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IN THE GRAND COUR OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO. 201 OF 1998

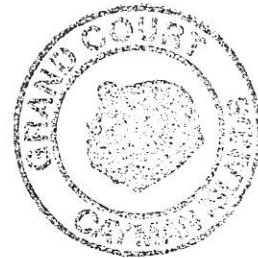
IN THE MATTER OF THE **GUARDIANSHIP AND CUSTODY OF THE**
CHILDREN LAW (REVISED)

AND
IN THE MATTER OF TWO MINORS

Kellock, J. (In Chambers)

Appearances:

John Furniss for the father and grandfather
Sheridan Brooks for the mother



Before Kellock, J. in Chambers
Friday 18th January, 2002

REASONS FOR JUDGMENT

Kellock, J.

These proceedings were commenced by the grandfather of the two minor children pursuant to the Guardianship and Custody of Children Law (1996 Revision) seeking his appointment as guardian and the custody, care and

control of the children. An ex parte application was then made to Graham, J. who ordered that the children be made wards of the court. Graham, J's order (which was made March 18, 1998) granted care and control of the children to the applicant. The wardship's order remains in force today.

It appears that from the outset there was concern that the grandfather did not possess the status required to permit him to invoke the provisions of the guardianship statute and as a result Graham, J's order was made pursuant to this court's inherent jurisdiction.

It was agreed by all parties that these proceedings should be continued so that the court's primary obligation, which is to the children maybe fulfilled consequently and on consent I made an order *nunc pro tunc* amending the style of Cause to make the father the applicant (instead of the grandfather) and deleting the grandfather's name from the style of Cause. Consequently for the purpose of all future proceedings in this matter the father will appear as applicant and the mother as respondent.

For the purposes of these reasons I will refer to the grandfather, father and mother as such, and the children as the older and the younger. Both children are boys. The older is now 7 years of age and the younger 5.

When these proceedings were commenced in 1998 the two children were 3 and 2 respectively. They had been under the care and control of the grandfather from birth, but in early January 1998 they were removed from his care and the father and mother were not able to agree where and by whom the children should be cared for. Needless to say the father and mother were then living apart.

Mr. Justice Graham's wardship order was made pursuant to the court's inherent jurisdiction which derives from the royal prerogative as *parens patrie* over wards of court (5(3) Hals 4th Ed. Para. 302). At common law these children would have been regarded as *filius nullius* so that no one possessed full parental rights with respect to them (*Barnardo v. McHugh* (1891) AC 388 per Lord Herschell at 398).

At the date *Barnardo v. McHugh* was decided in the House of Lords, Lord Herschell observed that all of the English courts were governed by

equitable rules and those rules favoured the desire of the mother in determining custody of children born out of wedlock.

In the light Sections 7 and 19 of the Guardianship and Custody of Children Law I do not believe that the outcome of this application should be influenced by any presumption in favour of either parent. Rather it should be decided on the basis of the language of Section 19. The welfare of the children is the first and paramount consideration.

Section 19 seems to have been drafted on the assumption that at common law a father's wishes were to be preferred to those of the mother.

Section 19 provides as follows:

“Where in any proceeding before any Court the custody or upbringing of a child or the administration of any property belonging to or held in 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.”

It is clear as *Barnard v. McHugh* demonstrates that the common law had been overtaken by the rules of equity at least by 1891.

I will therefore approach this application on the basis that the welfare of the children is the paramount consideration. Unfortunately, while this approach serves to focus the analysis it does not make my task easy.

Given an array of options it becomes a matter of judgment as to which option has the best chance of achieving the desired goal. In most of these cases the strongly held opinions of the parents, based as they always are, in the emotions which identify and define the ties between parent and child, are likely to conflict. The parents personal concerns naturally and understandably take into account considerations in addition to concern for the children. The parents fear for their own emotional well-being. This is the cost of separation and it is a cost that is not born by the parents alone but to a greater or lesser degree, by the children and other members of their families.

There have been two Social Enquiry Reports prepared in this matter, one in 1999 and the other in 2001 or 2002. (It is dated January 14, 2002.)

The older child lives with his paternal grandparents and that has been the case (with very limited exceptions) since his birth. The father and grandfather wish to see that arrangement continue. The younger child lives with his mother and that has been the case for a substantial period of time.

The most recent Social Enquiry Report was prepared by Sonya Hurd. She attended the hearing in Chambers before me and provided further helpful insight and advice.

I gather that both children attend the same school. It would also appear that the older child is particularly attached to his grandfather and father while the younger is particularly attached to his mother.

Miss Brooks submitted on behalf of the mother that it was in the best interest of the two boys that they should live together under the same roof. Only in this way can they experience the love and friendship that should characterise the relationship. She pointed out that it was unlikely that the older boy would reside with the grandfather throughout his childhood and accordingly the change of place of abode should be made now.

She proposes that both boys should reside with their mother and this was the recommendation made in the 1999 Social Enquiry Report. She pointed out that had the mother been afforded with the opportunity to appear and make submissions when the ex parte order was made in 1988 it is likely that the order might not have been made at all or it could well have contained different provisions. There is force in that argument.

Mr. Furniss agreed that the boys should spend as much time together as possible but there is a fear that if they are living with their mother the father may have access problems. He said that living in separate residences was not having an adverse impact on the children.

It appears to me that all concerned in this litigation, the father, mother, grandfather and other members of both families love and care for these children. It seems to me that loving contact with such an extended family should be encouraged. While this relationship is not unique it is not a situation which is as widely available as it should be and it should be afforded as much support and encouragement as possible. There are however some dark shadows in the corners of this case.

It appears that the father and mother's respective spouses are not liked very much by some members of the extended families. That is unfortunate.

I explained to the parties that the adult members of these families were obliged to so conduct themselves so as to prevent these sentiments from impacting on the children. I use the terms adults advisedly because it seems to me adults should be able to follow those instructions and that if this matter becomes the subject of the court's consideration in future, as is likely to be the case, I would expect the court to take a dim view of those who allow personal prejudices to adversely affect the children lives.

In addition it appears that the order of the Chief Justice made August 20, 2001 contains (in paragraph 6 thereof) a provision enjoining the father from engaging in inappropriate conduct towards the mother. There is evidence in the record that the mother has been subjected to physical abuse in the past.

The recommendations made in the January 2000 Social Enquiry Report are as follows:

- (1) • The father and the mother attend mediation sessions to assist them to resolve their issues and work towards co-parenting the children.

- (2) • That joint custody be awarded and that the separate living arrangements remain as they are at present with visitation rights to both parents.
- (3) • That the grandparents and the parents attend family therapy sessions.

However Ms. Hurd advised me that she did not oppose the children living together but the older boy should not be 'yanked' from his grandparents. He needs to be prepared for a change.

It appears that all parties are in favour of mediation but there is a concern that mediation cannot work unless there is an incentive to make it work.

There should certainly be no incentive to cause mediation to fail. I should therefore say again that the court will be unlikely to tolerate conduct which in any way undermines the mediation process.

I asked the grandfather whether or not he would assist in the process of preparing the older boy for a change in place of residence if the court thought that that would be in the child's best interests. I was not encouraged by his response and I can only hope that he will be guided by these reasons.

Conclusions

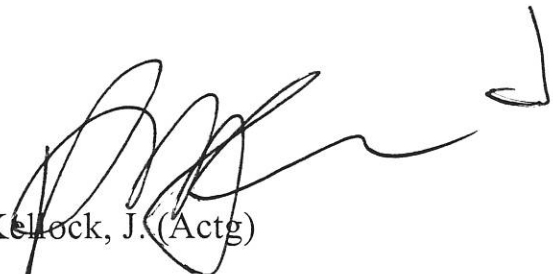
Having carefully considered the record before me and the submissions I have heard I have concluded as follows;

1. Firstly I do not think that there should be any change made yet to the children's status as wards of the court. That status should be maintained until the court can be sure that the situation no longer requires it.
2. Subject to that, the custody and day to day care and control of the children should be a joint responsibility of both the father and the mother
3. Unless there is a drastic change in circumstances both boys should reside with their mother, but the father should have liberal access including temporary custody so as to ensure to the extent possible that there is now and in future a close relationship between the children and both parents.

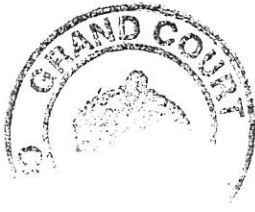
4. Both parents should exert every reasonable effort to encourage the children to have contact with their grandparents and such other relatives as they may consider appropriate.
5. The first and third recommendations of Social Enquiry Report should be implemented forthwith and reports provided to the court from Tanya Nelson the mediator and Judy Seymour the therapist.
6. Paragraph 6 of the August 20, 2001 order is to continue in force.
7. The older boy should cease to reside with his grandfather and begin to reside with his mother and brother, as soon as the older child can be prepared for the move but not later than the end of February 2002. The move should not be left until the last possible date. Rather the move should be made just as soon as the preparatory work has been done.
8. Liberty to apply is granted should the circumstances change significantly, for the purposes of discharging the wardship order or for making any other necessary orders or directions.

I note that the summons seeks maintenance and costs. Neither matter was raised before me and must therefore be left to be dealt with at a later time.

I will conclude by repeating that the welfare of the children is of paramount importance and all of those concerned are cautioned that the court will not likely tolerate conduct which undermines this order or the purpose for which it is made.



Kellock, J. (Actg)
Judge of the Grand Court



Dated ^{21st} January, 2002