COURT FILE NO. D53955/11

ONTARIO COURT OF JUSTICE
TORONTO NORTH FAMILY COURT

B E T W E E N:	
M.A.W.	**JOSEPH OSUJI, for the APPLICANT**
APPLICANT	
- and -	
J.A.W.	**M. CHRISTINE ROTH, for the RESPONDENT**
RESPONDENT	
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS	**MONMI GOSWAMI, DEPARTMENT OF JUSTICE (CANADA), on behalf of the MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**
INTERESTED PARTY	
	HEARD: JANUARY 28, 2013

JUSTICE S.B. SHERR

REASONS FOR DECISION

Part One – Introduction

[1] The parties have one child together (the child), a daughter, who is five years old.

[2] The respondent (the mother) is subject to a deportation order to Jamaica. She seeks orders for: sole custody of the child, that the father have reasonable access to the

child on reasonable notice (whether she resides in Canada or Jamaica), child support, and dispensation of the father's consent for her to obtain travel documents for the child and for her to travel with her outside of Canada.

[3] The applicant (the father) brought an application seeking sole custody of the child and an order that the child not be removed from Canada (a non-removal order). In his opening statement, he changed that position to ask for joint custody of the child, with specified access to himself and a non-removal order. By his closing statement, the father was agreeable to orders that: the child reside with the mother, whether in Canada or Jamaica; he would have reasonable and generous access to the child in either country on reasonable notice (non-specified access) and he would pay child support of $400 per month to the mother.

[4] In her closing submissions, the mother was agreeable to an order that the father pay child support of $400 per month, starting on February 1, 2013. She opposed the father's request for a joint custody or a non-removal order.

[5] The Minister of Public Safety and Emergency Preparedness (the Minister) was added on consent as an interested party, was permitted to participate in the trial and make full submissions. The Minister's intention is to deport the mother to Jamaica shortly after the conclusion of the trial. The Minister opposes any order for specified access or that prevents the child's removal from Canada as such orders may legally interfere with the Minister's plan to deport the mother.

[6] By the end of the trial, the remaining issues were:

a) Whether the court should make a sole or joint custody order.

b) Whether the court should make a non-removal order.

c) Whether the court should dispense with the father's consent for the mother to obtain travel documentation for the child and for her to travel with the child outside of Canada.

Part Two – Background facts

[7] The mother is 44 years old and lives in Toronto, Ontario with the child and a 19-year-old child from another relationship. The mother was born in Jamaica and came to Canada in 1998. She has lived in Canada since then. The mother has a third child, age 15, who has been raised by her relatives in Jamaica. The mother owns and runs a hair salon in Toronto.

[8] The father is 47 years old and lives in Brampton Ontario. He is a Canadian citizen. The father has seven children (including the child) from four different mothers. He is divorced and single. Two of his grown children live with him, together with one

grandchild. The father works full-time at a car wash and has worked part-time as a music producer.

[9] The parties had an off/on relationship from 1999 until 2006. They never cohabited or married.

[10] The child is a Canadian citizen.

[11] The parties agreed that the father has always financially supported the child. Recently, they orally agreed that the father would pay the mother $400 per month for child support.

Part Three – Mother's immigration status

[12] It is highly unlikely that this case would have come to court if not for the risk of the mother being deported. The father testified that he has not been involved in court proceedings with any of the mothers of his other children. He issued this application because he was concerned about the child's welfare if the mother was deported to Jamaica.

[13] The mother does not have legal status in Canada. She was arrested and detained by the Canada Border Service Agency (CBSA) in October of 2001. In May of 2002, she made a refugee claim and was issued a conditional deportation order. In October of 2003, her refugee claim was denied. Her application for leave for judicial review was denied in January of 2004. The mother's application for a pre-removal risk assessment was denied in December of 2004. In January of 2006, the mother submitted an application to remain in Canada on humanitarian and compassionate grounds (H and C application). In October of 2007, the mother was arrested again by the CBSA, but was released because the child was sick. Shortly after, she was served with a direction to report for deportation. The mother then submitted a request for deferral of her removal based on the medical needs of herself and her children. This was denied. In November of 2007, the mother brought a motion for a stay of her removal. This was dismissed. On November 2, 2007, the mother failed to report for removal and an arrest warrant was issued. The warrant was not executed until May 1, 2011 (at a routine traffic stop) and the mother was placed in detention.

[14] The father applied for custody of the child on May 11, 2011, while the mother was in detention.

[15] The mother was released from detention on June 7, 2011. On September 21, 2011, she was charged with assault with a weapon and uttering a threat to cause death or bodily harm. The mother's removal to Jamaica is currently stayed pursuant to section 50 of the *Immigration and Refugee Act (Canada)* due to these outstanding criminal charges. The Minister plans to ask the Crown to stay the charges to permit them to proceed with the mother's removal from Canada.

[16] On January 25, 2012, the mother's H and C application was refused.

[17] The Minister agreed to defer the mother's removal from Canada until after the completion of this hearing. The Minister is not prepared, subject to court order, to defer her removal from Canada any further.

[18] The mother has applied for judicial review of the refusal of her H and C application and this application is scheduled to be heard by the Federal Court of Canada on February 21, 2013.

Part Four – Primary residence

[19] The mother has been the child's primary caregiver since birth. The child has thrived in her care. She has responsibly taken care of the child's physical and emotional needs. The child was described as smart and happy. She has a very close relationship with her mother and her older sister. The evidence indicates that the child is safe and secure in the mother's care.

[20] The mother testified that it would be in the best interests of the child if both of them could continue to live in Canada. She believes that the child would have a better future here. Her plan for the child, if she is deported to Jamaica, remains murky. She is unsure where she could afford to live. She is worried about a former violent boyfriend learning that she has returned to Jamaica and will want to live far away from where he might be (she testified that her fear of him and his associates is the reason she initially fled from Jamaica). If required to return to Jamaica, she hopes to be able to open a hair salon and rent an apartment for her and her children. She has made no specific arrangements for any of this.

[21] The mother testified that the child has a close relationship with her father and is very sad about the possibility of moving away from him. It appears it will be very difficult for the child if the mother is deported and she moves with her to Jamaica. Canada is the only home the child has ever known and she would be separated from her family and friends.

[22] The mother testified that, even with the deficits involved in moving to Jamaica, it would still be in the child's best interests to reside with her, as she has been the parent who has always provided for her needs and the child has a closer bond with her than with the father. She strongly believes that it is best for the child to live with her, wherever that may be.

[23] The father testified that he preferred that the child live with the mother, whether she lived in Canada or was deported to Jamaica. He said that young girls should be with their mothers. He agreed that the mother should arrange for schooling and medical care for the child if she is deported. He agreed that the child was doing well in the care of the mother. He testified that he can't take the child by himself on a full-time basis.

[24] The court finds that it is in the best interests of the child to live with the mother, whether she lives in Canada or is deported. The court is satisfied that the mother will be able to positively parent the child if she is deported to Jamaica. She is fully committed to the child and selflessly looks after her best interests. She has proven to be resourceful and the court is satisfied that she will be able to financially support the child, ensure that her medical and developmental needs are met, and that she is kept safe.

Part Five – Access

[25] The child sees the father frequently, including most weekends. She also enjoys telephone access with him. The father is an important part of the child's life. The parties agreed that they have, for the most part, been able to work out access arrangements between them.

[26] The mother testified that she would facilitate access to the father, whether she lives in Canada or in Jamaica. She is agreeable to permitting the father contact with the child by Skype and by telephone if she is in Jamaica. She said that she would facilitate access for the father in Jamaica on reasonable notice. She expressed some concern that the father might try and take the child back to Canada if she gave him unsupervised access.

[27] The father testified that if the mother is deported he will make arrangements to visit the child in Jamaica. He agreed that the child is too young to travel to Canada to see him at this time.

[28] The parties both submitted (in closing submissions) that they would prefer a final access order that was flexible and worded as "reasonable access on reasonable notice, whether in Canada or Jamaica". The court is content that such an order is in the best interests of the child. The evidence indicates that a specified access order is not required. It is highly unlikely that the issue would have even been before the court, if not for the possible deportation of the mother. The reality is that the mother may be removed shortly from Canada, and the court should not make a specified access order just to frustrate the deportation process, when the terms of access are not in dispute (see my comments in *Canabate v. Ayala* [2010] ONCJ 54, paragraphs 58-60 and *Ffrench v. Williams*, [2011] ONCJ 406), paragraphs 119-123.

Part Six – Child support

[29] At the start of the trial, it appeared that child support would be a contentious issue. The father was maintaining that he was only earning $15,000 per annum and the mother was maintaining that his income was much higher. The analysis was complicated by the fact that the father was in serious breach of multiple financial disclosure orders, hadn't updated his financial statement since April of 2012 (despite court orders) and hadn't provided satisfactory documentation of his financial affairs.

[30] As the evidence unfolded, the mother agreed that the father had always supported the child to the best of his ability. The mother believed that the father would continue to do so. The parties agreed that the father historically gave the mother support somewhere in the range of $400 per month. They both testified that they had orally agreed to have the father regularly pay this amount two months ago, and he was honouring this agreement. They agreed that there should be an order that the father continue to pay this amount on an ongoing basis.

[31] It is necessary to fix the father's annual income at $44,300 to correlate with a child support guideline table payment of $400 per month. The evidence supports making such a finding as:

a) The father works full-time (40 hours each week) at a car wash earning $13.23 per hour.

b) The father has worked part-time in the music business earning cash. There was inadequate disclosure of this cash income.

c) The father owns and maintains three homes. He rents two of them.

d) The father is able to help support five children (he also has two grown children who live with him).

e) The father has been earning sufficient income to pay child support at close to this level in the past, despite his income tax returns showing marginal income.

f) An adverse inference is drawn against the father for his failure to provide complete financial disclosure and comply with court orders.

g) There was no evidence of any medical limitation that would prevent the father from earning this level of income.

h) The father appeared to be intelligent and resourceful and capable of earning a comfortable income.

i) The father has agreed that $400 per month is a fair amount to pay for child support and he has the ability to pay this to the mother.

[32] This leads to the issues that remained in dispute at the end of the trial.

Part Seven – Non-removal order

[33] Presently, there is a temporary order that the child not be removed from Ontario. The father sought a continuation of this order. The mother opposed this.

[34] The case law sets out that for the court to exercise its jurisdiction to make a non-removal order, there must be a genuine *lis* between the parties. The purpose of non-removal orders under the *Children's Law Reform Act* is not to frustrate the deportation of persons who have been ordered removed from Canada pursuant to immigration legislation, but to prevent parents from removing children from the jurisdiction in contested family law proceedings. Non-removal orders are not to be made lightly and must be carefully examined on their facts. See: *J.H. v. F.A.* 2009 ONCA 17; *Wozniak v. Brunton and Minister of Citizenship and Immigration (No. 2),* 2004 Canlii 19764 (Ont. S.C.J.).

[35] The evidence is clear that there is no genuine *lis* between the parties with respect to the issue of non-removal. No evidence was led that either party has any intention of voluntarily removing the child from the jurisdiction, save and except through the operation of the deportation order itself. See: *Martin v. Royal*, [2012] ONCJ 202. In fact, the mother is fighting very hard to remain in Canada and has no desire to go to Jamaica with the child.

[36] The temporary non-removal order will be terminated.

Part Seven – Custody

7.1 Legal considerations

[37] The Ontario Court of Appeal in *Kaplanis v. Kaplanis* [2005] O.J. No. 275 sets out the following principles in determining whether a joint custody order is appropriate:

1. There must be evidence of historical communication between the parents and appropriate communication between them.
2. It can't be ordered in the hope that it will improve their communication.
3. Just because both parents are fit does not mean that joint custody should be ordered.
4. The fact that one parent professes an inability to communicate does not preclude an order for joint custody.
5. No matter how detailed the custody order there will always be gaps and unexpected situations, and when they arise they must be able to be addressed on an ongoing basis.
6. The younger the child, the more important communication is.

[38] Joint custody should not be ordered where there is poor communication and the parties fundamentally disagree on too many issues affecting the child's best interests. *Graham v. Butto,* 2008 ONCA 260, *Roy v. Roy* [2006] O.J. No. 1872 (Ont. C.A.).

[39] Courts do not expect communication between separated parties to be easy or comfortable, or free of conflict. A standard of perfection is not required, and is obviously not achievable. *Griffiths v. Griffiths* 2005 CarswellOnt 3209 (O.C.J.). The issue is whether a reasonable measure of communication and cooperation is in place, and is achievable in the future, so that the best interests of the child can be ensured on an ongoing basis. *Warcop v. Warcop*, 2009 CanLII 6423 (Ont. S.C.J.).

[40] Where a conflict between parents (such as an inability to communicate effectively) is primarily the fault of one parent, that parent should not be able to use the conflict as justification to oppose a joint or shared parenting order. To do so allows an obdurate parent to engineer a result in his or her favour. However, where the conflict is extreme and there is substantial blame to be leveled against both parents, a joint or shared custody approach is not appropriate. *Geremia v. Harb* 2008Canlii19764 (Ont. S.C.J.).

[41] The Ontario Court of Appeal's decision in *J.H. v. F.A., supra,* makes it clear that it is not this court's function to deal with the mother's immigration issues. This court's sole focus is on the child's best interests. The issues raised by the Minister are factors to be considered by immigration officials and if necessary, the Federal Court of Canada. See: *Canabate v. Ayala, supra.*

[42] In *J.H and F.A. and The Minister Of Citizenship And Immigration And the Minister Of Public Safety And Emergency Preparedness* 2008 CanLII 7748 (Ont. S.C.J.) wherein it is was suggested that the best interests of the child should be considered with the deportation of the mother in mind, the court wrote at paragraph 56:

> Not every interest of the child can be satisfied in an order, so judges must evaluate the best interests of the child in the factual and legal circumstances before them and limit their orders to matters over which they have jurisdiction.

[43] Ultimately, the court must decide if a joint custody order is in the child's best interests and consider the factors set out in subsection 24 (2) of the *Children's Law Reform Act* in reaching this decision. This subsection reads as follows:

> **Best interests of child**
> (2) The court shall consider all the child's needs and circumstances, including,
> (a) the love, affection and emotional ties between the child and,
> (i) each person entitled to or claiming custody of or access to the child,
> (ii) other members of the child's family who reside with the child, and
> (iii) persons involved in the child's care and upbringing;
> (b) the child's views and preferences, if they can reasonably be ascertained;
> (c) the length of time the child has lived in a stable home environment;
> (d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessaries of life and any special needs of the child;
> (e) any plans proposed for the child's care and upbringing;
> (f) the permanence and stability of the family unit with which it is proposed that the child will live;
> (g) the ability of each person applying for custody of or access to the child to act as a parent; and
> (h) the relationship by blood or through an adoption order between the child and each person who is a party to the application.

7.2 Analysis

[44] The Minister conceded (and the parties agreed) that there is a genuine *lis* with respect to the issue of whether the court should order joint custody to the parties or sole custody to the mother. Accordingly, the court must determine what order is in the child's best interests.

[45] This is not a case where a joint custody order is required to preserve the father's relationship with the child. The mother appreciates the importance of the father's role in the child's life and has always facilitated their relationship. The court is satisfied that the mother would continue to do her best to facilitate the child's relationship with the father, even if she is deported to Jamaica.

[46] The following evidence would support the father's claim for joint custody:

a) The parties have cooperated around access arrangements and have been flexible in changing them.

b) Both parents have facilitated the child's relationship with the other parent.

c) There have been no significant disagreements on major issues affecting the child.

d) The father has financially supported the child.

e) The child loves both of her parents and is thriving.

[47] Notwithstanding this evidence, the court finds that it is in the child's best interests to grant the mother sole custody of the child for the following reasons:

a) The evidence demonstrates that the mother has been the parent who has made the major decisions for the child. The father has shown no previous inclination to be involved with these decisions. He said that he plans to leave medical and schooling decisions about the child to the mother. His application for joint custody appears to be solely motivated by the mother's possible deportation and his fear of losing his relationship with his child.

b) The mother has responsibly made major decisions for the child.

c) The mother has always kept the father fully informed about major decisions for the child. Up until now, he has been content with this arrangement.

d) The child has had some special medical needs. When she was younger, she had seizures that required hospitalization. This is now under control, but she often has breathing issues that require medical treatment. The mother has been the parent responsible for attending to the child's medical needs.

e) The mother described her relationship with the father as very difficult at times. She said that he gets very argumentative and rude with her. The father was charged with assaulting the mother in 2012. I found the mother's evidence about their relationship credible.

f) The mother said that the father has an alcohol problem. She says that a few times each year, he will call her up drunk. She says that she will withhold access from the father when he is in this condition. The father did not contradict this evidence.

g) The father has, at times, demonstrated questionable judgment. The Peel Children's Aid Society was involved with the father in 2011 due to allegations of improper supervision of the child (the mother was in detention at the time). The father also spent time in jail in 2012 arising out of charges of drinking and driving and breach of condition. This reflects adversely on his ability to act as a parent.

h) The father has demonstrated little regard for court orders in providing financial disclosure. He has also been difficult and obstructive in complying with undertakings given in his out-of-court questioning. This makes him a poor candidate for a joint custody order.

i) The mother does not trust the father. She is worried that he is capable of absconding with the child from Jamaica. She feels this way because the father, on occasion, will act unilaterally and over-hold the child after access visits. She is also fearful because he aggressively opposed her taking the child to Jamaica until this trial started and he might change his mind again.

j) The level of communication between the parties is not good enough to justify making a joint custody issue at this time.

k) The father did not seem to appreciate what joint custody means. He seemed more concerned that any access order is enforceable and that he could be sure that his child was doing well.

l) If the mother is deported to Jamaica, joint custody would not be workable with these parties, given the distance between them and the challenges in their relationship. It would not be in the best interests of the child to paralyze the mother from making decisions for her because the father might be unavailable or uncooperative.

[48] It is in the child's best interests that the father be consulted on any major issues about the child and to receive information from her school and services providers (if he wants such information).

Part Eight – Travel issues

[49] The evidence indicates that it is in the child's best interests to grant an order dispensing with the father's consent for the mother to obtain travel documentation for the child, including passports, and to permit the mother to travel outside of Canada with the child for the following reasons:

a) The child must be able to travel with the mother if she is deported.

b) The father has been resistant, up until the start of the trial, to the mother being able to take the child to Jamaica. There is a real possibility that he will shift his position again in the future and try to obstruct her from leaving Canada with the child.

c) The father has not respected court orders. The court has little confidence that he would execute consents on a timely basis for the mother to obtain travel documents for the child or for her to travel with the child outside of Canada.

Part Nine – Order

[50] Cases like this are very difficult. In a perfect world, the child would be able to remain in Canada with her mother and continue her positive relationship with her father and his extended family. They are an important part of her life. However, this might not be possible. If the mother is deported, it will be very important that both parents make every effort to ensure that the child can maximize her contact with the father and his family.

[51] A final order will go on the following terms:

a) The mother shall have sole custody of the child, whether she remains in Canada or is deported to Jamaica.

b) The mother shall consult with the father about any major decision regarding the child.

c) The mother shall execute any directions necessary for the father to speak to any school the child attends or any service provider for the child.

d) The mother shall send the father copies of the child's report cards upon receipt.

e) The father shall have reasonable and generous access to the child, on reasonable notice to the mother, whether the child resides in Canada or in Jamaica.

f) If the mother resides in Jamaica, the father shall not remove the child from Jamaica without the written, notarized consent of the mother, or prior court order.

g) If the mother resides in Jamaica, she shall ensure that the father can have Skype contact with the child, a minimum of twice each week and telephone contact, initiated by the father, a minimum of once each week.

h) The mother may obtain all travel documentation for the child, including a passport, or a renewal of passport, without the father's consent.

i) The mother may travel outside of Canada with the child without the father's consent.

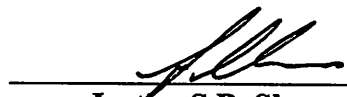
j) The existing order that the child not be removed from the Province of Ontario, dated December 12, 2011, is terminated.

k) Based on a fixed income of $44,300 per annum, the father shall pay the mother the child support guideline table amount for one child of $400 per month starting on February 1, 2013.

l) The father shall provide the mother with complete copies of his income tax returns and notices of assessment by June 30th each year.

m) A support deduction order shall issue.

[52] If the mother chooses to seek her costs, she is to serve and file her written submissions by February 14, 2013. The father will then have until February 28, 2013 to serve and file any written response. Submissions are not to exceed three pages, not including any offer to settle or bill of costs.



Justice S.B. Sherr

Released: January 31, 2013