the court may make such order if it is shown to the satisfaction of the court that it is in the child's best interest for him to have custody.

59. Section 22 of the CPA provides:

(1) A court may, upon the application of any of the parents of a child or in the course of the hearing of any such application by one parent make such order as it may think fit regarding —

(a) the custody of the child; and

(b) the right of access to the child mentioned in section 14 by either parent; and

(c) any other matter affecting the child, having regard to the age and the best interests of the child and taking into consideration the conduct and wishes of the parents and the child.

(2) Where a court makes an order under subsection (1) or under section 21(4) giving the custody of the child to one parent, it may further order that the other parent pays to the parent having custody of the child a weekly or other periodical sum towards the maintenance of the child as the court thinks reasonable having regard to the means of the parents.

(3) Where any order as to custody of the child or payment to a parent of a periodical sum for the maintenance of the child had been previously made by another court, a court may, if it is of like or superior jurisdiction to the latter court and it thinks fit, in the exercise of its power to make an order for the custody or maintenance of the child under this section, discharge the previous order and substitute any order as it may think fit.

(4) An order may be made under subsection (1) or (2) as regards the custody or maintenance of a child notwithstanding that the parents of the child are then residing together.

(5) An order under subsection (1) or (2) may be varied or discharged by a subsequent order made on the application of either parent or, in the case of an order under subsection (1), after the death of either parent on the application of any guardian under this Act, without prejudice to the powers conferred by the other provisions of the Act upon an officer of the Department.

(6) A parent granted custody of, or access rights to, the child under subsection (1), may apply to the court to voluntarily give up such custody or access to the child.

60. Section 3 of the CPA provides:

3. (1) Whenever a determination has to be made with respect to —

(a) the upbringing of a child; or

(b) the administration of a child's property or the application of any income arising from it, the child's welfare shall be the paramount consideration.

(2) In all matters relating to a child, whether before a court of law or before any other person, regard shall be had to the guiding principle mentioned in subsection (1) and that any delay in determining the question is likely to be prejudicial to the welfare of the child.

(3) In determining any question relating to circumstances set out in paragraphs (a) and (b) of subsection (1), the court or any other person shall have regard in particular to —

(a) the ascertainable wishes and feelings of the child concerned considered in the light of his or her age and understanding;

(b) the child's physical, emotional and educational needs;

(c) the likely effects of any changes in the child's circumstances;

(d) the child's age, sex, background and any other circumstances relevant in the matter;

(e) any harm that the child has suffered or is at the risk of suffering;

(f) where relevant, the capacity of the child's parents, guardians or other persons involved in the care of the child in meeting his or her needs.

61. Section 21 (1) of the CPA provides:

“The mother of any child born out of wedlock shall be the guardian of that child and a court shall be capable of exercising with respect to the child born to a single woman all the powers conferred upon it by this Act with respect to a child born within wedlock.”

Decision

62. The Court derives its jurisdiction pursuant to Section 21 and 22 of the CPA. In guardianship cases what is in the best interest of the child is singularly the deciding factor. In **J v. C** [1970] AC668 Lord McDermott stated:

“The second question of construction is as to the scope and meaning of the words “... shall regard the welfare of the infant as the first and paramount consideration.” 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 interests of the child’s welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed...”

63. The parties to this action are unmarried. The Claimant commenced this application pursuant to Section 22 of the Child Protection Act “CPA” which gives the right to any parent to bring an application for custody.

64. While the Defendant has raised the issue of the appropriate Section under which this application should have been brought, she also responded to it by filing an Acknowledgment of Service, multiple Affidavits and a Supplemental Affidavit, each time taking a fresh step in curing what could be an irregularity.

65. The Court does not accept that the appropriate Section to have brought this application under is Section 21. Section 22 of the CPA allows for any parent to bring an action for custody, right of access or any matter affecting the child.

66. In **Tiffany Glass Ltd. v. F Plan Ltd (1979) 31 WIR 470**, Kelsick JA held:

“Entry of an unconditional appearance to a defective writ waives any objection to the jurisdiction of the court as well as any irregularity in the commencement of the proceedings. So also does any fresh step taken, with the knowledge of the irregularity, with a view to defending the action on its merits. See the note to Order 2, rule 2, in the Supreme Court Practice 1979, page 10, and the cases there cited. In my judgment the failure to comply with Order 6, rule 2(1)(c), was an irregularity which was waived by the Defendant when it entered an unconditional appearance to the writ.”

67. Justice Winder in **Blue Planet Group Limited v Downie; Downie v. Blue Planet Group Limited [2019] 1 BHS J. No. 14** expressed:

“It is now well settled law that Order 2 of the RSC effectively eliminates the concept of a nullity and any defect in proceedings is an irregularity which is capable of being rectified by the Court.”

He further noted that the Court Shall,

“... regard every omission or mistake as an irregularity which the court can and should rectify so long as it can do so without injustice.” [Emphasis Added]

68. In the case of **Gateway Ascendancy v The Estate of Percy Burrows CLE/gen/00407 of 2014**, at paragraph 41, the Court previously held:

“Based on the Defendant’s participation in the proceedings, it is my opinion that the filing of the Notice and Memorandum of Appearance, along with the filing other pleadings by the Defendant each formed a ‘fresh step’ in the proceedings which subsequently waived the irregularities of the Plaintiff. Had the Defendant filed a conditional appearance and an application to strike out this action, the outcome would have been different. Subsequently, at this stage the Defendant has submitted to the jurisdiction of the Court. While the Defendant relinquished custody of P.M to the Claimant due to her health challenges. This is commendable. This is by no means a consideration against the Defendant. She acted in the best interest of the child.”

69. Having regard for the above, the Court finds that if Section 22 ought to have been used in the originating application, the Defendant waived that irregularity.

70. While the Court commends the Defendant for taking the necessary steps to seek help, it must equally determine whether the Defendant is now capable and able to care for P.M. (as by operation of law in this circumstances the Defendant is the custodial parent of P.M. unless the court determines otherwise.)

71. The paramount consideration for the Court in these circumstances pursuant to Section 3 of the CPA is what is in the best interest of the child.

Financial Care

72. The evidence reflect that both parties provide financial assistance for P.M. However, the court notes that a more substantial contribution was provided by the Claimant as he pays

P.M school fees along with extra-curricular activities and day to day expenses, while the Defendant's financial contributions are more geared towards food and snacks and is not on a consistent basis.

73. Since P.M. was placed in the custody of the Claimant he has been the significant provider.

74. The Defendant produced evidence which showed that there was never a financial inability to maintain P.M. and in fact she assisted the Claimant in maintaining P.M. throughout the years, despite it not being equally proportioned.

75. The Defendant admitted there was a difficulty transferring money to the Claimant for the maintenance of P.M.

Education

76. P.M. attended Day Spring Academy and is currently enrolled in Queens College. The evidence reflect that these fees are borne by the Claimant.

77. The Court considers whether moving P.M. to a new institution at this point in her educational journey is best. P.M. is 6 years old, the Court is of the view that any drastic change in the developmental stage of P.M. may have a negative impact on her ability to properly function in a new environment and place a stint in her learning curve.

78. The Defendant states that she made inquiries of a psychiatrist, to assist with providing help for P.M. in adjusting. This is important.

79. The Defendant's actions are of concern to the Court. She took P.M. to Freeport, Grand Bahama while in the custody of the Claimant without communicating this to him.

80. The events that ensued as a result of the Defendant taking the child to Grand Bahama are most unfortunate and does not support co-parenting in the best interest of the child. A trip

was planned and it took a Court Order to have the child returned in order to allow her to enjoy the much anticipated holiday. The parties must exhibit greater parenting skills.

81. The evidence suggest that the Claimant always had steady living accommodations as he resides with his mother. The Defendant on the other hand at some point fell into hard times which resulted in her taking up residence with family members who were able to assist her, she also lived with the Claimant and his mother at some point, on her own, with her mother and now on her own, there is some clear indication of instability.
82. The evidence reflect that the Defendant has now been able to obtain living accommodations of her own, she purchased a new vehicle and she has been employed by the Freeport Container Port for about 19 years. She is able to support P.M. She is equally financially stable.
83. Of grave concern to the Court is the current mental health of the Defendant and her ability to adequately care for P.M. Parenting alone can be challenging and the evidence suggests that she does not have a strong support system in place.
84. It was submitted by the Claimant that P.M. had a bruise on her genital area, a black eye, had fallen out of the bed and hit with a door which resulted in her being injured, all without the Defendant seeking medical assistance for her.
85. While the Defendant in all instances stated that she sought the assistance of medical professionals, over the telephone, and that she also kept the Claimant informed. The Court is concerned about the amount of instances of injury to P.M. while she was in the care of the Defendant, this is worrisome.
86. The Defendant's care for the child was not at the best standard. The Court has regard for the child's welfare. Lord Hanworth MR in **Thain v Taylor [1926] All ER Rep 384** stated:

“The other statute referred to is the Guardianship of Infants Act, 1925, which by s. 1 provides that the Court, in deciding any such question as we have here, “shall regard the welfare of the infant as the first and paramount consideration.” That is no new law, and the welfare referred to there must be taken in its large signification as meaning that the welfare of the child as a whole must be considered. It is not merely a question whether the child would be happier in one place than in another, but of her general well-being...”

87. The evidence provide that on 22 February 2020, Dr. Wayne Thompson made a diagnosis of Borderline Personality Disorder of the Defendant.
88. The Court also notes that the Defendant was seeking therapy from Ms. Lundy from February 2021 until July 2023 and that she indicated that there was no threat to P.M by the Defendant.
89. Having regard to all the reports, the Court is not clear whether the Defendant continues to battle this disorder and the impact it may have on P.M.
90. Dr. Thompson in a report dated 14 August 2023 briefly discussed the parenting of the Defendant and confirmed that there was no concerns on the Defendants ability to parent. However, the letter failed to confirm whether the Defendant still has the disorder or was it successfully treated. He did not address future care and risks.
91. In absence of such confirmation, the Court must determine whether P.M would be in some form of imminent danger if the Defendant is given primary care, custody and control.
92. The Defendant submitted that she has friends and family to assist her with P.M.
93. Although the Defendant has shown significant improvement throughout the years in her ability to care for P.M, the Court is not satisfied that those efforts are enough to grant primary custody to the Defendant at this time.

94. What is clear is that at present the child is in a safe environment. She is thriving by all accounts. The Claimant has a healthy support system in place. As his mother gave evidence of her involvement and commitment to continue. The Court cannot disregard this and gives weight to the evidence of the Defendant's mother. She is supportive of the child remaining with the Claimant and stated that she should not be given to the Defendant.

95. It is important that both parents have access and a role in the care, growth and development of the child. They contribute differently in providing for a well-rounded child. It is never good, but for extreme cases to deprive a parent of access. This is not one of those cases.

96. The evidence of the mental health experts are unfortunately not unanimous and/or clear. The Court accepts that the Defendant is in a better place and clearly on the mend. Her seeking help and continued treatment is supported and wise.

97. In **F v D [2017] JMSC CIV 9**, Skyes J relied on the dicta of Ormrod LJ in **S (BD) v S (DJ) (infants: care and control) [1977] 1 All ER 656** stating,

“The question is not what the essential justice of the case requires but what the best interest of the children requires. ... It is clear from J v C that if the interests of the children require a decision in favour of one parent, the perfectly proper interests and wishes of the other parent, unimpeachable or impeachable, must yield to the interests of the children.”

98. The Court is of the view that the stable safe environment that the child is now in should remain while the parties work on co-parenting skills and the Defendant develop a closer bond with the child. In time the Court is of the view that the Defendant may be entitled to primary care, custody and control. I am not satisfied that this is the appropriate time or that it would be in the best interest of the child.

99. For all of the reasons stated above, the Court having heard the evidence, having observed the demeanor of the witnesses and having considered the relevant law finds as follows:-

- i. Joint custody to the Parties, with primary care, custody and control to the Claimant, with access to the Defendant being:
 - a. One month during the summer to be agreed between the parties.
 - b. Christmas and New Year's to alternate between the parties starting with the Defendant having the week of Christmas 2024 and the Claimant having New Year's 2025.
 - c. The Defendant having one week during Easter break.
 - d. Mother's Day weekend to the Defendant and Father's Day weekend to the Claimant.
 - e. The Defendant having two weekends each month. The cost of travel of the minor being that of the Defendant;
 - f. Any other time as agreed between the parties;
- ii. The Defendant to contribute towards the maintenance of the child in the sum of Three Hundred Dollars (\$300.00) monthly payable to the Claimant by the 28th of each month commencing on the 28th August 2024. To be deposited in a bank account of the Claimant, the details to be provided;
- iii. The Parties to share equally all educational, medical, dental and optical expenses of the child;
- iv. The above Order is until further Order of the Court or until the child turns eighteen (18);
- v. Each party to bear their own cost.
- vi. There is liberty to apply.

Dated this 7th day of August 2024, A.D.



The Hon. Madam Justice J. Denise Lewis-Johnson MBE