IN THE SUPREME COURT OF BELIZE, A.D. 2012

ACTION NO. 78 of 2009

WENDY SIMMONS	**APPLICANT**
AND	
WILMONT SIMMONS	**RESPONDENT**

Hearings
2012
16th October
6th November
28th November

Mrs. Robertha Magnus-Usher for the applicant/petitioner.
Mrs. Naima Badillo-Barrow for the respondent.

LEGALL J.

JUDGMENT

1. The applicant and the respondent were married on 22nd May, 2004. There is one child of the marriage, Leshaun A. Simmons, male, born on 14th September, 2007. Due to problems in the marriage, a decree absolute dissolving the marriage was made on 26th July, 2010 on the ground of adultery on the part of the respondent. By consent, the

court ordered in the decree that the parties should have joint custody of the child of the marriage, and that the applicant should have control of him with access to the respondent as agreed between the parties. An elaborate agreement was signed by the parties in which contained details concerning, among other things, the respondents access to the child. A most unusual clause in an agreement of this kind, clause 26(1)(a), authorized either party to terminate the agreement upon notice to the other party. The applicant acting under that clause terminated the agreement on alleged grounds of failure to comply with a maintenance order made by the court against the respondent, excessive drinking, disagreements between the parties and problems in relation to the respondent's access to the child.

2. The alleged problems perhaps formed the basis of the present application before me dated 7th June, 2012 for:

> "(1) a variation of the joint custody order granting sole custody of the child to the applicant; and
> (2) That the respondent be granted supervisory custody of the said child."

Learned counsel withdrew paragraph (2) above. This judgment is in respect of paragraph (1). After much discussion, the parties agreed to a consent order granting access to the respondent. The consent order states that the respondent is granted access to the child every other Friday from 6:30 p.m. to the following Sunday at 6:30 p.m. commencing from 19th October, 2012. The consent order further

states that the applicant shall take the child on the relevant Fridays mentioned above at 6:00 p.m. to the residence of Christine Gibson at 5841 Bachelors Avenue, Belize City to where the respondent will go to collect the child at 6:30 p.m. on the said Friday, and to where he would return the child at 6:00 p.m. on the following Sunday. The reason for the use of the intermediary, Ms. Gibson, who agreed with the arrangement, was because of major problems the parties experienced, including assault, due to previous arrangements on their meeting to take and return the child.

3. Due to the above consent order, this judgment deals principally with the application by the claimant for sole custody of the child. In deciding any question as to the custody of a minor, the court must regard the child's welfare as the paramount consideration. In making any decision relating to the upbringing of the child, the guiding principles are as set out in the First Schedule to the Families And Children Act Chapter 173 (the Act). Paragraph 1 of the First Schedule states, inter alia, that whenever a court determines any question with respect to the upbringing of a child, the child's welfare shall be the paramount consideration. This principle applies in making a decision in relation to an application for custody of a child. In determining a question relating to the upbringing or custody of a child, paragraph 3 of the First Schedule of the Act states that the court 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 others involved in the care of the child in meeting his or her needs."

4. In relation to (a) to (e) above, the evidence is that the child is five years old, male, and has been residing with his mother since 2010. The handing over of the child by the parties in accordance with previous access arrangements was the source of major problems and complaints by the parties resulting, as we shall see below, in violence involving the parents of the child; and also resulting in police intervention. The evidence of the applicant is that the handing over process caused "emotional damage to the child" resulting in the child becoming "aggressive and uncontrollable" for which she had to seek counselling for him. The applicant swore that in the process of handing over the child to the respondent, the child on several occasions said that he did not want to go to the respondent's house, and he did not want to go with the respondent who swore that, not only did the applicant told him that the child did not want to go with him; but that on most weekends when the applicant went to his house to pick up the child, the child did not "want to go with her." The

evidence of each parent is that, at the handing over of the child for purposes of the previous access arrangements, there is unwillingness on the part of the child to be handed over to either parent. The behaviour of the parents at the handing over of the child no doubt resulted in some emotional problems in the child; but the applicant has been active in seeking counselling for him. The child is also enrolled in school where his educational needs are being provided. The above access order made by consent would go a long way in reducing contact by the parents, which has the potential of removing conflict by the parents in the presence of the child, and thus can have a positive effect on the emotional and psychological well being of the child, which, in turn, can result in improved performance by him at school, and his association with other children.

5. In relation to paragraph (f) above, the applicant is 39 years old, has remarried to Amilcar Sifontes who has no children with the applicant, but who resides with her and the child. The applicant is a director and shareholder in a company, namely, Oxley International Corporate Services Ltd., from which she says she earns monthly a net income of about $6,000 to $8,000. Sifontes works in the same company; but his income is unknown. The evidence is that the applicant and her new husband are regular church goers, attending Eagleness International Church, situate at Phillip Goldson Highway, Belize City, the pastor of which, the Reverend Howard Longsworth, testified of their involvement in church activities, including a prayer group; and the applicant's active role in the Women Ministry of the church. The evidence is that she takes the child to church with her, and she gives

to the child parental guidance, and exercise care, love and discipline. The applicant is an international judge in body building competition and does charity work as a member of Kiwani International. The applicant says that her new husband and the child get on well and there is a close relationship between him and the child.

6. There is no evidence of a description of the house in which she lives with her new husband and the child, which would have given an idea of the accommodation and facilities available to the child for his comfort. The applicant testified that the respondent contributes $570 per month for the child and resists paying anything more. By a consent order made on 20th December, 2010 the parties agreed that the respondent would pay $450.00 monthly for maintenance of the child and that he would pay half the education and medical expenses of the child. The applicant was arrested by the police for assault on the respondent during the process of personally delivering access of the child to the respondent, but the charge was withdrawn due to the cooperation of the respondent. The applicant has no previous convictions for any criminal offence.

7. The respondent is 48 years old and is employed as a salesperson at a company called Prossers Fertilizer in Belize City. He has not remarried and lives at 187 Beltex Crescent, Belize City. There is no evidence whether he has other children, and there is no evidence of the description of the house where he lives. As is stated in the decree absolute above, he agreed that the applicant would have care and control of the child. And he agreed that the child had been residing

with the applicant since the divorce in July 2010. He has testified that he goes to church on special occasions. In his affidavit he swore that the applicant had not only prevented him from seeing the child, but refused to keep him informed about the child's performance in school. He swore that the applicant's new husband Amilcar Sifontes played a role in the previous arrangement for handing over the child to him, and on one occasion he saw Sifontes pull the child's hand when the child attempted to greet the respondent "thereby jerking Leshaun's arms and lifting him off the ground," to use his own words. The respondent swore that Sifontes assaulted him and behaved in an abusive and noisy and insulting manner on his premises during previous access arrangements with respect to the child. Sifontes was charged for assaults and these are pending in the magistrate's court. It is unfortunate, and indeed it ought to have been reasonably foreseeable by the applicant that, on giving over or retrieving access of the child, the presence of her then boyfriend Sifontes, would cause jealousy or conflict, which is perhaps what happened and resulted in the alleged assaults and charges. The respondent also exhibited similar behaviour, in that on occasions, he would be accompanied by his girlfriend, when going to take access of the child, which perhaps contributed to the assault and arrest of the applicant, referred to above.

8. There is evidence by the applicant that the respondent has a drinking problem and on occasions is intoxicated. She testified that she saw the respondent drinking with friends and the child was there. She testified that the respondent has different girlfriends. The applicant's friend, a fellow church goer, Amanda Betancourt, testified that she

saw the respondent who smelt of alcohol and she felt he was drunk. The respondent has not specifically denied any of the evidence of drinking or having different girlfriends or the child being present when the respondent is drinking with friends. The respondent did not call any witness denying the above allegations or to support his evidence for joint custody of the child.

9. Joint custody casts the responsibility for matters in relation to the upbringing and welfare of the child on both parents. In a situation where there is animosity between the parents who find it difficult or impossible due to their personality, behaviour, or conduct to cooperate and work together in the interest of the welfare of the child, the court should be reluctant to make a joint custody order. Before the court makes a joint custody order, there ought to be evidence that shows a genuine and sincere willingness by both parents to work together in a harmonious and cooperative way in the exercise of their rights under an order for joint custody. In ***Nagel v. Schergevilch 1995 Canl 11 5914 C (SK QB)***, Rothery J, in the Saskatchewan High Court, Canada says that for joint custody orders to succeed, "the parents must have one another's respect; they must share child rearing philosophy; each must be convinced that the other is a beneficial presence in the child's life; they must trust one another to do what they would have done and they must cooperate to achieve common goals."

10. The evidence in this case, examined above, shows not only animosity and distrust between the parents, but also disrespect and an inability to work together for the welfare of the child. The evidence does not

show a genuine willingness by both parents to work harmoniously together and to cooperate in the exercise of their rights under a joint custody order. I am therefore not satisfied that this case, on the facts, is suitable for a joint custody order. There is no doubt that the respondent loves the child and ought to have a role to play in the welfare of a child, especially a child of tender years. But the court in determining the extent of that role ought to consider the facts of the particular case. Alcohol abuse, promiscuity, maintenance problems, conduct and character, and there may be other matters, are matters which I think the court should consider in determining the extent of that role, because these matters are relevant and can impact on the welfare of the child. On the evidence the applicant not only has the capacity to nurture and care for the child and is committed to ensuring the welfare of the child; but also has the capacity to supply the financial, social and educational facilities for the development and welfare of the child, without exposing the child to the social negatives of intoxication and promiscuity. Considering that the welfare of the child is of paramount consideration, and considering the evidence as a whole, I hold that the welfare of the child is best served by granting sole custody to the applicant.

11. As shown above, the parties consented to an access order. The respondent states that he has experienced problems getting from the child's school, information as to the child's performance. I think the respondent should have further access to the child by visits to the school attended by the child, to obtain information from the principal or class teacher of the child as to his performance and educational

results or reports of the child. The respondent ought to be able to communicate with the child, including communication by telephone and internet; and to be consulted by the phone or internet on matters concerning the health and travelling abroad of the child. I think access to the child during the school vacation should be limited to the terms of the consent access order; because access for longer periods during the school vacation has the potential for prolonged exposure of the child to the social negatives mentioned above. I think the consent access order and the above should be an appropriate role for the respondent at this point in the child's life. As time goes by, and the parents exhibit more maturity, and the child grows older, an application can be made to make appropriate variations to this order.

12. For all the above reasons I make the following orders:

(1) The applicant is granted sole custody of the child Leshaun Alexander Simmons.

(2) The consent access order made in this matter is a part of this order.

(3) The respondent is authorized to visit the child at the school attended by him and communicate with him during the lunch break or other recess.

(4) The head teacher, or principal of the school attended by the child or his class teacher is ordered, on request by the respondent, to show within a reasonable time after such request, the respondent the educational report card in relation to the child.

(5) The applicant is ordered to consult the respondent by telephone or internet in relation to decisions concerning the health or travelling abroad of the child.

(6) The parties to this application may apply to vary or to discharge this order.

Oswell Legall
JUDGE OF THE SUPREME COURT
28th November, 2012