



Deondra Doenna Kelly born on the 21<sup>st</sup> July 1999; Doey Peterson Kelly born on the 7<sup>th</sup> March 2002 and Toshona Jada Fae Kelly born on the 21<sup>st</sup> February 2003.

The parties ceased living together and in 2001 the Plaintiff filed an Originating Summons seeking an order that he be granted custody of Deondra. An Order dated 21<sup>st</sup> August 2001 was made by the Grand Court whereupon Deondra was appointed a ward of the Court. It was further ordered that she should remain in the care of the Plaintiff and that she was to be closely supervised by the Social Services over a period of three (3) months.

On the 31<sup>st</sup> August 2001 the matter concerning Deondra was re-listed and the Court further ordered that the wardship order should continue until further order. Interim care and control of Deondra remained in the father for the said three months with access to the defendant as to time and place at the discretion of Mrs. Miller, the Social Worker.

The parties seemed to have reconciled their differences so they resumed cohabitation and two other children were born during this period. A further separation took place and at present all three children are now residing with the defendant.

The original Originating Summons was re-listed for hearing on the 5<sup>th</sup> November as it was contended by the Plaintiff that he was extremely concerned about the whereabouts of the children. In addition a further application was filed by the plaintiff whereby he sought custody of the other two children. It was decided that the matters would be adjourned for a short period so as to allow the Social Worker to file an Interim Social Welfare Report concerning all the children for the benefit of the Court. It was further agreed that the court would hear an application by the plaintiff for interim care and control of the children on the 12<sup>th</sup> November until the substantive issue of custody was fixed for hearing. On the 12<sup>th</sup> November I heard this application and reserved my ruling until the 14<sup>th</sup> instant.

It is necessary if I commence by summarizing quite briefly the facts that led to the final separation of the parties and the removal of the children by the defendant from the home in which they were residing.

It is without a doubt that the relationship between the parties during the period they resumed cohabitation was a rocky one. The defendant has alleged inter alia, in her affidavit evidence that on Friday the 24<sup>th</sup> day of October 2003, she went to work leaving the two younger children at home with the helper. Deondra was sent off to school. Upon her return home at about 6:30 p:m she discovered that the plaintiff had changed the locks for the doors so she could not enter. After a while the plaintiff came to the door, opened it and told her that she had to leave that evening. He then proceeded to throw out her belongings together with the children's clothes. It is further alleged that he told her that the two younger children were not his. She left and subsequently took Deondra with her also. She has asserted that she has been living at her sister's home with the three children on a temporary basis. She has been trying to find somewhere to live but so far she has been unsuccessful. Deondra has now been sent to a different school by the defendant.

The Plaintiff has alleged on the other hand, that he had not thrown out the defendant and children. He agreed that he had changed the locks for the door and that when she came home on the evening of the 24<sup>th</sup> October he had told her that she could leave the children with him and that once she secured proper accommodation she could return and collect them. He has denied however that he had told the defendant that the two younger children were not his children.

It has been further alleged by the Plaintiff that when the Defendant made enquiries about Deondra on the 24<sup>th</sup> October, he told her not to worry about her, that she was O.K and that she had two babies to "worry about now and for the time being to just worry about them".

Counsel for the Plaintiff submitted inter alia, that:

1. The Court should not disturb the status quo of the children since this would radically change their lives.
2. The mother's accommodation is uncertain and her sister can only accommodate her temporarily.

3. It would appear that the mother's record of relationship with the children is not a good one.
4. The father's family has been described by Mrs. Miller as large, supportive and closely knitted.
5. In terms of his conduct as a father there is no criticism and nowhere in the Social Welfare Report is it said that he is not capable of fathering the children.
6. When one looks at Mrs. Miller's report there is criticism of the father in his relationship with the mother but there is none of him as a father.

Counsel also submitted that the recommendation of Mrs. Miller that the children should be with mother is inconsistent with the contents of the Report itself. In the circumstances, Counsel argued that the father ought to be allowed to have care and control of all the children in the interim with reasonable access to the defendant.

Counsel for the Defendant argued on the other hand, that these are three young children hence the Court must be concerned as usual about their welfare. There was no evidence she submitted, that the father has coped with the three children before and that the only evidence was that Deondra had spent three months with him and her grandmother who was assisted with a helper. She submitted that the grandmother would certainly have no locus standi in these proceedings.

Ms. Brooks further argued that the defendant was not shying away from the fact that she has made mistakes in the past, but she has now got her act together. It would seem she argued, that the father's concern is centred on Deondra. He became fond of her during the three months she stayed with him and it was not however until she was removed from school that he instituted proceedings seeking access to the other children. She submitted that the relationship with the grandmother and father could continue with access being granted to the father.

Ms. Brooks also argued that the Court should not hold it against the defendant that she does not have a permanent place of abode now. She said that the father's drinking habits and for him to be attending at his father's bar at odd times are matters of grave concern for the Court. She submitted that it cannot be in the best interest of the children for the father to get the children and

then for him to give them to his mother to look after. In the circumstances, it was her view that the Defendant ought to have care and control of these children with reasonable access being granted to the Plaintiff.

The Court in deciding the issue for determination shall regard the welfare of the child as the first and paramount consideration. Lord McDermot in J. v C. 1969 1 All E.R 788 in considering the scope and meaning of the words emphasised above 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 mostly 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 on or determines the course to be followed."

As I approach the task of adjudicating upon this application, I bear in mind also the observations of Lord Justice Stamp in Re K. (Minors) [1977] 1 All E.R p. 647 at p. 649.

"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."

The manner in which this application is presented has led me to conclude that the crucial issue herein is whether the welfare of the children necessitate them being removed from their mother back to the father's residence. The main thrust of the plaintiff's case as I understood it was that the children were well settled before, being well cared for, enjoying a reasonable standard of

living and having an all together happy life. It is also appreciated that the plaintiff's application was supported by an affidavit deponed to by his mother who he says was closely connected to the children and with whom they enjoyed a good relationship.

I am disturbed however with regards to the allegation that the Plaintiff had changed the locks to the house whilst the Defendant was at work knowing quite well that she would have had to return home to their very young children. I am also disturbed about the allegation that the Defendant was told that she would have to leave the home with the two youngest children. The Plaintiff has admitted that he told the Defendant that once she had secured proper accommodation she could return and collect the children. What did he mean then when he stated in his affidavit that she was not to worry about Deondra and that she has two babies to worry about? Is it that it was his intention that it would be alright for Deondra to remain but she had to take the other two children? These are some of the questions that will have to be determined when the substantive issue comes up for hearing.

The Court is indeed grateful to the Interim Report that was submitted by Mrs. Miller and I have given it consideration.

The Defendant has deponed that she intends to employ a Ms. Brown as her helper. She asserts that she is familiar with the children and that she will assist with them whilst she is at work. I can see nothing wrong with such an arrangement having regards to the present economic situation where mother and father are required to seek employment. Such exposure has become a fact of life and many children in our society owe their upbringing, moral and spiritual to faithful and devoted household helpers.

Having identified the claims thus, the question arises: What does the welfare of the children demand? In resolving this issue, I adopt the words of Smith J A. (as he then was) in the Jamaican Court of Appeal in Clarke v Carey (1971) 12 JLR p. 637 at p. 648:

"In deciding this question it must be said at once that this is not a case of balancing what has been called the wealth of the father against the 'relative poverty' of the mother."

While the tender ages of the children point strongly in favour of custody being granted to the mother, yet there maybe other overwhelming factors which indicate that such an order would not be in the best interest of the children. I have not been convinced however, that the latter situation applies to the facts as they have been presented to me in this matter.

The welfare of the children that is paramount leads me to hold that the children Deondra Kelly, Doey Kelly and Toshanna Kelly ought to be placed in the care and control of the Defendant in the interim and I so order. I also order that the children's care be closely supervised and monitored over the next three (3) months by the Department of Social Services. At the expiration of this period both Originating Summonses should be set down for hearing and a final Custody Report submitted to the Court by the Social Services Officer.


I further order that the Plaintiff shall have reasonable access to the said relevant children. He shall have access to them on alternative week-ends commencing on the 21<sup>st</sup> day of November 2003 from the Friday afternoon until Sunday afternoon and for two hours on Wednesdays between the hours of 5:30 p:m to 7:30 p:m.

The Plaintiff is ordered to pay to the Plaintiff in the interim maintenance of C.I\$200 per month in respect of each child commencing from the 30<sup>th</sup> day of November 2003.

The other Orders contained in the Order of Graham J shall remain in force.

On the question of costs, I feel constrained to note the Defendant's stance in opposing the application is not an unreasonable one considering the delicate nature of the matter. In the circumstances, there will be costs to the Defendant to be taxed if not agreed.

There shall be liberty to apply.

  
14/11/03 JUDGE (Ag)  
7

