



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

2009: No. 276

**IN THE MATTER OF SECTION 12 OF THE MINORS ACT 1950  
AND  
IN THE MATTER OF J.T., (MINOR)**

**BETWEEN:**

S. S.

**Applicant**

-and-

S. T.

**Respondent**

Date/s of Hearing: 8<sup>th</sup> January 2010

Date of Judgment: 10<sup>th</sup> February 2010

Ms G. Marshall for the Applicant  
The Respondent in person

## **DECISION**

1. This matter concerning the care and control of an infant commenced by way of Originating Summons for the following orders: (1) to set aside the order of the Family Court for joint care and control; (2) to grant care and control of the minor to the Applicant; (3) that the Respondent be required to pay periodical payments for the minor. The Respondent cross applies for sole custody of the minor.

## Background

2. The minor in this case was born on the 28<sup>th</sup> September 2008. He resided with his mother in the Applicant's mother's home. Liberal access to the minor was afforded the Respondent and his mother. Shortly after the Respondent's mother and grandmother's visit on the 3<sup>rd</sup> of September and consequent upon discussions between the Applicant and the Respondent's mother relating to access arrangements, the Respondent commenced proceedings in the Family Court of the Magistrates' Court regarding the issues of custody, care and control pursuant to the Children Act 1998 as amended.
3. The original order made in the Family Court on 21<sup>st</sup> of November 2008 and stated to be by consent vested both custody and the care and control of the minor in each of the parties. As to the care and control arrangements the order provided that the minor reside with the Respondent father Sunday 5pm until Thursday at 7:30 am thereafter with the Applicant mother from Thursday 7:30 am until Sunday at 5pm. The care and control issue was to be reviewed on the 20<sup>th</sup> February 2009. The minor born on the 28<sup>th</sup> September 2008 was approximately 8 weeks of age at this time.
4. The Applicant wrote a letter dated the 6<sup>th</sup> February to the Family Court in which she raised issues relevant to and including her disquiet over the care and control arrangements. At the scheduled review hearing on the 20<sup>th</sup> February 2009 the Magistrate after hearing the parties confirmed the court order of the 28<sup>th</sup> November 2008, ordered the parties to attend mediation, and ordered a report to be produced. He set the matter for the 21<sup>st</sup> May 2009 to review the report and care and control.
5. By an undated letter received in the Magistrates' Court on the 25<sup>th</sup> February the Respondent informed the Magistrate of his feelings about his first appointment with the mediator. He expressed the view that the mediator was biased against

fathers and he requested a change in mediator. Matters did not proceed any further because the Applicant took out the Minors Act application.

6. The Applicant's summons was issued for a hearing date of 10<sup>th</sup> September. Upon being served the Respondent through the assistance of counsel filed a summons to dismiss the Applicant's originating action. Both parties filed affidavits with their respective summons. After hearing counsel on the 1<sup>st</sup> October 2008 the proceedings in the Family court was ordered to be transferred to the Supreme Court. The Respondent's summons was dismissed. General directions were given for the filing of affidavits and the obtaining of a Social Enquiry report. The Respondent was granted leave to file a cross application for care and control to be consolidated.
7. By summons dated 19<sup>th</sup> October the Respondent applied for care and control of the minor with generous and flexible access to the Applicant and for periodical payments for the minor. After some delay the matter was set down for hearing on 8<sup>th</sup> January 2010. The social inquiry report was filed dated 5<sup>th</sup> January 2009. On the date fixed for the hearing the Respondent filed a notice of intention to act in person and appeared at the hearing in person. The parties determined that the matter should proceed on the evidence as contained in the affidavits that had been filed in the consolidated matter and that viva voce evidence was not necessary.
8. Apart from the affidavit evidence of the parties the court has the benefit of the social inquiry report. The contents indicate that in their respective interviews with the Court Social Worker the parties were consistent in the provision of their views of each other, their narrative of the history of the relationship and their interaction with the minor.

## Law

9. The mother's application is brought under section 12 of the Minors Act 1950. This section empowers the court to make such order as it may think fit in relation to the guardianship, custody, maintenance and access of the minor. This section requires the court to have regard to the welfare of the minor, and to the conduct and wishes of either parent of the minor.
  
10. The Special Court matter was by my order transferred to this court and as such and by virtue of section 36C of the Children Act 1998 the Applicant mother and the Respondent father have joint custody of the minor. Joint custody was ordered on the 21<sup>st</sup> day of November 2008 in the Special Court. The parties were granted joint care and control of the minor at that time.
  
11. The matter of care and control was fixed for review on 20<sup>th</sup> February 2009. The court indicated that it might order mediation between the parties. On the 21<sup>st</sup> February 2009 the court ordered the parties into mediation. Further it ordered a further review of care and control for the 21<sup>st</sup> May 2009.
  
12. Whether the parties agreed to mediation and whether or not the court ordered the mediation is not an issue before me. However it is clear that the matter of care and control had not been finally determined. This could only have been the case where that court was not satisfied that joint care and control could be achieved to the benefit of the welfare of the minor. I concluded therefore that the order for joint care and control of the minor was granted on an interim basis only prior to any consideration of the guiding principles.

## Guiding Principles

13. Section 6 of the Minors Act requires the court to regard the welfare of the minor as the first and paramount consideration. Further the section mandates that neither parent has a more superior claim in an application to the court than that of the

other parent. I take these principles to mean that the interest of the minor is different from those of the parents.

14. I take that section also to mean that the parents have a procedural right to contest aspects of custody, of which care and control is one. Among the relevant factors to be taken into account in such a contest is the impact of the decisions of the parents on the minor, as well as the optimal circumstances for the minors' development.
15. In arriving at a solution to the issues of care and control and access the court's duty is to consider among other things the child's relationship attachments, and the willingness and or likelihood of a parent with sole care and control to facilitate and encourage the other parent's close relationship with the minor.
16. Of significant relevance to the court as well is the probability of a parent's provision of a stable long term home environment. The latter not only takes into account such considerations as the ability of the parent to provide safety, food, medical care and education for the minor. The court recognizes that the probability of long term stability is greater where a parent has demonstrated the ability to organize and support the aforementioned critical structures.

#### The Evidence

17. As is typical in this type of case the parties affidavits contain accusations by one against the other of lack of adequate care of the minor, failure to communicate effectively over the shared care of the minor, and interference by the other parties' family members. Additionally the parties indicate that they were in a very short tumultuous relationship and their evidence is replete with accusations of aggression and violence leveled at one by the other.

18. I find that little can be gained by rehearsing all of the criticisms, accusations and point by counter point details set out in the affidavits. However some are relevant to my consideration in light of the legal principles that provide guidance in the issue of care and control that is before the court.
19. The primary concern of the mother is that from the inception of the shared care and control schedule the father in fact spent or spends very little time with the minor during the child's waking hours. She complains also that the father was not in a position to pick the child up from her or to deliver the child to her personally. As a consequence several different people would assume the responsibility on the father's behalf and the child would be passed from "pillar to post".
20. The mother expressed concern about this destabilization because this handling of the minor persisted even when the child was taken from the mother asleep only to wake up in a different environment with out either parent. This persisted even when the child could have been cared for by the mother while she was unemployed at a time when the father was employed during the week days and during his week end job. The father refused that offer and paid a baby sitter to care for the child.
21. In his affidavit the father denies that joint care and control involves the child in being passed from pillar to post. His evidence is that when unable to collect or return the child a family member (there are six other in his house hold) does it for him. His position is that he paid his brother's girlfriend to look after the minor because she has a child her self and kept the minor active and entertained. He went on to state that the minor receives no physical or mental development in the mother's home. He did not substantiate this assertion, which if substantiated would have been of some relevance and weight.

## Conclusion

22. I recognise that the minor has a right to be nurtured by both parents. Further the court finds that the minor should not be deprived of his attachment relationships. The minor appears to be attached to both parents.
23. I am however concerned that the minor is at some risk in circumstances where the father has no fixed arrangement in place to secure the collection of the minor from the mother and the return of the minor thereto.
24. The court is impressed that the mother of the minor has the foresight to take the development needs of the minor into account in that she seeks arrangements for day care in a nursery. There the child is likely to benefit from socializing with other minors and the attendant learning opportunities.
25. Once in such an environment the security of the minor will be paramount. The person responsible for the collection of the minor at the end of the day will need to be certain, and no doubt the day care authorities will be strict in releasing the minor to an authorized person only. I believe that nothing less than a fixed arrangement will do in such circumstances.
26. In all the above circumstances I find that the mother of the minor is best equipped to make the day to day care and control decisions of the minor. I find that she is most likely to continue to ensure that the relationship with the minor's father is not diminished or severed.
27. I find that the mother of the minor will not require any special effort to ensure the safe delivery or collection of the minor to nursery or to the father of the minor. Further I find that she is likely to work with the father of the minor to establish a secure arrange for the father collecting and returning the minor to her and to the nursery as appropriate.

28. In those circumstances while the minor remains in the joint custody of the parties, the Petitioner mother is hereby granted care and control of the minor. Save for the access arrangements set out below the parents are encouraged to work together to consider what is in the child's best interest including the recommendation set out in the social inquiry report for family counseling.
29. I find that the most appropriate arrangement for access by the father to ensure the integrity of the minor's attachment to him is as follows: the father shall have all week end access to the minor from Friday at 5:30 pm until Monday at 7:30 am on each alternate weekend. On the week that the father does not have all weekend access the father shall have access to the minor on Friday at 5:30 over night returning said child to the mother Saturday at 3pm.
30. In so far as maintenance for the minor is concerned the Respondent father is to pay directly to the Applicant mother (or to her order) \$100 per week in maintenance for the minor. Once the minor is enrolled in day care the Respondent father is in addition to pay half the cost of the day care fees directly to the Applicant mother (or to her order).
31. The father is to return the child to the mother upon receipt or service of this order. Thereafter the above arrangement is to commence on the 19<sup>th</sup> February 2010.

Dated this 10<sup>th</sup> of February 2010

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Charles-Etta Simmons  
Puisne Judge