



**IN THE SUPREME COURT OF BERMUDA  
CIVIL JURISDICTION**

**2019: No. 150**

**A STEP-DAUGHTER**

The Paternal  
Sister

**-and-**

**A WIDOWED MOTHER**

Applicant  
mother

**REASONS - AMENDED**

**(In Chambers)**

*Litigants in person/ highly unusual circumstances / use of legal terminology in proceedings -Guardianship/Custody/Care & Control of a minor child*

Ms. Kathy Burgess of Burgess Family Law Practice, appeared for the Mother

Mr. Bruce Swan of Bruce Swan & Associates, appeared for the Paternal Sister

**Date of Hearing:** 6 & 8 of April 2022

**Date of Reasons:** 5 December 2022 (Amended 13 December 2022)

**Introduction**

1. This unusual case concerns a six (6) year old boy and a very unfortunate misunderstanding between his thirty-six (36) year old widowed mother ('Levi's mother/the Mother') and his forty-five (45) year old paternal sister ('the Paternal Sister').

2. For the purposes of this judgment, I shall refer to the boy as “Levi”, (although not his actual name). Levi’s father died when he was merely three (3) years old. Heartbreakingly, the shroud of grief which descended on Levi’s family was set ablaze by unmitigated animosity which simmered beneath an otherwise jovial familial façade.

### **The Application**

3. The application before the Court is the Mother’s Summons dated 27 August 2021 made pursuant to Section 12 of the Minors Act 1950 read with Section 36C and 36D of the Children Act 1998. The Mother’s summons is supported by two affidavits; the first sworn on 19 August 2021 and the other sworn on 18 January 2022.
4. Levi’s mother seeks an Order for the Paternal Sister to “*be removed as Co-guardian with joint custody and access over the minor child*”
5. Ms. Burgess, on behalf of his mother contends that there were a series of “*procedural errors*” which bring into question the consent of Levi’s mother to the order granting the Paternal Sister guardianship and custody rights. She contends that it would be “*manifestly unjust*” for the “*Co-Guardianship to remain in place*” given these occurrences and the on-going strained relationship of the parties.
6. The Paternal Sister firmly opposes the Mother’s application and filed one affidavit sworn on 16 December 2021. Mr. Swan, on her behalf contends, *among others*, that an appeal is the only proper and available mechanism to assess “*the understanding between the parties*” and that the evidence, in any event, demonstrates in all the circumstances, that Levi’s mother “*cannot make nor comprehend all the decisions that would need to be made*” for him.
7. In determining this matter, the Court had the benefit of a Social Inquiry report dated 4 April 2022, including the oral evidence of the parties as well as the oral evidence of the Court Appointed Social Worker, Mr. Caisey.

## **The Decision**

8. By an oral decision delivered on 9 June 2022, the Court ordered that the welfare of Levi would be better served in the sole custody, care and control and sole guardianship of his mother, with reasons to follow.

## **Summary background**

9. During his parent's marriage, the relationship between Levi's mother and his paternal sister was far from amicable. Unsurprisingly, Levi's father aware of his declining health voiced his desire for his daughter and wife to put aside their differences for Levi's sake.
10. Not long after expressing this desire, Levi's father died. Naturally, grief descended upon the family. After some months, Levi's mother decided, with Levi in her care, to travel to her country of origin where she would receive emotional comfort and support from her closest family members.
11. Whilst in her country of origin, the Levi's mother received a series of email communication from an attorney in Bermuda acting on behalf of Levi's paternal sister ('the Attorney'). The Attorney advised that he was instructed to apply to the Supreme Court of Bermuda for "*co-guardianship*" of Levi.
12. On 2 May 2019, the Attorney appeared before a judge in the absence of Levi's mother (who was still overseas) and requested an order for the Paternal Sister to "*be granted the rights of a guardian of the child {Levi}; thereby establishing and granting the joint custody of the child between the {Paternal Sister} and {Levi's mother}*".
13. The judge hearing the matter immediately ordered the adjournment of the Paternal Sister's application to permit Levi's mother an opportunity to (i) appear before the Court or (ii) file affidavit evidence confirming her position regards the Paternal Sister's application.

14. On the listed return date 9 May 2019, Levi's mother, who had just days earlier returned to Bermuda, attended the scheduled court hearing. The Attorney was in attendance together with the Paternal Sister and Levi's mother. From all accounts, the hearing concluded with the parties believing that the Court had approved their agreement to honour Levi's deceased father's wish, in the form of a consent order.
15. Regrettably, it was well beyond mid-point of this hearing before me that Ms. Burgess and Mr. Swan made known, by happenstance, that neither had in their possession nor had prior sight of the 'consent order' central to the dispute between the parties.

#### **The 'Consent Order'**

16. In this most unusual circumstance, a review of the court file revealed a document titled 'Consent Order' bearing the signatures of the Attorney, Levi's mother, and the judge dated 9 May 2019. The document reads as follows:-

*"Upon Consent of the parties*

*IT IS HEREBY Ordered as follows:-*

1. *That henceforth the Petitioner and the Respondent shall have the rights of a guardian of the child, namely [Levi], born on [x] ('the Child')*
2. *That the Petitioner and the Respondent shall have joint custody of the Child;*
3. *That the parties shall have access with the Child on such dates as may be agreed by the parties;*
4. *That the parties shall have liberty to apply to the Court in relation to these matters; and*
5. *That there be no order as to costs"*

17. However, the Judge's contemporaneous hand-written note of proceedings dated 9 May 2019, which is affixed to the court file, reads:-

"Order

*...will sign the order **if** para 1 is amended to say "joint guardianship" and new para 5 giving express liberty to apply". (Emphasis added)*

18. Notably, there is no evidence of an order filed into Court complying with the direction of the Judge to amend the prior 'consent order' to reflect the term "*joint guardianship*".

**Other Unusual Circumstances**

19. Ms. Burgess, on behalf of the Mother asserted, *among other things*, that:-
- a. During the court hearing on 9 May 2019 Levi's mother was so intimidated in the presence of the Paternal Sister, the Attorney and the 'gravitas' of the court room, that when questioned by the judge on whether she agreed with the order, she responded in one word, namely "yes".
  - b. Levi's mother's first language is Tagalog and that her comprehension of the English language is sometimes times "*lost in translation*".
  - c. Whilst there is no obligation to help an unrepresented person, the Attorney neither served Levi's mother with a copy of the said summons, affidavit and proposed consent order prior to the hearing, nor albeit informally, hand her copies at the door of the court on 9 May 2019. This, failure denied Levi's mother the opportunity to review the proposed consent order and obtain legal advice, if she so chose.
20. In these circumstances, *amongst others*, Ms. Burgess submitted that "*with the greatest of respect, if {the judge} had questioned the Mother further, {the judge} would have found out that she did not have the full understanding....and it is no doubt that the proceedings would have halted immediately.*"

21. The evidence of Levi's mother at paragraph 9 of her second affidavit, is that "*{the Attorney just continually reassured me that what I was doing was the right thing and that it was my late husband's wishes. Yet, he never took the time to explain what Joint Custody with Joint Access entailed. I wished I had the courage to speak up in front of the Judge, but I could not find it in myself to do so with {the Paternal Sister} present. I do believe that if the judge saw my emails to {the Attorney} {the judge} would see that I did not fully understand this process"....I was out of my depth and most unfortunately, gave away having sole rights to my child*".
22. During her oral evidence, she explained "*I was told to attend the hearing. {The Attorney} started taking to the judge. The judge only asked me if I agree. I said yes. I said nothing else.*" Indeed, the Paternal Sister's evidence at paragraph 9 of her affidavit confirms that during the hearing on 9 May 2019 the judge "*asked {Levi's mother} if she had any questions and she indicated that she did not, in my presence...*"
23. I observed the mother during her oral evidence and listened closely to her use of the English language. I am satisfied that having done so and found it necessary to direct Ms. Swan on a number of occasions to simplify his questions by using plain English and short sentences, that Levi's mother required additional time to make certain comprehension.
24. It is most unfortunate that the Judge's inquisitorial approach to Levi's unrepresented mother was fashioned in a closed-ended question. Court rooms are, indeed, intimidating and overwhelming places for most people. Therefore, it is unsurprising that Levi's mother, whose first language is not the English language, only replied "yes". The judge, perhaps hard-pressed for time, did not recognized the enormous value of taking an extra moment to explain, in ordinary and simple language, the practical and legal consequences of the proposed court order to make certain that Levi's mother understood.
25. These most unusual circumstances, in my judgment, not only shed light on very concerning conduct of a member of the Bermuda Bar but indeed on the need for

improved efficiency within the Courts' administrative process. Members of the Bermuda Bar are expected to conduct themselves in accordance with the Barristers' Code of Professional Conduct 1981 and Rules of the Supreme Court 1981. Thus, Mr. Swan's assertions regards the Attorney's conduct and absence of duty to co-operate with Ms. Burgess, a barrister in relation to these proceedings are entirely rejected.

26. Likewise, Mr. Swan's assertions that the only remedies available to Levi's mother regards alleged irregularities in the 2019 proceedings are (i) an appeal, or (ii) an application to vary the order, are rejected. It is common for a judge in family proceedings to decide that the paramountcy of the welfare of the child requires the court to look beyond the issues and arguments identified by the parties. In my judgment, this is one such case.
27. In this Court's duty to determine the paramount welfare of Levi, it is necessary in my judgment, to ask the question:-

**What was the Agreement between the Parties?**

28. At paragraph 6 of her Affidavit sworn on 19 August 2021, Levi's mother states:-

*"My husband used the word Guardian but it is my belief that the {Levi's paternal sister} had held conversations with my husband and provided him with this term. When my husband and I discussed Co- Guardianship, I asked him if this means {Levi's sister} will be able to make decisions over our son. My husband reassured me that {she} will 'assist' me and that I will still be the mother and be the one making the decisions over our son."*

29. The Paternal Sister contends at paragraphs 6 and 11 of her affidavit undated affidavit filed 16 December 2021 that:-

*" my father repeatedly emphasized to me prior to his death, on multiple occasions and usually in front of witnesses , to obtain joint custody of [Levi]*

*as he was concerned as to the Respondent's ability to manage to care for {Levi} on her own"*

*"I do seek to act as my father would have, having the privilege of over 40+ years of his influence in my life, and namely to assist in {Levi's} positive growth and development. It was never intended by anyone that I be nothing more than a babysitter to {Levi} and an Assistant for {his mother}"*

30. There are various written email exchanges between the Attorney and Levi's Mother at TAB 4 of the Paternal Sister's Trial bundle and TAB 7 - pages 23, 27, 31 – 33 of the Mother's Trial bundle, including:-

**(i) Letter dated 11 February 2019 –**

*To Whom It May Concern, I ... am the parent of {Levi}, in honor of my late husband's wishes, father of my child. I would like to give permission {Paternal Sister} to co-guardian my son ...as it pertains to his education and health. Feel free to contact me if you have any questions or desire information"*

**(ii) Email dated Saturday 6 April 2019 12:13 am (Bermuda time)– the Attorney to Levi's Mother** headlined;- *"Re An Application for Guardianship of [Levi] (a Minor)"*

*"...if you have a number on which I can call you, we would be most appreciative; so as to speak with you, and begin to move this process along."*

**(iii) Email dated Friday 5 April 2019, 18:36 – Levi's Mother's reply to the Attorney**

*"...at the moment I'm in the Philippines with my son...and will be back in the island on May... Please let me know what is the first step I'm going to do? And any questions that I need to answer to start the application.*

*I also want to know about the guardianship means very well. Thank you"*  
*(Emphasis added)*



**(iv) Email dated Tuesday 9 April 2019 - the Attorney to Levi's mother:-**

*"Thank you for your email.*

*We intend to make an application to the Court for {Paternal sister} to have co-guardianship rights, with you, in respect of {Levi}. {Paternal sister} has informed us that this was the wish of your late husband, and that you are in agreement with her having guardianship with you for {Levi}.*

*We look forward to your arrival on island, this May. It is then that we can formalize whatever documentation need be endorsed. However, in the meantime, can you confirm your agreement?"* **(Emphasis added)**

**(v) Email dated Friday 12 April 2019 @ 5:57 am (Philippines) – Levi's Mother's reply to the Attorney:-**

*"Good day Sir,*

*This is to confirm that I have an agreement with her to honor the wish of my late husband .....I will be back in the island on May 2<sup>nd</sup> and I can meet with you to start the application.*

*Thank you.* **(Emphasis added)**

**(vi) Email dated Monday 15 April 2019 @ 9:07 PM (Bermuda time) - The Attorney's reply:-**

*"Good morning...*

*Thank you for your email. We look forward to your return to Bermuda. We are beginning the application process, now. So, hopefully, by the time you return, all will be in place.*

*Warmest regards,*

*{the Attorney}*

**(vii) Email dated Monday 15 April 2019 @ 1:41 pm (Philippines Time)– Levi's Mother's immediate reply:-**

“Sir, I want to clarify this co-guardianship about, is it about she can also make decisions for my son? Without my permission? I don’t want to have a conflict that maybe someday, she will make all the decisions in everything and takeover my rights as {Levi’s} mother.” (Emphasis added)

(viii) Email dated Monday 15 April 2019 @ 2:24 pm (Bermuda time) - The Attorney’s reply:-

“Good day

Thank you for your email. My understanding is that {Paternal Sister} wants to assist you with raising {Levi}. She is not interested in subverting your rights as his mother. You will work together, for the benefit of the child!

Warmest regards

{Attorney}

31. What's more, on the very day namely **15 April 2019** that Levi’s mother’s requested clarification of the term “co-guardianship” the Attorney responded purporting to provide assurance in the form of “his understanding” of the Paternal Sister’s intentions, and then within hours thereabouts **at 3:18 pm (Bermuda time)**, filed a letter into the Supreme Court addressed to the Registrar stating “our client seeks an Order from the Court granting joint custody of her brother” enclosing an Ex Parte Summons and affidavit (without notice to Levi’s mother), having never previously raised the concept of custody nor used the legal term in any prior communication with Levi’s mother.
32. Section 36C of The Children Act 1998 provides that a person entitled to custody of a child has the rights and responsibilities of a parent in respect of the person of the child, including the right to care and control of the child and the right to make major decisions affecting education, health, moral, religious training and overall development of the child.
33. The practical effect of a custody order under The Children Act is that a person with custody of a minor child acquires parental responsibility for the child. Thus, following the death of one parent, the surviving parent of a minor child, whether or

not they are or have been married to the deceased parent, automatically acquires sole parental responsibility for the child, sole parental guardianship of the child and is entitled to sole custody of the child, unless otherwise ordered by a court.

34. Consequently, I agree with Ms. Burgess' assertion that the "*tactic*" of the Attorney, via this series of emails, would seem to have been to obtain Levi's mother's written confirmation of "agreement" and thereafter "*chose to look the other way*" disregarding his professional duty to urge her to obtain independent legal advice in accordance with the Barristers Code of Professional Conduct.
35. The Barristers Code of Professional Conduct provides "*a barrister's conduct when dealing with a person who is not represented professionally should not depart from the conduct required of him when dealing with another barrister*". Consequently, the Attorney's decision to make an *ex parte* (without notice) application with knowledge that Levi's Mother was overseas and in the absence of any evidence of emergency or other great urgency, demonstrates tactical conduct, which in my view, has no place in proceedings involving the care and custody of children.
36. I am satisfied on the totality of the evidence that Levi's mother never expressly or otherwise agreed to share or transfer major decision making rights and parental responsibility for Levi to the Paternal Sister. Consequently, I find that there was no agreement between the parties.
37. It is well established in family proceedings that a consent order derives its authority from the court's endorsement of the agreement and not from the consent of the parties. Thus, this court unequivocally rejects Mr. Swan's contention that "*there can be no doubt regards the agreement in the face of Levi's mothers evidence that she googled the meaning of "co-guardianship"*" prior to writing to the Attorney. Accordingly, no weight whatsoever, in my judgment could fairly be attached to the mother's "yes" response to the judge's inquiry during the hearing on 9 May 2019.
38. Without hesitation, I find that these very regrettable and unusual circumstances, cast doubt on the integrity of the 9 May 2019 hearing including the handwritten

direction of the judge dated 9 May 2019. This raises another unusual circumstance in this case.

**How did the document inconsistent with the judge's handwritten note dated 9 May 2019 become endorsed with the judge's signature together with the signatures of the Attorney and Levi's mother?**

39. The court file reveals email correspondence between an administrative court officer and the Attorney on 15 May 2019.

The court administrative officer at 1:16pm stated:-

*"We are in receipt of the Consent Order filed for the above captioned matter, however we note that it has not been signed by {Levi's mother}. Before the Consent Order can be signed by the Judge, we need {Levi's mother's} signature".*

The Attorney on the same day at 1:17pm replied:-

*"Thank you for your email. I did advise {Levi's mother} that she would need to sign. I will remind her".*

40. The Mother's evidence is that an unidentified Court Clerk, who soon after the hearing on 9 May 2019, telephoned her and instructed that she "*must come*" to the court building where she "*must sign*" the order. In compliance with the telephone instruction, Levi's mother's evidence is that she attended the court building where she complied with the instruction to sign a document which she had never before seen. She recalled that her verbal request to obtain a copy of the document was denied by administrative court staff. However, Levi's mother was permitted to take a photo of the document. That document exhibited at TAB 7 page 29 of her bundle does not reflect the directed amendments of the judge, but it is signed by the Attorney.

41. This unusual circumstance highlights the necessity to put in place fair practices to accommodate unrepresented litigants and more efficient administrative procedures to ensure orders signed by both judges and unrepresented litigants are consistent with the note of the judge.

**The Impact of these Unusual Circumstances on the Welfare of Levi**

42. In my judgment, it is not necessary to repeat the parties' evidence detailing the skirmishes that followed including a physical fight with one another, name calling and incidents of alleged coaching and withholding of Levi.
43. Whilst the unusual circumstances of this case, in my judgment, were avoidable, the subsequent conduct of Levi's mother and Paternal Sister, in my judgment, entirely lacked focus on Levi's welfare. Levi should never have had to bear witness to disparaging remarks about his mother least of all a physical attack with Police attendance. The impact of having so witnessed, in my judgment, is yet to be told.
44. There is no doubt in my mind that Levi's mother desires all that is good for her son, over and beyond anything that the Paternal Sister, the Court Appointed Social Worker or even this court could imagine, conclude after assessment and determine on the evidence or by legal definition.
45. I am certain that Levi's mother recognises, like most parents, that she is not perfect. However, this court is satisfied on the evidence that she seeks to act in his best interests and minimise the impact that these regrettable unusual circumstances have had on his welfare. The Court Appointed Social Worker's evidence confirmed Levi's mother's participation and progress in services made available via the Department of Child and Family Services.
46. Unfortunately the same is not true of the Paternal Sister, in my judgment. Her position is captured in the following paragraphs of her affidavit:-

[Paragraph 10] *"I share the same father by blood and I cannot honour this fact and effectively elevate {Levi's} experiences,*

*support his development in all areas of his life educate and engage him in his Bermudian heritage, and advocate for him without serving in the role as his co-guardian with joint custody and access”.*

[Paragraph 11] *“I do seek to act as my father would have, having the privilege of over 40+ years of his influence in my life, and namely to assist in {Levi’s} positive growth and development. It was never intended by anyone that I be nothing more than a babysitter to {Levi} and an Assistant for {his mother}”.* (Emphasis added)

47. The Paternal Sister’s deep-rooted grandiose sense of self-importance and mistaken premise that she is entitled to parental responsibility including an apportionment of the Widow’s Pension received by Levi’s mother to care for Levi, in my judgment, seriously hinders her from recognising that her conduct is negatively impacting the welfare of Levi.
48. The Court Social Worker’s assessment at page 7 paragraph 2 of the Social Inquiry Report dated April 4, 2022 accurately describes the impact of this circumstance on Levi:-

*“As parent/guardian, there is an obligation to intently and continuously seek the well-being of and act in the best interest of the child. Sadly, in the present matter, this obligation appears one-sided. For personal reason, {the Paternal Sister} seems to be resistant to improving the co-guardian relationship with {Levi’s mother}. This undoubtedly has created a power struggle and will continuously be a barrier that will prevent the matter from moving forward or reaching any level of resolve. This matter will continue to be highly contentious and harmful to the child if permitted to continue without intervention. As such, with the best interest and well-being of the child paramount, this office cannot in good faith*

recommend that there be a continued joint guardianship arrangement". (Emphasis added)

49. This court therefore reject's Mr. Swans' submission that Levi has thrived in the conflict of his mother and paternal sister's power struggle.
50. The focus of this court must be the best interests of Levi. His welfare is paramount. It is well established that a parent's claim to custody takes precedence over that of a non-parent, absent unusual circumstances of parenting incapacity. Whilst this case at bar has many unusual circumstances, there is no evidence regards Levi's mother's parenting incapacity or inability to meet his day-to-day needs. Similarly, there is no evidence that she "*cannot make or comprehend all of the decisions that would need to be made for the minor child*", as submitted by Mr. Swan.
51. Given the Court Social Worker's evidence that the Paternal Sister's is resistant to improving her relationship with Levi's mother, it is inconceivable, in my judgment, that the Court Social Work Office would recommend a joint care and control arrangement. Such recommendation is akin to 'splitting the child' and could not in my judgment given the high level of contention, be in the best interests of Levi.
52. I am satisfied to find that Levi's best interests would be better served by an order granting his mother sole custody and sole care and control of him. It is hoped that her church family and other community friends will lend support as needed.
53. It must be emphasised that in this modern era of the twenty-first century this court recognizes that following the death of Levi's father, his mother has the sole right to make all decisions regarding his health, religion, education, development and overall welfare. She alone possesses the power to appoint someone to act, from time to time, on her behalf for the benefit of Levi.
54. In reaching this decision, this court has not overlooked the relationship which exists between Levi and the Paternal Sister. It is hoped that the Paternal Sister, in time, will come to comprehend that that Levi's mother does not oppose her having a



supportive sibling relationship with Levi provided that it respectful of her parental rights.

55. The Court Appointed Social Worker's recommendation that Levi's mother should be encouraged to continue therapeutic services for support is re-affirmed by this court. Hopefully, such services will alleviate the stress brought about by this nightmare experience within the family 'justice' system and link her to all available support within Bermuda needed to achieve Levi's optimal well-being.
56. For the avoidance of doubt, the matter of Paternal Sister's access is, in my judgment, more appropriated for family mediation, if at all possible given her entrenched beliefs, whether via the Department of Child and Family Services or other private agency.



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**HON. JUSTICE NICOLE STONEHAM**