

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
ST CHRISTOPHER AND NEVIS CIRCUIT
(DIVORCE)
A.D.2009

Claim No. SKBHMT2008/0017

Between:

FREDERICK CARL KAESMACHER

Applicant

and

KATHERINE ANNE KAESMACHER

Respondent

Appearing: Mrs. Marguerite Foreman for the Applicant
Ms. Marsha Henderson for the Respondent

**2009: July 29th
September 14th**

DECISION

- [1] **[BELLE J.** Both parties in this matter filed applications asking for custody of the children of their marriage, which had been previously dissolved on 18th November 2008. However since the first application was filed by Mr. Frederick Kaesmacher I will refer to him as the Applicant and to Katherine Kaesmacher as the respondent.
- [2] I have decided to make the following interim order, which will be in force for a period of one year commencing on the date of this decision.

- (i) The Court orders that the applicant Frederick Carl Kaesmacher be granted custody care and control of the said children with access granted to the mother of the children Katherine Anne Kaesmacher. This grant of custody is to be for a trial period of one year commencing 14 September 2009.
- (ii) During the period commencing 17th September 2009 and ending 30th June 2010 the Social Development Department of the Government of St Kitts and Nevis is ordered to assign an officer to monitor the ability of the applicant to meet the daily economic, social and emotional needs of the children Max and Lexi Kaesmacher. The officer appointed is to present a report to the court on the aforesaid matters relating to the welfare of the children under the care of Mr Kaesmacher on or before July 16th 2010.
- (iii) The respondent is ordered to contribute no less than \$ 3000.00 monthly to the general care of the children and no less than half of any reasonable request for a contribution to the costs of health care, and education of the children.
- (iv) The respondent is permanently restrained from removing the two children of the union namely Max and Lexi Kaesmacher from the jurisdiction of the court without the court's leave or the applicant's agreement.
- (v) The respondent shall give the applicant 30 days notice of any request for the children to travel overseas to spend time with her for holidays or otherwise.

[3] This order is based on the following factors:

- (a) It is obvious that historically the father has been the primary caregiver of the children. This is so because he has not maintained sustained employment for the past years and has therefore had the time to devote to various aspects of the children's lives.
- (b) The mother of the children has provided almost all of the economic support for the children because she has been the breadwinner in the family. However she was often absent from recreational events in the children's lives when she had to be at work. There is no clear indication that this pattern will change.
- © The court is aware that the mother presently works and resides in Anguilla. If she is granted custody the children would have to move to Anguilla. This

would cause some instability in the short term and may not be in the best interest of the children.

- (d) The court is of the view that it would be better for the stability and welfare of the children if they are permitted to remain in St Kitts where they have friends and are familiar with the surroundings as long as the respondent is willing to assist with their economic needs just as she has done in the past.
- (e) The interests of the children is paramount and it is best that the children remain with the applicant for the time being. But the applicant will have to prove his ability to hold sustained employment and earn a reasonable income. This view of the law is supported by section 14 (8) of the Divorce Act section 3 of the Guardianship of Infants Act Cap. 323 of the Laws of St. Christopher and Nevis and the case **S (BD) v . S (DJ)** [1977] 1 All E.R. 656.

[4] I have considered the affidavit evidence of both parties and the submissions of counsel and find favour with the submissions of counsel for the applicant. However I must note that it is never easy to deal with the separation of children from their parents. Parents as adults make choices and the children are expected to accede to those choices. I agree with counsel for the applicant that that there is no longer a general presumption that favours the mother in relation to the care and custody of children. See: **B v S** (1999) W.I.R 311 and the reference therein to **Re S (a minor)** (1991) 2 Family LR 388. One of the issues in favour of mothers in the past has been that the mother would normally be the primary caregiver while the father seeks employment and is the breadwinner. In this case before me the reverse was true.

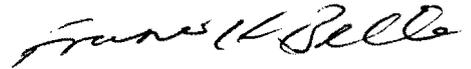
[5] The applicant stated in paragraph 7 of his affidavit of 26th May 2009, that he was presented with a new situation after the break down of the marriage and he feared it would deteriorate if the respondent was permitted to leave the country with the children. He stated that throughout most of Max and Lexi' s lives he was their primary caretaker. He noted that Katherine was the primary breadwinner and was often unable to attend the children's school events, parent conferences or birthday parties for other children. He was the stay at home parent who chauffeured the children around to their

various play dates and extra curricular activities and spent time with them on the beach. I accept these statements as the truth.

- [6] I think that the applicant was presented with a "fait accompli" with which he was obliged to comply. The respondent thought it necessary to leave the country with the children because she was the primary breadwinner of the family. But she did not deny that her emotional state made it difficult for her to sit down and have a rational conversation with the applicant about the children. The respondent claims that she was provoked by the applicant's behaviour, but the children were caught in the middle of this emotional battle over the new woman in the applicant's life.
- [7] Mr. Kaesmacher's position as the primary care-giver in the relationships relevant to this case is supported by affidavits of Mala Weston, Heather Hotchin, Anne Margaret Fish and Sherise Esdaille. There are no serious complaints about the quality of his care-giving skills. While considering the paramount interests of the children I also take into consideration that the children would have to leave the familiarity of their lives in St. Kitts including their schools, friends, neighbours and activities, to start over in Anguilla. While this often happens when a family moves the point is that in those circumstances it would be necessary. In the instant case it would not be necessary.
- [8] I am cognizant of the fact the respondent is clearly more financially capable of providing the children with various amenities. The facilities being offered by the school in Anguilla appear superior to those in St Kitts. The respondent is also provided with handsome allowances, superior accommodation and health care facilities if her affidavit is to be believed. However at the end of the day, the children can only effectively make use of those facilities if they are residing in a happy home. A mother who spends a great deal of time at work cannot guarantee the atmosphere conducive to a happy home. The respondent has justified her dedication to work by pointing to the applicant's failure to work or contribute financially to the welfare of the children leading to a dire financial situation for the family. But this pattern did not work to keep the family together. In the present circumstances a new pattern must emerge. The applicant must both work and take care of the children or in default custody will be granted to the respondent.

- [9] I am not one hundred percent convinced that Mr Kaesmacher will be able to meet the financial needs of the children. But he has shown that he can meet their emotional and social needs over the last few years of the marriage, except for immediately after the breakdown of the marriage when he was put out of the matrimonial home and had to make arrangements to be with the children.
- [10] I do not think that the fact that the applicant now resides with his new partner detracts from his ability to be an effective caregiver. Mrs Kaesmacher is in a position to ensure that the children lack for nothing and she should be willing to provide them with the necessary support to cater more than equally for the children's various needs.
- [11] I hold that the factual and legal findings in this matter are on all fours with persuasive decisions on such matters and I therefore have little hesitation in making the order proposed above. Counsel for Mr. Kaesmacher has offered more detailed suggestions in relation to the care and custody of the children. However it is my view that the parties should be able to work these things out over time and if they so desire return to the court to have their agreements made orders of the court.
- [12] I am aware that many things would be said and done in this situation between the parties, which are instigated by deep hurt, and pain on the part of the respondent and the stress of having to find a way of dealing with the outbursts and anger of the respondent on the part of the applicant. I therefore think that it is important that tempers be given time to cool and that both parties come to terms with their new reality without resort to blame. In my view it would not be safe to change the status quo until it is clear that both parties are more accepting of the other's needs in relation to the children and are more certain about their own ability to take care of the children's needs.
- [13] I must also state that this is not the occasion for sorting out the property issues between the parties. The distribution of property interests is not before the court at this time, but any decision, which is in the best interests of the children, would have to include the provision of suitable accommodation. If a property settlement is required to make this possible then counsel should hasten to put such a settlement in place.

I also believe that both parties would want the children to enjoy the best housing available in the circumstances and therefore advise their respective lawyers to make meaningful proposals in that regard.

A handwritten signature in black ink, appearing to read "Francis H V Belle". The signature is written in a cursive style with a large, stylized initial 'F'.

Francis H V Belle

High Court Judge