

**THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2011/319

BETWEEN:

In the Matter of the Guardianship of Infants Act, Cap 197 of the
Laws of Antigua and Barbuda Revised Edition 1992

And in the Matter of the Status of Children Act, Cap 414 of the
Laws of Antigua and Barbuda Revised Edition 1992

And in the Matter of the Application for Custody of the
Minor Children, **JAHVONTE SHEMARIE ASI SMITH,
ONIA AVON CERENA SMITH AND OSARION JAMALIE NATHAN SMITH**

AVONDALE SMITH

Claimant

and

TISHA COCHRANE

Defendant

Appearances:

Mr. Peyton J.V. Knight for the Claimant
Mr. Steadroy Benjamin for the Defendant

2013: September 13

JUDGEMENT

[1] **HENRY, J.:** The claimant (hereinafter Mr. Smith) is the father of the minor children Jahvonte, Onia and Osarion Smith. The respondent Tisha Cochran (hereinafter Ms Cochran) is the mother of 7 children including the 3 fathered by Mr. Smith. By Fixed Date Claim Form Mr. Smith seeks an Order that he be granted sole custody of the minor children born to him of Ms Cochran. Also filed with the claim form is an Application of Urgency seeking the same relief. It is supported by an affidavit.

The grounds of the application are that:

1. Ms Cochran has continually neglected the health and well-being of the minor children;
2. Ms Cochran has been neglectful, cruel and abusive to the minor children;
3. Mr. Smith, the applicant, is in a position to take care of the minor children; and
4. The interest of the minors is best served by them being in the custody of the applicant.

[2] In the affidavit, Mr. Smith deposes that he is the father of the minor children. Jahvonte and Onia, twins, were born on 1st February 2003 and Osarion was born on 5th December 2003. He asserts that Ms Cochran has been a neglectful and abusive mother. He dates the start of the abusive behavior to shortly after the birth of the twins. He states that he would hear the babies crying in the nights uncontrollably. At the time the parties did not share a residence, but he lived in another house about 20 ft from Ms Cochran's. He would go to Ms Cochran's house to inquire what was happening, but she would be nowhere to be found. He alleges that she would regularly leave the babies alone in the house without informing anyone that she was leaving or of her whereabouts.

[3] According to Mr. Smith's account, since the children's infancy, it has been he who has done everything for them. As a result, the children began spending more and more time with him and he would take them to spend weekends with Ms Cochran. On those occasion when he took them to visit their mother, he would still have to take food, or when he collected them, they would complain that they were hungry, because their mother had given them nothing to eat.

[4] He complains that there were times when he would give Ms Cochran money to purchase items of food for the children, but she would instead spend the money on herself. As a result, whenever they had to go to see their mother he would pack a lunch kit for them as if they were going to school. However, when he collected them, they would tell him that their mother ate their lunch and all they had to eat was bread. This, he says, caused much arguments and altercations between them. As a result she took the children from him and he would not see them for months.

- [5] Mr. Smith makes further allegations of neglect when he states that whenever the children were eventually returned to him, they would need medical treatment for skin rashes. On occasions, visits to the doctor would result in medication being prescribed by the doctor. If, he states, Ms Cochrane was the one who took them to the doctor at his request, if they subsequently had a disagreement, she would withhold the children's medication until the issue between them was resolved.
- [6] He asserts that on 20th April 2011, Ms Cochrane took the children from him and a week and a half passed before he could see them. When he finally saw them, he noticed their teeth had not been taken care of. Upon inquiry, he was told by the children that their teeth had not been brushed during that period. One child had to be taken to the dentist, who indicated that the child's teeth, although developing had many cavities
- [7] Mr. Smith's allegations include assertions that the environment provided by Ms Cochrane is unhealthy for the children. Mr. Smith's evidence is that when the children are with him he ensures that they go to the doctor and eat balanced meals. He is also mindful of their school work and completes school assignments. He asserts that he also pays for all the children to receive food at school from the School's Meal Programme. On the other hand, he describes Ms Cochrane's home as lacking indoor plumbing and therefore has inadequate toilet facilities. He states that almost on every occasion that the children arrive to stay with him they are sick and requires a doctor's visit. He concludes that the poor environment at Ms Cochrane's home is having a negative effect on the children, including for at least one child, poor performance at school.
- [8] There are further allegations that Ms. Cochrane beats the children for no good reason.
- [9] Mr. Simon, in his affidavits, also makes allegations of Ms Cochrane's neglect of the children's health. One example he gives is in regard to Jahvonte who at the time suffered from fainting spells. Mr. Simon had secured an appointment at Mt. St. Johns Medical Center for tests to be carried out to determine the cause. On the morning of the appointment when he arrived at Ms Cochrane's home to collect Jahvonte, Ms Cochrane indicated that she did not want him to attend the appointment. In the end Mr. Simon had to enter the yard and take the child. On the way to the hospital, he was called and questioned by the police. It was only after he had explained the situation to the officer that he was allowed by police to take the child to the Doctor. At the end of the procedure, he took the child home. Ms Cochrane however, did not allow him to see the other children or allow them to receive their dinner or breakfast from him. He eventually sought assistance from the police who got her to release the children to him so they could eat.

- [9] In her affidavit of response, Ms. Cochrane denies that she has beaten the children for no good reason or that she been neglectful of or abusive to the children in other ways. She admits that she has had occasion to correct her daughter whenever she misbehaves, but whenever she did so, by spanking her or otherwise, it was never in a manner that can be considered to be abuse. She admits that there are times when she does speak loudly, but never with expletives.
- [10] Ms Cochrane insists that the one thing she has done and continues to do is take care of the children: she washes, cooks, cleans and feeds them well.
- [11] Ms Cochrane admits that the children were living with Mr. Smith at one point and explains why. She states that two months after the birth of their third child, Mr. Smith moved out of the house they shared and took up residence in another house in the same yard. Shortly thereafter, he moved to Freeman's Village leaving Ms Cochrane and the children in the house in Parham. Sometime thereafter, he returned to tell her that his aunt was returning from Canada and wanted the house. She was forced to find alternative accommodation. Her evidence is that she and her eldest daughter (from a previous relationship) then took up residence with her sister. But the premises were not large enough to accommodate the three children, so they went to live with Mr. Smith. The three children lived with him from early 2005 to 2007. The arrangement, according to Ms Cochrane is that the children stayed with Mr. Smith during the week and spent weekends with Ms Cochrane.
- [12] In 2007, a new boyfriend built Ms Cochrane a new house and they all moved in together, including the three children fathered by Mr. Smith. She states that all the children, her new boyfriend and herself have a loving, caring and warm family relationship. The environment around them is healthy and clean. The children are healthy and have settled into a stable background with a stable life and secure relationship and the children have blossomed in every meaningful way. According to her the children perform very well at school and are comfortable, happy and enjoy each other's company. She requests that they not be separated. She characterizes Mr. Smith's application as unwarranted, unjustified, malicious and without merit.
- [13] In reply, Mr. Smith terms Ms Cochrane's affidavit as replete with lies, falsehood and innuendoes. Lastly, he states that he is the one solely responsible for feeding the children. According to him he has to travel from Freeman's Village to Parham to give the children breakfast every morning. He returns in the afternoon during the holidays and gives them lunch and later in the evening he also returns and provides them with supper. During the school term, the children receive lunch from the school lunch program paid for by Mr. Smith. Their mother, he states

plays no role in their maintenance needs. He complains that when he takes meals for the children they are required to meet him at the curb, they then enter his vehicle where they eat what he has prepared for them. If he sends the meal into the house, then it would be shared amongst all the occupants in the household. The children would then complain later that they are hungry. He reiterates that the children are not being cared for and the neglect and abuse by the mother is having a serious effect on the children's health, education and well being.

The Social Inquiry Reports

- [14] A total of 3 Reports have been filed with the court by the Citizens' Welfare Division. The first report indicates that Mr. Smith had visited that department back in September 2010 and requested custody of his 3 children because the mother was not adequately caring for them. The details of the report indicate that similar allegations as those set out above were made to the welfare officer. The report indicates that Mr. Smith is a self employed contractor who earns a salary of \$4000.00 monthly. He resided alone in a 3 bedroom 2-storey house. At the time, the house was under construction, but the report noted that there was adequate yard space for the children.
- [15] The report noted that at the time, Ms Cochrane resided with her 6 children (including the 3 children the subject of this matter) and her boyfriend in a 2 bedroom house. There was no indoor bathroom or running water. The house was described as clean, but disheveled. One bedroom had 2 beds. Four children slept in this room - each bed accommodated 2 children. In the second bedroom, Ms Cochrane shared a king size bed with her boyfriend and their 2 children, then ages 4 and 2 years old.
- [16] According to the report, the 3 Smith children - Jahvonte, Onia and Osarion - revealed that they liked living with both parents. However, they explained that they were fed better when they were with their father. Onia, in addition, expressed that she preferred to reside with her father because he was kinder. She complained that whenever she told her mother she was hungry, her mother responded by telling her to drink her spit. She also indicated that there were times when Ms Cochrane spoke indecent language in front of her and that she did not like this.
- [17] The welfare officer also interviewed school representatives who indicated that both parents were attentive to the children's educational needs. However, their conclusion was that Ms Cochrane was more attentive. She had a record of attending all the Parent-Teachers' Meetings (PTM) and had even attended a workshop hosted by the school. While the school's records did not show Mr.

Smith attendance at PTMs, they did show that he contributed to the financial support of the children at school.

- [18] The Division's assessment at that time was that the children were adaptive, that is, self sufficient. They got on well with their peers and their language skills were in keeping with their age group. The Division further found that each parent was capable of being a good influence in the children's lives, with each parent possessing strong as well as weak attributes. The greatest problem, the report concluded, was the parents' relationship. The lines of communication, the report stated, had totally broken down. The division recommended that both parents attend counseling sessions.
- [19] The second report was prepared by order of Lanns, J. on 21st November 2012. She requested an update and more detailed report on living conditions of the parties, state of health and educational wellbeing of the children. Visits to the homes of the parties were carried out between the 9th – 18th January 2013.
- [20] The updated reported indicated that Ms Cochrane's household now consisted of 7 children. She had given birth to a baby boy who was, at the time of the visit, 3 months old. Ms Cochrane's household was still housed in the 2 bedroom wooden structure in Parham. However, an indoor bathroom was currently under construction. But at the time of the visit bathroom activities were still being carried out in an outdoor facility. Sleeping arrangements had changed somewhat. In the bedroom utilized by Ms Cochrane and her boyfriend, instead of a king size bed, there now were two beds. Ms Cochrane, her partner and the 3 month old baby occupied one bed, while the other was occupied by Kezia, age 4 years and Alton age 6 years. The other children shared the second bedroom as before.
- [21] Information had been culled from the Parham Community Clinic records in regard to the health of the children. They showed that the children had received all immunization shots to age 5. There had been occasional visits to the Doctor for respiratory tract infections, but none of the children were asthmatic. The records of their visits to the clinic show the following:

Jahvonte: 20th April 2010 – skin fungus

4th January 2011 – Fungal infection in head (school had a major breakout)

Onia: 25th October 2011 – ear ache

7th February 2012 – acute gastroenteritis

Osarion: 4th January 2011 – ear ache, fungus on skin

7th June 2011 – ringworm

- [22] The Principal and Teachers of the Parham Primary School were also interviewed. Jahvonte was deemed a good student, although considered reserved. Onia was said to be an excellent student, very outgoing and expressive Osarion, however, was said to be a good student, but very quiet and slow to respond to questions.
- [23] All the children were described as well behaved, however it was suggested that the boys appeared to be "too quiet". It was believed that they were scared or afraid of saying the wrong thing. It was also revealed that Osarion spends a lot of time flying an invisible plane.

The Welfare Officer made a few critical observations at the end of the report:

1. Ms Cochrane's home is overcrowded, given the fact that there are 7 growing children.
 2. Mr. Smith not only has adequate space to accommodate the children, but also the capacity to care for them.
 3. Due to the lack of an indoor bathroom at the Cochrane's residence, meeting basic needs such as taking a bath presents challenges.
 4. Ms Cochrane has found herself in an economic situation which does not enable her to provide adequate care for the children.
- [24] At a preliminary hearing on 7th February 2013, the Welfare Officer was cross-examined. She admitted that in completing the last report she had not spoken to Ms Cochrane, nor had she spoken with the children individually. The court, at the request of Counsel for Ms. Cochrane, requested that the Officer conduct the necessary interviews and file a final report.
- [25] The third and final report is dated 12th April 2013. At the time of this report, the twins, Jahvonte and Onia were 10 years old and Osarion was 9 years.
- [26] Ms. Cochrane describes her relationship with the children as sometimes good. She admits that at other times the children get on her nerves. Punishment for misbehaving, she revealed is normally by beating with a belt, and sometimes by shouting at them, but she denied using indecent language. With regard to the children's meals, Ms Cochrane says that she has asked Mr. Smith to deliver the meals (breakfast and dinner) to an aunt's home in Parham. With regard to their health, she admitted that Jahvonte suffers from fainting spells, froths at the mouth and shakes. During this period he is unaware of his surroundings. She also admitted that Mr. Smith took Jahvonte to the Doctor but complains that he did not give her an explanation of what had produced the seizure.

Interview with children

- [27] In the interview conducted by the Welfare Officer, the children all expressed love for both parents. However, now they stated a preference for living with their father. The reason stated is because he takes better care of them. If they do something wrong, they stated, their father would first talk to them, but if they repeat the action then a beating is usually the end result. On the other hand, their mother beats first. "Beatings" were described to include slaps and punches. In addition, the mother is said to use bad words (indecent language) when angry. The issue of adequate food was also addressed by the children. They indicated that when they are with their father, there is enough food and they eat on time. If hungry there is access to food in the fridge without restriction.
- [28] They also expressed their feelings about Alton Edwards, Ms Cochrane's boyfriend. They stated candidly that they do not like his attitude towards them. They complained that he smokes and even though the smoking takes place on the verandah or in the yard, at times it affects Jahvonte. Mr. Edwards too shouts and speaks bad words to them and on occasion would pinch. However, the court notes that Ms Cochrane has instructed him not to punish the children, an act she undertakes herself.
- [29] Among the issues raised in the Welfare Officer's assessment is that of the inability of both parents to communicate with each other, especially during times of illness which according to her could prove detrimental to the children. The children are painfully aware of their situation and for them being able to eat regularly, and on time are of utmost importance,

The Law

Section 3 of the Guardianship of Infants Cap 197 provides:

"3. Where in any proceeding before any Court the custody or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the Court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father."

[30] **Lord MacDermott J v C¹** has provided some guidance in applying the words of the statute. He states:

"Reading these words in their ordinary significance . . . it seems to me that they must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parent, risks, choices, and other circumstances are taken into account and weighed, the course to be followed will be that which is the most in the interest of the child's welfare as that term as now to be understood. That is the first consideration because it is of most importance and paramount consideration because it rules on or determines the course to be followed."

Mr. Smith's claim for sole custody is based on abuse and neglect by the mother. Section 2 of the Childcare and Protection Act, 2003, No 29 of 2003 defines neglect. Even though the Act deals with the Child Care and Protections Agency and its functions, the definition is instructive and provides and follows

"Neglect" means the failure or refusal, without reasonable cause, of a person having care of a child to provide the child with basic needs such as food, clothing, shelter, adequate supervision or medical attention.

[31] It is therefore the duty of the court to assess all the relevant circumstances and arrive at a decision²

[32] Counsel for Ms Cochrane submits that the factors the court ought to take into consideration in determining the best interest of the children in this matter are:

- (a) Religion
- (b) Conduct of the parents
- (c) Security and Stability;
- (d) Financial and material standing of parents
- (e) Mental and physical fitness of parents
- (f) Single parents
- (g) Parents wishes and future plans;

¹ [1970] AC 686

² Milne v Milne (1974) No 2162 of 1973 High court Trinidad & Tobago C (unreported)

- (h) The Children's ages
- (i) The sex of the children
- (j) Separation of siblings; and
- (k) The wishes of the children

- [33] Counsel also submits that this is not a case of balancing the wealth of the father against the relative poverty of the mother.
- [34] Counsel emphasize that there is no corroborative evidence of loose and/or immoral behavior on the part of Ms Cochrane. According to him, the evidence reveals that though not clothed in wealth, the children are in a secure and stable environment. He submits that the status quo ought to be preserved.
- [35] The court accepts that both parents are desirous of ensuring that their children do well. They have both demonstrated interest in the children's performance at school. However, having considered all the circumstances, there are several factors that stand out and are pivotal to the court's determination.
- [35.1] The physical and emotional needs of the children: Adequate food is a basic requirement for growing children. The evidence clearly demonstrates that there is a problem with the provision of food to the children while at Ms Cochrane's home. The current meal arrangement for the children is an unusual one. The children are denied the opportunity to sit at a table and enjoy the comfort and society during a meal, like a normal family.
- [36] The court accepts the evidence that in the past, when money was given by Mr. Smith to Ms Cochrane for maintenance, the money was spent on providing food for the household. Ms. Cochrane explained that if any of the fathers were delinquent in meeting their obligations, that she would use whatever she received from the others fathers to benefit everyone. From a mother's perspective this is totally understandable. However, it has left the Smith children inadequately provided for and in a state of neglect.
- [37] Furthermore, Ms. Cochrane finds herself in a precarious financial position. She is currently unemployed. She was dismissed from her position from the National School Meals Programme in February 2013. She is therefore not in a position financially to help herself.
- [38] Ms Cochrane's response to these allegations of neglect is simply not adequate. Her statement that she cooks and feeds the children well is not borne out by the evidence and therefore not accepted by the court. She has alleged that in the

past Mr. Smith has not supported the children financially and that at one point she was forced to institute proceedings against him for maintenance. These proceedings were abandoned and never re-instituted.

[39] The court finds that the current arrangement for providing meals to the children is unacceptable. Ms Cochrane's proposed solution that the meals be delivered by Mr. Smith to an aunt's house is also unacceptable.

[40] It is accepted that when the children are at their father's home, meals are adequately provided and consumed in the "normal" way. The children themselves express that this need is better provided for at their father's home.

[41] Emotional needs: In her assessment in the third report, Ms Ruddy, the Welfare Officer stated:

"The children are painfully aware of their situation, and for them, being able to eat regularly, and on time are of utmost importance. Also of importance is to be in a loving non-threatening environment. Indecent language, slaps and punches are not ideal forms of correction as the wrong message is being transmitted. Violence and disrespect only begets more of the same."

[42] In addition, the opinion of the Teachers is that the boys appear to be "too quiet". They are of the view that they were 'scared' or 'afraid' of saying the wrong thing. It was also expressed that the children, especially the boys appear 'stifled'.

[43] The court is also concerned about the behavior of Alston Clarke towards the children. To her credit, Ms Cochrane has stopped him from disciplining the children. However, the issue of his use of indecent language to the children has not been addressed.

[44] The physical environment: Adequate shelter is another basic requirement for a child. The report of the Welfare Officer concludes that the Cochrane's residence is overcrowded. The description and sleeping arrangements have been set out above. While the Childcare and Protection Act, 2003 identifies shelter as one of the basic needs of a child, the denial of which is one of the indicators of neglect, the Act does not speak to overcrowding. Nor could the court find a definition of overcrowding in any other legislation.

Sections 324 - 326 of the UK Housing Act 1985 contain such a definition³. By that standard, the Cochrane home is overcrowded. In the Caribbean setting however, sharing a bedroom with siblings is considered 'normal'. I dare say that the sharing of a bedroom by itself would not raise any red flags. However, this home does not function on other levels. The lack of indoor bathroom facilities and running water presents major issues for a household containing 7 minor children. Although the second report made mention of the construction of a bathroom, nothing further was mentioned in the final report or in the submissions. At the time of the second report the outdoor facilities were still in use. The father's allegations are that the 3 children bathe in the same bucket in the same bath water. He is of the view that this has contributed to a higher rate of skin fungus and other infections, as noted in the clinic records. The situation certainly highlights the inadequacies of the present state of the home.

- [45] Medical/Health Needs: Even though the records at the clinic indicate that as young children they all received their shots, the court finds that currently this area is not given the attention it should by Ms. Cochrane. There is some neglect. Ms. Cochrane, on occasion, has allowed her negative feelings toward Mr. Smith to cloud her judgment in this critical area.
- [46] The animosity and lack of communication between the parents: At least two of the three reports have highlighted the animosity and lack of communication between the parents as a major factor negatively impacting the children. On page 3 of the third report, Ms Ruddy opines the lack of communication between the parents is one of the biggest obstacles to moving forward.
- [47] The wishes of the Children: In the first report, only one of the 3 children expressed a preference to reside with the father. By the time of the third report, all 3 children expressed a desire to live with their father. Their reasons were that he was kinder and provided better for their physical needs. At ages 10 and 9 years old they are capable of forming opinions and expressing their feelings on the matter. The court finds that the reasons given by them have been substantiated by the evidence in

³ **324** **Definition of overcrowding:** A dwelling is overcrowded for the purposes of this Part when the number of persons sleeping in the dwelling is such as to contravene sections 325 and 326.

325 The room standard is contravened when the number of persons sleeping dwelling and the number of rooms available as sleeping accommodation is such that two persons of opposite sexes who are not living together as husband and wife must sleep in the same room. Children under the age of ten shall be left out of account, and A room is available as sleeping accommodation if it is a type normally used in the locality either as a bedroom or as a living room.

326 The space standard is contravened when the number of persons sleeping in a dwelling is in excess of the permitted number, having regard to the number and floor area of the dwelling available as sleeping accommodation.

the matter and the reports of the Welfare Officer. The court has therefore given some consideration to their expressed dissatisfaction with the status quo.

Conclusion

- [48] The court finds that the conditions under which the children live at the Cochrane's residence amounts to neglect. There is a failure to adequately provide for the children's physical and emotional needs. There is also a lack of sufficient attention to their health and wellbeing. The court also finds that the method of discipline, including the use of indecent language to the children, borders on abusive conduct. In light of the above, the court cannot agree with Ms Cochrane that, at her home, the children are happy and in a secure and stable environment.
- [49] The court understands a mother's desire to have all her children with her under one roof. However, Ms. Cochrane's present circumstances, including her financial situation, have resulted in neglect of the 3 children.
- [50] The court is convinced that the best interest of the children requires that they be placed with their father at this time. Mr. Smith has demonstrated that he is capable of taking care of the 3 children. With such placement the children are not being sent to a strange or unknown environment. They lived with their father from 2005 to 2007 and have expressed a wish to resume living with him. Furthermore, the issue of separation from the other siblings can be addressed by the imposition of generous visitation provisions.
- [51] However, the court is impressed to make a temporary order for approximately 6 months in the first instance. During this time Ms Cochrane has an opportunity to address the inadequate conditions in the home and the areas of neglect highlighted above. The court also suggests that she seeks to obtain a maintenance order against the delinquent fathers, so that the household will have the necessary funding. Counseling is also required during this time.
- [52] Accordingly, the court orders as follows:
1. The claimant, Mr. Smith, is granted temporary custody of the minor children: Jahvonte Shemarie Smith, Onia Avon Smith and Osarion Jamalie Smith until further order of the court.
 2. Ms Cochrane is granted visitation each weekend. Holidays and school vacations are to be divided between the parties. The parties are to submit a schedule for the court's approval.
 3. Both parties are to attend counseling with the Welfare Officer to address the animosity and lack of communication issues. In addition Ms Cochrane is to

receive counseling on parenting skills, including the use of proper disciplinary measures

4. The matter is set down for review on the 14th day of March 2014 at 9:00 am.
5. No Order for cost.



CLARE HENRY
High Court Judge
Antigua & Barbuda