In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2013: No. 29

BETWEEN:

RB

First Appellant

and

MB

Second Appellant

-v-

Family Court Worshipful Stoneham & Panel

and

The Director of Child and Family Services

Respondents

CR

Affected Person

Date of Hearing: 21 July and 5 August 2014
Date of Judgment: 29 October 2014

Mr Saul Dismont, Christopher's Chambers, for the Appellant
Mrs Karen Williams-Smith, Trott & Duncan, for the Respondent

The Application

1. This is an appeal against a 19 September 2013 Family Court care order ('the Order') made by Her Worshipful N. Stoneham (Panel Chairman), Mr A Steede JP and Ms J. Burgess JP (Panel members) sitting as a Special Court.

   Under this Order the minor child 'BR' was to be subject to a care order for a further six months.

2. The parties in this application are:
   i. The First Appellant ('RB') the child BR's stepfather.
   ii. The Second Appellant ('MB') BR's mother. She is married to the First Appellant.
   iii. The Respondents: Family Court Worshipful Stoneham & Panel, and the Director of Child and Family Services.
   iv. The Affected Person ('CR') BR's biological father.

3. The facts and the grounds of appeal are set out in Counsel for the Appellants' submission and summarised in this decision.

Background

Removal of the child

4. The child BR was eight years old at the time of this appeal hearing. The facts as this court was able to glean from the material before it indicate that on 31 May 2012, the boy BR allegedly told his biological father CR that cuts and bruising to his legs were caused by his stepfather RB (the First Appellant) hitting the boy with a belt. During the police investigation of the complaint, the Department of Child and Family Services (DCFS) removed BR from his home where he resided with his mother, stepfather and two siblings. DCFS placed BR with his biological father CR.

Chronology of court proceedings

5. Based on the Appellants' submission: on 5 June 2012 an emergency protection order, under section 39 of the Children Act 1998, ('the Act') was granted for 14 days. BR was placed in the care of his biological father CR for the duration of the order, and the Appellants (MB and RB) were granted supervised access.

6. On 19 June 2012 the emergency protection order was extended.

7. On 28 June 2012, pursuant to section 25 of the Act, a six-week care order was granted. Since that date the order has been reviewed several times and the order extended for various periods.

8. On 16 October 2012, the Supreme Court reviewed the order.

   The Supreme Court upheld the care order pending the outcome of an appeal and judicial review undertaken by RB (the First Appellant).

   The placement of BR was left to the discretion of the Director of Child and Family Services (the Director). BR remained in the care of CR where he continues to reside.

9. In or around July 2012 the Appellants were charged with the alleged May 2012 assault of the child.

10. On 19 September 2013 the Special Court granted a six-month care order 'upon consent of the parties'. The First Appellant (RB) is listed as an absent party.

    After listing the access arrangements for the child's mother, the 19 September order states in part:

> *3. During the abovementioned access and associated transport/transfer of the Child, there shall be no contact whatsoever between [CR] and [RB], step-father.*
>
> *4. The Child's step-father, [RB] shall have supervised access to the Child (whether within or outside the home), until further order of this court.*
>
> *5. [RB] shall submit to therapeutic counseling and or psychiatric intervention to achieve understanding of external changes in his life over which he has little control including the improved relationship between his wife and the Child's biological father [CR].*
>
> *6. The Director of Child and Family Services shall conduct an assessment of all risk factors within [MB and RB's] home and report its findings to the Court on the next Review Date.*
>
> *7. [MB] shall be permitted to remove the Child from Bermuda on the following terms and conditions … [RB] shall not accompany [MB] and the Child during this period of travel outside of Bermuda.*
>
> *8. Pursuant to Section 31(3) of the Act, the Director shall make a written report to this court in relation to the recommendations contained in the report dated 18th September, 2013 on or before Wednesday 27th November, 2013.*

11. On 16 October 2013 the Magistrates' Court ruled that the First Appellant, RB, had no case to answer in respect of the assault charge. The Second Appellant, MB, was acquitted of the charges.

Ground of appeal

12. The First Appellant appealed the 19 September 2013 care order on the following ground:

> *1. …*
>
> *i. The learned Magistrate erred in proceeding with the hearing in the absence of the First Appellant,*
>
> *ii. The learned Magistrate erred in granting the Order in the absence of the First Appellant,*
>
> *iii. In granting the Order the learned Magistrate erred in considering unsworn evidence,*
>
> *iv. In granting the Order the learned Magistrate erred in considering biased and/or unmeritorious reports,*
>
> *v. In granting the Order the learned Magistrate erred in considering irrelevant matters and falling* [sic] *to consider relevant matters,*
>
> *vi. The hearing was unfair, unlawful and breached the Bermuda constitution,*
>
> *vii. The Order was unfair, unlawful and breached the Bermuda constitution.*

13. Counsel for the Appellants submits that the grounds of appeal can be dealt with as two general issues:

> *2. …*
>
> *(a) The court should not have proceeded without the First Appellant,*
>
> *(b) The Care Order should not have been granted.*

14. About two months before this appeal was heard the Second Appellant, BR's biological mother, was joined as a party to this appeal.

Ground of appeal: absence of the First Appellant

15. Under this category the Court considers the following from the Appellants' submission: that the Family Court's Learned Magistrate should not have proceeded with the hearing, nor subsequently granted the 19 September care order in the absence of the First Appellant.

Appellants' submission

16. Counsel for the Appellants submits that the Family Court should not have proceeded with the hearing in the absence of the First Appellant. He contends that the First Appellant's absence rendered both the hearing and the 19 September order 'unfair, unlawful …' and in breach of Bermuda's constitution.

    Under Order 15/3 and 15/4 of the Magistrates' Court Rules 1973 in civil matters a court must at its discretion consider whether to proceed without a party.

In criminal proceedings, the Criminal Code Act 1907, s. 526 prohibits a court from hearing a criminal matter in the absence of the defendant unless the defendant makes it impracticable for him/her to be present.

Counsel submits:

> *The Children Act [1998] is silent on the issue of the absence of a party in care order proceedings. Adopting the Criminal Code approach in prohibiting the court hearing care order applications if a 'parent' (s.2(1) of the Act: 'parent' includes a step-parent and a guardian) is not present is consistent with the purpose and spirit of the Act. In addition, such an approach also complies with domestic and international human rights obligations, particularly the United Nations Convention on the Rights of the Child 1989…*

17. Counsel highlights international law with regard to the rights of a child, which includes the right to have their family life be protected from unlawful interference.

    He cites the United Nations Convention on the Rights of the Child 1989 (UNCRC) art. 3, 5, 7 and 14 on a child's right of protection and the state's duty to ensure such protection (Article 3) whilst respecting 'the responsibilities, rights and duties of parents … or other persons legally responsible for the child' (Article 5).

    He further submits that UNCRC art. 16 repeats the international commitment to protect the family as required under the European Convention on Human Rights (ECHR) art. 8 ('Right to respect for private and family life').

    A child should not '… be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation…' and the law should protect the child '… against such interference or attacks' (UNCRC art. 16).

    Both UNCRC art. 16 and ECHR art. 8 are wholly consistent with the Children Act, specifically s.5: protection of children, integrity of the family and the welfare of children.

18. Counsel cites Kawaley J (now Kawaley CJ) in *Davis et al v the Governor et al* (no 2) [2012] SC (Bda) 22 Civ:

    > *31. … because ECHR has been extended to Bermuda by the United Kingdom Government and its terms apply to Bermuda at the public international law level, litigants in Bermuda have a legitimate expectation that the rights protected by the Convention will be adhered to by the Executive in Bermuda.*

    Counsel stresses:

    > *It is against this backdrop that Family Courts preside of* [sic] *Care Order proceedings. Given the obvious interference a Care Order will have on the rights of the 'family', particularly the child, courts should require the attendance of all relevant parties before proceeding. This fulfils the obligations under the UNCRC for the rights and duties of parents to be considered, such as Art. 4, 5 & 14.*

> *At the very least, considering the Criminal Code and the Court Rules approach to absent parties, in general the Family Courts should make enquires sufficient to apply a discretion as to whether to proceed or adjourn. This is particularly so when the absent parents are unrepresented.*
>
> *In the case of the First Appellant there was no exercise of any discretion. There were no enquiries made of the reason for his absence or consideration of whether it was appropriate to proceed without him. The Magistrate's note reflects this.*

19. Counsel further submits that the court – having read the 18 September 2013 social inquiry report by Mrs Elaine Charles – should have been even more reluctant to proceed in the First Appellant's absence.

    The report contained various accusations about the First Appellant, and recommendations for the Order directly affected him. He maintains that the First Appellant had no notice of the accusations and should have been given the opportunity to respond to the report.

20. Counsel cites the Bermuda Constitution Order 1968, schedule 2, chapter 1, para 6(8) ('Provisions to secure protection of law') which states that a court or adjudicating authority shall be impartial and independent and a case given a fair hearing within a reasonable period.

    He asserts:

> *Under all the circumstances, the court erred in proceeding with the hearing in the absence of the First Appellant and doing so breached his right to a fair hearing under s.8 of Bermuda Constitution, as did any subsequent orders.*

Respondents' submission

21. In the Respondents' submission Mrs Williams-Smith, Counsel for the Respondents, addresses the allegation that the hearing was biased, prejudicial and unfair because the Appellant was not given the opportunity to cross-examine his accusers and the validity of the 11 and 18 September 2013 social inquiry reports:

> *... The Appellant chose not to be present at the court hearing. Although he was in the confines of the Court at the time, he failed to appear. On that occasion, the Appellant was fully aware of the hearing as his wife was in attendance. He did not attend or indicate that he wished to cross examine any of the parties on that occasion as he was well aware who was going to be in attendance. ...*

22. With regard to giving the First Appellant the opportunity to be heard, Counsel for the Respondents submits that the date for the hearing was secured in July 2013 when the parties were before the Family Court on a mention:

> *All parties were aware of the pending Court date for September. In fact, albeit the Appellant was in the confines of the Court on 19 September, he chose not*

> *to attend the hearing. He was not precluded from attending. On that occasion, the mother was in attendance and so too was the father of the child [BR]. As the parties were consensual on all fronts in respect of the directions and recommendations being made by the social worker, the court proceeded to a hearing and granted an Order in terms of which were all agreed.*

The child's biological mother, the Second Appellant, was present at all times during the hearing.

23. The Appellants' submission is that during the 24 June 2013 hearing the First Appellant's behaviour led the magistrate to request a police presence in court. The First Appellant, fearful of being taken into custody, was afraid of attending subsequent hearings.

Counsel for the Respondents is dismissive of this claim:

> *It was not unusual in the history of this matter that [RB], the [First] Appellant, would attend on some occasions and not others. It was clear that most times when the mother presented her submissions (in the absence of her husband) before the Court, she was fully prepared with commentaries and directions given by her husband on occasion. She would refer to emails that were sent by her husband to the Court in respect of certain issues regarding the social worker or the like. In any event the mother was invested in the process and attended court and indeed, at times, spoke on behalf of her husband.*
>
> *At no time was it made aware to the Court either by the wife or by the [First] Appellant, that indeed he feared the court process and feared being arrested …*

The Court

24. The nature of Family Court proceedings, particularly when it involves the welfare of a child and an allegation of abuse, requires the Family Court to be astute.

25. While this court accepts that the First Appellant is a parent and has all the 'rights, duties, powers and responsibilities and authority' which by law (Children Act s.4) a parent has in relation to their child, it must be borne in mind that on 27 March 2013 DCFS sought an interim care order extending a previous order because of the allegation that this stepparent (the First Appellant) had physically abused the child.

The First Appellant was defending those criminal charges before the Criminal Court when the Learned Magistrate was asked to consider the application by DCFS to extend the interim care order. The Learned Magistrate had a positive duty to protect the child from harm and to ensure the welfare of the child (Children Act s.5).

The parties – the child's biological mother and his biological father – were before the Family Court and consented to the 19 September 2013 order. This court accepts that the First Appellant was in the confines of the court when the family proceedings were being dealt with.

The Court notes that the First Appellant did not apply for an adjournment from the Learned Magistrate and none was given.

26. Based on the materials before this court, this ground of appeal – that the First Appellant's absence from the hearing was unfair, unlawful and in breach of our constitution – has not been made out.

    The Court is satisfied that the First Appellant knew of the hearing and could have been present if he so wished. Accordingly, the Court finds no breach of the First Appellant's right to a fair hearing.

Ground of appeal: biased and unmeritorious evidence

27. Here the Court considers the Appellants' submission: 'In granting the Order the [L]earned Magistrate erred in considering biased and/or unmeritorious reports' with particular reference to the 18 September 2013 social inquiry report prepared by Mrs Elaine Charles.

Appellants' submission

28. The First Appellant is aggrieved, as he outlines in his written submission, that the 18 September 2013 report makes unsubstantiated allegations including the suggestion that family members may be at risk from him.

    Counsel for the Appellants, Mr Dismont, maintained that the report did not give any real explanation of the risk posed by the First Appellant. Also, in preparing the report, Mrs Charles did not meet with the First Appellant.

29. Mr Dismont references section 31(1) of the Act ('Plan of care for child') which states the requirements for the plan of care the Director of Child and Family Services must submit to the court before the court can make a care order or supervision order. It also outlines the contents of such orders.

    He maintains that the 18 September report is biased and subsequently the plan of care and the order on which the plan of care was based are not valid.

    He applies the fair-minded and informed observer test for bias as established in *Porter v Magill* [2002] 2 AC 357, HL:

> *102. … The Court of Appeal took the opportunity in In re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700 to reconsider the whole question. Lord Phillips of Worth Matravers MR … summarised the court's conclusions … :*
>
> > *85 … The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and*

informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.

Mr Dismont lists fourteen reasons for concluding that the 18 September report is biased:

> *28. …*
>
> *i. The report was required as an assessment of the parental abilities of the parties but the writer never assessed the First Appellant,*
>
> *ii. The writer met with all the parties except the First Appellant,*
>
> *iii. It was compiled from information provided by all the parties but the First Appellant,*
>
> *iv. It contains unsubstantiated allegations about the First Appellant,*
>
> *v. The writer did not give the First Appellant an opportunity to respond to the allegations,*
>
> *vi. Without challenging the allegations, the writer accepts them as true,*
>
> *vii. The writer discounts previous psychological reports for being insufficient but relies on them against the First Appellant,*
>
> *viii. The writer attached alleged text message conversations between the First Appellant and the Affected Person as evidence,*
>
> *ix. The writer did not attach any of Affected Person's messages,*
>
> *x. The writer overly exaggerated the behaviour of the First Appellant,*
>
> *xi. The writer makes diagnosis that she is not qualified to make,*
>
> *xii. The writer warns of the risk of harm without identifying what the risk is,*
>
> *xiii. The writer infers that there is a risk of murder without any evidence,*
>
> *xiv. There are recommended expectations of the First Appellant but no 'description of the services to be provided to remedy the condition or situation on the basis of which the child was found in need of care or supervision' as required by s.31(1)(a).*
>
> *29. A fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. Consequently, the court erred in considering the biased and unmeritorious Report and in considering the unsworn hearsay evidence contained within it.*

30. Mr Dismont adds that the order states 'Upon consent of the parties, it is ordered…' but the First Appellant was absent so he did not consent to the order. He asserts that therefore under section 24 of the Act ('Court orders, relevant factors') '… the [L]earned Magistrate erred in considering irrelevant matters and failing to consider relevant matters'.

31. Counsel then turns to the restrictions on the First Appellant's contact with the child, the recommendation that the First Appellant submit to 'therapeutic counselling', and that the First Appellant not accompany the child and his mother on a court-approved trip outside Bermuda (see paragraphs 3, 5 and 7 of the Order).

Mr Dismont argues that the Act does not provide the court with the power to make such orders particularly when the First Appellant was absent.

With regard to the recommendation that the First Appellant submit to 'psychiatric intervention', he maintains:

> *To order such was unfair, unlawful and breached the Bermuda Constitution, specifically s.9 'Protection of freedom of expression' and s.11 'Protection of freedom of movement'. Other than the Mental Health Act there are no provisions in Bermuda law to force someone to have treatment.*

32. Counsel urges that the Learned Magistrate 'erred in proceeding with the application and in granting the Order'.

    The Appellant seeks an order that the matter be remitted to the Family Court before a different Magistrate as well as the cost of this application.

Respondents' submission

33. The Appellants claim that the First Appellant's wife (MB) told the court of her concerns about Mrs Charles' ability to provide an unbiased report but the court did not 'properly consider and address' MB's concerns.

    Counsel for the Respondents, Mrs Williams-Smith, submits that this issue was not considered during the making of the 19 September order because it had been dealt with at a prior hearing. The issue of the potential bias of Mrs Elaine Charles was dealt with on 12 September 2013, by a panel constituted of Acting Magistrate Worshipful Mrs Jackie MacLellan (Chairman) and Mr Roderick Burchell JP (member). This panel ruled that:

> *...*
>
> *1. The Court finds no conflict of intent in relation to Mr [sic] Elaine Charles preparing the ordered Social Inquiry Report (S.I.R.) and because of the familiarity with the parties she is the best person to prepare the report.*
>
> *2. [RB] and [MB] shall allow Mrs Charles to make a home visit. Should they refuse to comply, negative inferences may be drawn.*
>
> *...*

34. With regard to the credibility of the 11 September and 18 September reports provided by Mrs Charles, Mrs Williams-Smith asserts there was no need for the Learned Magistrate and Panel to consider this issue of credibility during the making of the 19 September order.

    She stresses the 12 September ruling that Mrs Charles was 'the best person to prepare the report'. She states that this '… determination was made prior to the Order of 19 September and should not be subject or considered as a ground for an appeal by the Appellant'.

35. The Appellants allege that the Learned Magistrate had no factual evidence for ordering the First Appellant (RB) to submit to counselling without RB being able to be heard on the matter.

    Mrs Williams-Smith maintains that the order that the First Appellant attend counselling was first made on 27 March 2013 when the plan of care sought an interim order *inter alia* that the parties attend full psychological assessment and counselling. The parties had seen Dr Fowle and he recommended that the parties have counselling and psychological assessment.

    Review hearings were held on 24 June and 12 September 2013. At these hearings the 27 March 2013 care order was extended.

    During the 24 June hearing, the court ordered a social inquiry report because the child's biological father CR had applied for sole care and control. DCFS identified Mrs Charles as the appropriate officer to prepare this report. That decision gave rise to a series of e-mails being sent by the First Appellant and his wife (MB, the child's biological mother).

    On 12 September, Acting Magistrate Mrs MacLellan dealt with these issues. The child's biological mother and father adhered to the assessment, attended all meetings with Mrs Charles and agreed with her recommendation and, as a consequence, agreed to the consent order.

    The records show that MB was present on each review date. The First Appellant, RB, was present on some review dates (for example the 24 June review).

The Court

36. Having considered all of the material this court finds no admissible evidence before it to support the allegation that the 18 September 2013 report by Mrs Charles is biased.

37. The 18 September 2013 report was produced after the Panel members convened on 12 September. During the 12 September hearing the Panel considered the issue of Mrs Charles' conflict of interest in preparing a social inquiry report and gave their ruling.

    Despite Mrs Williams-Smith's position this court is of the view that the First Appellant's concern went beyond the 12 September ruling that there was no conflict of interest. The First Appellant is challenging the 18 September report on the grounds of bias and for several reasons as listed in the Appellants' submission.

38. At the end of Counsel for the Respondents' submission, and after an adjournment, Counsel for the Appellants sought to lodge two unsworn unsigned affidavits purportedly made by the Appellants. The Court did not consider these affidavits.

    In effect the First Appellant is aggrieved with the recommendations made by the Court Social Worker (Mrs Charles) but this dissatisfaction cannot properly support an allegation of bias. The Second Appellant accepted the recommendations in the 19 September order.

None of the material presented to this court has discredited the 18 September 2013 report. Given the circumstances the Court rejects this complaint of bias.

39. With regard to the order for psychological assessment, in this court's judgment the 27 March 2013 order was an interim order made pursuant to section 32 ('Interim orders') as read with section 25(2) of the Act:

> *Care and supervision orders*
>
> *25. ...*
>
> *(2) The court may only make a care order or supervision order if it is satisfied—*
>
> *(a) that the child concerned is suffering, or is likely to suffer, significant harm; and*
>
> *(b) that the harm, or likelihood of harm, is attributable to—*
>
> *(i) the care given to the child or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give him; or*
>
> *(ii) the child's being beyond parental control.*

There was ample material before the Family Court that would have led it to conclude that the child was suffering or likely to suffer significant harm.

The subsequent hearing on 24 June was a review and extension of the 27 March order. Also, when the Family Court reviewed the matter on 12 September it adopted the previous plan of care and extended the order.

40. On 19 September 2013 the Family Court had the 18 September social inquiry report. It would seem that the order that the First Appellant (RB) 'submit to therapeutic counseling and or psychiatric intervention' was made based on the recommendation in the 18 September report.

41. Section 32(5) of the Act grants the Family Court the power to order 'medical or psychiatric examination or other assessment' for interim orders. The 19 September 2013 order is an interim order (to expire 18 March 2014) not a permanent order therefore the Court disagrees with Counsel for the Appellants. The Learned Magistrate and Panel did have the authority to order psychological assessment in the 19 September order.

Conclusion

42. The Children Act, s.18 allows appeals under the same conditions as provided by the Criminal Appeal Act 1952:

> *Appeals*

18. Any child or other person aggrieved by any order made under this Act may appeal from the order to the Supreme Court in the manner and subject to the conditions provided by the Criminal Appeal Act 1952 [title 8 item 87] as though the order appealed against were an order made on a conviction by a court of summary jurisdiction.

43. In *A.W. v Director of Child and Family Services*, Appellate Jurisdiction 2008: No 16, Bell J cites Kawaley J (now Kawaley CJ) in *D v Attorney General* [2004] Bda L.R 45 who reflected on the mechanism when dealing with appeals from the Family Court and the effect of the proviso to the Criminal Appeal Act s. 18(1):

> *56. It is no doubt helpful to set out how Kawaley J. viewed the application of section 18(1), since I respectfully agree with his approach. He said:*
>
> > *In my view section 18(1) clearly applies to appeals such as this. Section 18 of the Children Act confers, on a person dissatisfied with orders made under the 1998 Act, the same rights of appeal as a person convicted of an offence by the Magistrates' Court enjoys under the 1952 Act. References to "conviction" must read as "order" and references to "criminal proceedings" read as "civil proceeding", with references to "sentence" presumably ignored. So a decision of the Family Court can be reversed on the grounds of (a) it being against the weight of the evidence, (b) an error of law, or (c) any other miscarriage of justice. But the proviso entitles this Court to dismiss an appeal if satisfied that "no substantial miscarriage of justice occurred".*

Bell J continued

> *58. Kawaley J. then carried on to consider how the court's discretion should be exercised in a child welfare case, given the wording of the proviso, and in particular the reference to "no substantial miscarriage of justice". Kawaley J. took the view that regard must be had to the provisions of section 6 of the Act, and the requirement that in the administration and interpretation of the Act, the welfare of the child should be the paramount consideration. He carried on to say:*
>
> > *In the appellate context, therefore, it seems to me the circumstances will be rare where a decision which is not clearly inconsistent with the interests of the child and/or not fundamentally flawed will be interfered with by this Court.*
>
> *and*
>
> *Thus for this additional policy reason, in my view this Court should be slow to second-guess the Family Court on the merits of a child welfare decision, unless something is obviously materially wrong.*

44. This court is of the view that in rendering judgments the Family Court must have at its forefront Section 5 and 6 of the Act:

> *Purposes of the*
>
> *Act*
>
> *5. The purposes of this Act are to protect children from harm, to promote the integrity of the family and to ensure the welfare of children.*
>
> *Welfare principle*
>
> *6. In the administration and interpretation of this Act the welfare of the child shall be the paramount consideration.*

In considering the welfare of a child, under section 24 of the Act, courts must take into account all relevant issues such as the wishes of the parents, the conduct of the parents, the age and sex of the child, the wishes of the child, et cetera. In considering the weight and effect of these factors courts must regard the child's welfare as first and paramount.

45. The circumstances at the time of the making of the 19 September order included an allegation – which led to criminal prosecution – that the First Appellant (RB) had harmed the child. The rights of RB as stepfather must be assessed and weighed together with all other factors. The course to be followed, and the first consideration, is the one that is in the best interest of the child's welfare.

It is clear that the Learned Magistrate and her Panel took into account the rights and wishes of the child's biological parents who were present and consented to the Order. At the time of the hearing and the making of the Order, RB was not unimpeachable and the Court is satisfied that this weighed heavily in their final analysis and the resulting Order.

46. For the above reasons the Court dismisses the appeal. This matter is remitted to the Family Court #2 before the Worshipful Nicole Stoneham.

47. The Appellants sought their cost of this hearing. In the Court's view it is not appropriate to make an order as to costs in this case but the Court shall hear the parties on costs if they so wish.

Dated ___ day of _____

Justice Norma Wade-Miller
Puisne Judge