

**IN THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
IN THE HIGH COURT OF JUSTICE
(DIVORCE)**

**CLAIM NO. BVIHMT 2015/0023
BETWEEN:**

GC

Petitioner/Applicant

and

LC

Respondent

Appearances

Ms. Asha Johnson for the Petitioner/Applicant
Ms. Charmaine Bunbury for the Respondent

2017: February 17, 23, 27
March 15

Family Law – Custody of Minor child – Powers of the Court – Welfare principles first and paramount consideration – Various factors to be considered - Present emotional and educational needs of child – Likely effect of change on the child- Capability of each parent - Wishes of the parents – Conduct of the parents – Parent failing to provide for child – Parent kept away from seeing child – Both parents demonstrating a real interest in child – Not a case where parties unable to communicate – Order of joint legal custody appropriate – One parent to have primary care and control – Other parent with challenges related to present day to day care of child - Whether graduated access order appropriate.

DECISION

[1] **RAMDHANI J. (Ag.)** This is application for ancillary relief during divorce proceedings and sought the custody of a child just over three years old born of the marriage between GC the Petitioner and LC, the Respondent.

[2] The parties were married on the 6th April 2011. The child LJC was born on the 9th September 2013. Certain unhappy differences arose even before the birth of the child, and on the 18th March 2015, the Petitioner presented a Petition to the court for the dissolution of the marriage on the ground that LC, the Respondent had behaved in such a way that the Petitioner cannot reasonably be expected to live with him. The Petition was uncontested even though the Respondent appeared in court, and the decree nisi was granted.

[3] The Notice of Application to proceed with application for ancillary relief filed on the 31st October 2016 sought the following orders

- (1) *That the Petitioner/Applicant be granted sole custody of the minor child of the marriage.*
- (2) *That the Respondent have supervised visitation with the child as follows:*
 - a. *Supervised visits between the age of 3 years to 10 years which shall include Mondays, Wednesdays and Friday between 4:p.m. to 6 p.m. and*
 - b. *From the age 10 years to 18 years the Respondent shall have overnight visits with LJC which shall include every other weekend and half of all school vacations.*
- (3) *The Respondent shall pay the monthly sum of \$450.00 for maintenance and educational expenses of LJC until such time as he reaches the age of 18 and thereafter for a minimum period of three years from the date of which he commences tertiary education.*
- (4) *That the Respondent pay half of all uninsured medical expenses of LJC until he reaches the age of 18 years and thereafter for a minimum period of three years from the date on which he commences tertiary education.*
- (5) *Costs and*
- (6) *Such further or other relief as the Court deems fit.*

[4] The Petitioner's application was resisted and by his answer the Respondent sought joint custody of the child.

[5] The Petitioner is a 33 years Trinidadian who is employed within the health sector. The Respondent is a 34 years old BVI national who was at the time of the marriage, a teacher, but is now self-employed.

[6] At the hearing, the Petitioner relied on her affidavit in support of the application. She also gave oral evidence and was cross examined. She also called two witnesses in support of her applications.

[7] The Respondent relied on his affidavit in answer dated 14th February 2017 and his oral evidence given in chief and in cross examination. He called no witnesses.

The Petitioner's Case

[8] The Petitioner claims that the Respondent is irresponsible. She contended that after marriage and during the time he was pregnant he was never supportive of her and was out most evenings coming home late. She says that it got to the point where she spoke to him about it, and when she was going to Puerto Rico to give birth to the child, she was forced to give him an ultimatum that if he did not attend the delivery that they were over as a family, and that she would leave and go straight to Trinidad after the birth. She said that just after the child's birth, her mother died in Trinidad and she was compelled to go there to sort out her mother's estate. She stated that she went to Trinidad with the child, and that even though the Respondent visited and spent some months during time she was there he hardly spent any time at home with them; he would be out late again on the pretext of doing business so that again she had to manage on her own taking care of herself and this time the infant. She said that during this time she used her own money to support herself and child. There was no intimacy between the parties after the birth of the child.

[9] She said that after he returned to Tortola, she did call on a daily basis, but that he only sent about \$100 every other week. She said that as far as she was concerned their marriage was over, so that when she eventually returned to Tortola in October 2014, for a new job, she did not tell him anything. She was prepared to live on her own with her child.

In her uncontested divorce petition, she had also found out at this stage that he was having a relationship with another person.

[10] She said they did not resume cohabitation; she lived with her child in an apartment. She did ask him to assist in the care of the child when she was on call for her job. He came several times, but he was not reliable and on one occasion, he came he was smelling of alcohol. She said that they got into an argument and she told never to return to her home in that condition. He did not come back she said.

[11] She said that she made arrangements for her child to attend a day care and pre-school. She informed him of this and he did visit the child on occasions. He said that he was disruptive to the school as he often came during the time that the child and other children were asleep. He got into an argument with teachers on one occasion. She became aware that he was attending the school with other persons, and that he often came smelling of alcohol. She said that after that incident, he did not return. That was early in 2016. She said that for all of last year she only got \$500.00 from him for maintenance of the child. She said that for many months he has not contacted the child and he has not paid any child support. She said that she found out that he was dismissed from his job because of his drinking, and that further she is not sure whether he has anywhere stable as he is often seen about town. It is for these reasons she believes that he has no stable environment and it would be harmful even if custody is shared as there is no communication between she and him. She states that at present she has moved on with her life and she is presently living with her boyfriend who has been caring for the child taking him to and from school and supporting her generally. She is effectively saying that her home environment is stable and the child welfare would be best served if an order as to sole custody is made in her favour.

The Respondent's Case

- [12] The Respondent on the other hand refutes any suggestion that he has not been a caring husband and father or that he is not responsible person with the capacity to ensure that his child's welfare is protected.
- [13] He states that it is not true that he was not supportive of his wife during the marriage and before the birth. He disputes that he was out all the time and that he was not there for her before the birth of the child. He accepts that there was an ultimatum given but that he believed that it was because she had already made up her mind to leave the marriage. He said that he went to Puerto Rico for the birth of the child. He said that he accepted that she had to go to Trinidad shortly thereafter on the death of her mother and to take care of her estate. He said they left in October 2013, and that that same December, he travelled to Trinidad and spend until early February 2014. He left just before Valentine's Day and even after he returned to Trinidad in February 2014 he caused gifts to be sent to the child and a blank cheque to delivered to her for her own use. (She did not use it). He said that he returned to Trinidad late February 2014 and stayed until June 2014 when he returned again to Tortola. He denied that he was not sending time with his wife and child in Trinidad, but did accept that there were times he was out late in Trinidad. According to him, he was trying to explore business options with certain persons. He said that during the time they were in Trinidad and he was in Tortola, he would call several times every day to speak with her and his son. He said that during October 2013 and October 2014, when he was in Tortola he sent \$100.00 every other week. He said that she had spoken to him about securing an apartment for all of them as she was returning soon. He said that he looked around but did not source any by the time that he heard that she and the child was back in Tortola. That shocked him and he rushed around and found her. They spoke and he realized that she wanted to live on her own. She eventually sourced her own apartment where she lived with the child. He said that he tried to keep in the child's life and offered to care for the child whenever he could and especially when she was on call during evenings for her job. He denied that he had been unreliable and that he had been under the

influence when he came to her home during that time. He accepted that she had to call for him one day and he had arrived late and she used this to tell him not to return.

[14] He said shortly after that he found out that she had placed he child in a day care and preschool center; he had not been notified or consulted. He said that he began to visit the school to see his son. He said that there was an open door policy but, he believed that the teachers had been turned against him as they were not happy about his visits. He said that they told him that he should not visit when the children were sleeping. He said that he was only able to visit during the times he visited because of his own lunch hours at work and the fact that he had to depend on others to take him to the school. He accepted that on one of these visits when the child had to be awoken, he and the teachers had an incident. He denied that he had attended the school ever under the influence of alcohol or even smelling of it. He said that after that incident he did not return to the school and that he has not seen his son since. He has accepted that he has not sent any money for his son during the last eight months but states that this is because he has been trying to avoid any troubles with the Petitioner. He accepts that he was let go from the last job but it had nothing to do with any alcohol issue but rather a confrontation with his boss because he was asking to be paid what he had earned. He states that the employer was charged with a criminal offence for having assaulted him. That matter is before the court. He states that he now works on his own and he has a business that he is working on. He earned He said that he is prepared to care for his son, and wants joint custody. He said that even though he is presently living with his parents and siblings, he is prepared to secure accommodations to take care of his son.

[15] He believes that the Petitioner has her 'own' family now, and wishes to have nothing to do with him and does not even want him to see his son as this would disrupt her own life. This is why the Petitioner is seeking to have sole custody, and it has nothing to do with his own conduct.

The Issues for the Court

- [16] The application has raised a number of issues, which are relatively straightforward. The court has to decide (a) what is the appropriate custody order to be made? And (b) what would be an appropriate maintenance order to make?
- [17] In deciding these issues the court has how the respective wishes and conduct of the parties will inform the orders to be made.

The Law and the Court's Findings

- [18] Section 44 of the Matrimonial Proceedings and Property Act, 1995 ("MPPA") gives the court a very wide discretion to make orders for the custody of children. In determining custody rights or the upbringing of the child, the court must have regard to the welfare of the child as the paramount consideration. Section 3 of the Guardianship of Infants Act Cap 270 of the Laws of the Virgin Islands states:

"Where in any proceedings before any Court the custody of upbringing of an infant ...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... is superior to that of the mother, or the claim of the mother is superior to that of the father."

- [19] Two points of relevance arise from this provision. First, it makes it clear that no right which had hitherto been given to the father by the common law is to be considered as being superior to any right of the mother. That also means that even though the child is male, no view that the father's claim is superior to that of the mother. This provision finds its source in section 1 of the UK's Guardianship of Infants Act, 1925 which sought in part to 'establish equality between sexes'. In the BVI, this provision has confirmed that these presumptions no longer apply in this jurisdiction.¹

¹ See also **J v C** [1970] A.C.668 citing page 702 **R v Clarke** (1857) 7 E & B 186, 198.

[20] Second, the provision compels the court to regard the welfare of the child as the first and paramount consideration. In deciding what is meant by the phrase: ‘...shall regard the welfare of the child being the first and paramount consideration, I am guided by the expression of principle by Lord MacDermott when he stated in **J v C**² that these words were ‘declaratory of the common law as it existed in 1925. He stated at pages 710 to 711:

“Reading these words in their ordinary significance... it seems to me that they must mean more than the child welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote process whereby, when all relevant facts, relationships, claims and wishes of parents, 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 interests of the child’s welfare as that term has now to be understood.

[21] In approaching my task under section 3 I am also guided by Lord MacDermott summary of the guiding principles where speaking of the comparable provision found at section 1 of the UK 1925 Act, he stated:

(1) ...

(2) In applying section 1, the rights and the wishes of the parents, whether unimpeachable or otherwise, must be assessed and weighed in their bearing on the welfare of the child in conjunction with all other factors, relevant to that issue;

(3) While there is not no rule of law that the rights and the wishes of unimpeachable parents must prevail over other considerations, such rights and wishes, recognized as they are by nature and society, can be capable of ministering to the total welfare of the child in a special way, and must therefore preponderate in many cases.

[22] The wishes of the parents will always fall within the general list of matters of the considered. It is always a presumption that the welfare of the child would be promoted with contact with the parents. This presumption of course would be rebutted where it is clearly shown that the conduct of one or the other is such that when taken into consideration with

² [1970] A.C. 686

other matters it is shown that the welfare principle would be best served if contact with the that parent is kept to a minimum or avoided altogether.³

[23] A court always has to bear in mind that one parent may simply wish not to allow the other parent any further contact with the child and may even be hostile to the other parent. It is not unknown that a parent may lose sight of the best interests of the child and focus instead on this need to keep the other one away. The point has been made that even implacable hostility of one parent does not inevitably prevent contact orders being made.⁴

[24] Speaking of this issue in the context of access, Sir John Arnold P in **Hereford and Worcester County Council v J.A.H**⁵:

*"The function of a court trying a contested access application must always be to put the interests of the child first and to consider whether, in the particular circumstances of the case, it is favourable from the child's point of view that there should be an order for access, and only if that is the case should the court come to a conclusion in favour of access. This is not a matter which should be influenced by the conception that the natural parent has a right to that access to the child. That right is a right which is the product of the court's decision, and that decision should only be made if it is demonstrated that the access asked for is favourable to the child and, in order to come to a conclusion upon that matter, the court is bound to pay regard, and substantial regard, in the balancing exercise to those factors which are relevantly put forward as factors militating against the conclusion that, in the particular case, access to the child is a desirable development in the interests of the child."*⁶

[25] In **Re K. D. (A Minor) (Ward: Termination of Access)** Lord Oliver made the following critical observations related to access by the natural parent:

"Parenthood, in most civilised societies, is generally conceived of as conferring upon parents the exclusive privilege of ordering, within the family, the upbringing of children of tender age, with all that that entails. That is a privilege which, if interfered with without authority, would be protected by the courts, but it is a privilege circumscribed by many limitations imposed both by the general law and, where the circumstances demand, by the courts or by the authorities upon whom the legislature has imposed the duty of supervising the welfare of children and young persons. When the jurisdiction of the court is invoked for the protection of

³ (See for instance **Re: C (a child: contact)** [2004] All ER D 367.

⁴ (See **Re J (A Minor) (Contact)** [1994] 1 FLR 729.

⁵ [1985] F.L.R. 530 at pages 533 to 534

⁶ Principles applied in this jurisdiction by Ellis J in **M v M** [2015] ECSCJ No. 33

the child the parental privileges do not terminate. They do, however, become immediately subservient to the paramount consideration which the court has always in mind, that is to say, the welfare of the child."

And later:

*"I do not find it possible to conceive of any circumstances which could occur in practice in which the paramount consideration of the welfare of the child would not indicate one way or the other whether access should be had or should continue. Whatever the position of the parent may be as a matter of law - and it matters not whether he or she is described as having a "right" in law or a "claim" by the law of nature or as a matter of common sense - it is perfectly clear that any "right" vested in him or her must yield to the dictates of the welfare of the child."*⁷

[26] At the end of it all the law is clear, the wishes or interests of the parents must give way to the welfare of the child.⁸ Where such access will contribute to the best interests of the child – in his or her development the courts will grant access to the non-custodial parent. A court in preventing access or limiting it must only do so where it is satisfied that there is a real risk that such access is likely to adversely affect the welfare of the child.

[27] The Act does not specify what matters the court should take into account in considering what would be in the best interests of the child. It has been submitted that as a matter of practice that the court should had have regard to the welfare checklist set out in section 3 of the Children 1989 (UK). For my own part I do believe that this checklist makes good sense in considering these types of matters.

[28] The welfare checklist comprises of the following matters, namely:

- (a) The ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- (b) His physical, emotional and education needs;
- (c) The likely effect on him of any change in his circumstances;
- (d) His age, sex, background and any characteristics of his which the court considers relevant;
- (e) Any harm he has suffered or is at risk of suffering;

⁷ These passages were also relied on by Ellis J in *M v M* [2015] ECSCJ No. 33

⁸ (See **Re O (Contact: Imposition of Conditions)** [1995] 2 FLR 124 at page 128

- (f) How capable each of his parents, and any person in relation to whom the court considers the question to be relevant, is of meeting his needs.

[29] I now turn to consider set out my findings of facts in so far as they are relevant to the issues at hand.

Findings of facts

[30] I believe the Petitioner when she stated that the Respondent did not provide marital support for her before the birth of the child, and that he spent much time out of the home late in the evenings. This continued well into her pregnancy and it was the reason she decided that the relationship was at that stage going bad. She began to withhold intimate privileges just after conception because of his conduct. This led to her giving him that ultimatum that if he did not attend to the birth of the child in Puerto Rico she would take her child and return to Trinidad. It is likely that she counted on him not turning up as she was mentally already out the marriage. He did in fact turn up.

[31] After the birth of the child, the Petitioner had gotten to the point where she wanted out of the marriage. Her mother's death shortly in Trinidad provided a fateful opportunity for her to leave with the child to Trinidad just weeks after the child's birth to Trinidad. She had not yet told the Respondent that she was out of the marriage and so he, believing that he still was in a viable marriage came up to Trinidad for Christmas 2013 to be with his family, and stayed there until early February 2014.

[32] Again, it seemed that he wanted to be around but did not wish to be burdened with responsibility. I believe that he did not spend much time with the mother and the child whilst in Trinidad and he spent much time away from the home evening during late evenings. He returned to Trinidad late February 2014 and stayed until June 2014 but his conduct was the same. This court believes that he cared for the Petitioner and the child and wanted to keep his marriage. This court however is of the view that he was unable to endear himself to her and to restore marital relations by his own inclination to spend much

time away from home and perhaps her disinclination to stay married to him.. He said that it was for business reasons in Trinidad but there was really nothing to support this as it seems that nothing came out of any of that.

[33] This court finds that he did buy gifts for her and give her blank cheque during Valentine day in 2014 when he was in Tortola, and that during July to October 2014 he sent \$200 every other week. During these times he called to speak to the child at least three to four times a day. I am inclined to think it might have even been as much as seven times a day as he claimed.

[34] When he returned however, she had gotten to the point of deciding that she would inform him that it was over, and she began to ask him to source an apartment for 'her'. I find that she told him that she was returning with the child to live on their own. It seemed that he was hoping that this was not so.

[35] He was taken by surprise when he discovered that she had returned with the child. When he accosted her, she confirmed that she was moving on and she eventually got an apartment which she paid for from her own monies. She was now employed with the BVI Health Services.

[36] She had to ask him to assist her in taking care of the child when she was on call for her job. He came several times, but very early into this new arrangement, he did not show up on one occasion as he had promised he would. This led to an argument during which he told her that he got more comfort from the streets than he did from her. The next time he visited, he was under the influence of alcohol. This led to her telling him that he must not return whenever he is in that state. (This court do not accept the evidence of his former employers and will disregard it. Even so, this court believes the Respondent about his drinking and the teacher that he came to the school smelling of alcohol. This court considers that he has issues with alcohol.)

[37] He choose not to return to her home. Thereafter he began to visit the child at the school. The school has an open door policy which means that they encourage parents to visit their children. There were times in the day care/school day however, when the children were either in lessons or they were sleeping. The very young children were often conditioned to nap after lunch every day. All of these children would be asleep at this time. It was at this time that the Respondent turned up. Whenever he came the teachers would wake his child so that he could visit and spend time. I believe the teacher who said that the school was not happy about this, because, it was disruptive and it led to other children waking up at that time. They spoke to him about it and explained it to him. To the court he explained that these were the only times he could visit having regards to his job and the availability of others to give a ride. His case was that he was unable to continue visits at the home.

[38] This court finds his explanations to be without merit. The Petitioner's evidence was that she told him not to return to her home when he was under the influence. This court accepts this evidence. He was not prepared to deal with that, and this court also accepts that he turned up at the school smelling of alcohol. It seems that he has an issue with this. It is likely that this caused him not to appreciate the disruption that he was causing to the school when he visited during those times and to leave him with the impression that nothing was wrong with him visiting during those times and requiring that teacher wake his child. In fact even now he does not seem to understand that this was a sensible policy that the school had in place for young children. Anyone who considers this would realize that infants and toddlers need to sleep in the day, preferably after lunch. In any event, it is good for the health and development that they develop and stay to schedule rest period and napping. He seem unable to grasp this.

[39] He has convinced himself that the teachers and school acted deliberately to prevent him from seeing his child. He blames the Petitioner for this. She did write to the school after the incident in June 2016 when he and the teachers had a confrontation. She asked them to not let him attend during lesson time. This court is of the view this was not unreasonable on her part. She had raised an issue with him about his dinking but she had not stopped

him at all from visiting the child. She knew he had been visiting at school and it was not until this incident that he wrote the school.

[40] After this incident at the school, he limited his visits to once or twice a week. He stated that he did not want to get into trouble. The divorce proceedings were pending at this time and the Petitioner had clearly moved on with her life, as her present partner had moved in to live with her. That too may have caused him to stay away and reduce contact. It is significant that during this period he also did not provide any financial assistance towards the upkeep of the child.

[41] I do not accept this explanation that it was simply her not responding to him. There are many ways he could have found to provide financial support for his child. He failed at this. I have no doubt that he cares about this child in his own way but it does not seem that he has quite worked out what is necessary for him to do if he is capable of caring and supporting such a young child.

[42] This court had to enquire on several occasions if he understood what it meant to have joint custody of a child and even went as far as enquiring if he understood what was necessary for the day to day care of this child. His answers were all broad and general.

[43] This is a Respondent who does not live with the child, and is seeking joint custody. Nowhere in his evidence in chief does he state what arrangements are in place to take care of this child on a day to day basis. Matters such as residence and daily care had to be extracted from him in cross examination. He said that he was living with his parents and his siblings and he had a room. He actually seemed surprised when he was asked about possible sleeping arrangements for the child. In my view, it came to him while he was giving evidence that he might have to move out and find an apartment so that he could raise his child. It is not that this must be so, as many children may be quite properly raised in large household with grandparents and extended family members. What is significant however, is that this court is convinced that the Respondent has not thought this through and seems ready to simply provide answers which he believes he should give.

[44] I am of the view in this case, that the Petitioner did take steps to keep him away from herself and her child. She is convinced that he would not be a reliable caregiver and that he has an alcoholic problem. She is convinced that he is not reliable and in fact would be disruptive to the child life to the point which would be harmful to the child. She has prevented him from participating in the major decision involving this child.

[45] He on the other hand is convinced that he can care for this child and should be allowed to share jointly both legal and physical custody. There is no doubt in my own mind he cares in his own way for this child. Much of his conduct, however, falls short of doing those day to day practical things which is required of a responsible father. That said there were times when he has gone to lengths to see and visit his child. Much of that might have been to also see the Petitioner, but there were times when he seemed to genuinely care about his child.

The Child's views, Emotional and Education needs

[46] The child is but three years old, and has spent all of this life in his mother's care. The time that the Respondent spent around him was minimal. Even when he visited in Trinidad, he spent much of that time out of the home and came home late evenings. He seemed more inclined to be seen as a father without wishing to put the time in. This court has not seen this child. Neither of the parties has requested this. The court itself did not think that having regards to his age, that this would serve any useful purpose.

[47] I am of the view that his present emotional needs are being catered for by Petitioner and her present partner. It is likely that as he grows, he may have the need for his natural father but this can always be catered for access and rights of visitation.

[48] His educational needs are being met. His mother has placed him in a day care. He has been there for more than a year now. She attends parent/teacher meetings for him. From all the court has heard he seems to be in a stable home environment with a parent who cares deeply for him and who has shown that she is quite competent to take care of his

wants and needs. Whilst at his young age, he might be able to deal with changes to his life, and change would of course be disruptive to his life. Such disruptions can in cases be managed as they in turn work out in the best interests of the child.

Joint Custody

[49] An order of joint custody was once regarded as an exceptional order. Today, it is simply an order which the court is empowered to make in keeping with the welfare of the child.

[50] The Petitioner has submitted that such an order is not appropriate in this case, as the Respondent has shown that he is not responsible and that the relationship between him and the Petitioner is such that that there is no reasonable prospect that the parties would be able to make decisions together.

[51] The court was asked to consider a number of decisions setting out relevant considerations on this issue. In **Jussa v Jussa**⁹ Wrangham J noted at page 884H:

“For my own part, I recognize that a joint custody order with care and control to one parent only is an order which should only be made where there is a reasonable prospect that the parties co-operate.”

[52] A regional decision referred to was **Shuric Merchant v Tameika WilLJCs**¹⁰ in which Leigertwood-Octave J stated at paragraph 32:

“In joint custody, both parties have equal rights and powers and in case where they do not get along, exercising those rights and powers can easily lead to upheaval in their child’s life. Simple matters are in many instances blown out of proportion, decisions as to the choice of school see the parents in full battle cry... Joint custody works best when the parents get along. Shuric and Tameika do not get along and there are many matters.

[53] As far as joint custody is concerned, I am not convinced that these parties are unable communicate with each other. The Respondent’s petulant stance is to be put in context of the Petitioner’s own resistance to his presence and her efforts to keep him away. There

⁹ [1972] WLR 881

¹⁰ Claim No. 85 of 2009 SKN

was once good communication between the parties, even when the Petitioner had made up her mind to move on, she was still calling for him. He has shown to this court that he is interested in the child, travelling to Trinidad twice between December 2013 and June 2014, and calling several times on a daily basis to speak to the child when he was not. He sent money during the times he was not. In 2014, when he was in Tortola, he sent gifts for the child and the Petitioner on Valentine's Day. He went as far as sending a blank cheque for her use.

[54] This Court has concerns about his ability to act responsibly with regards day to day care matters related to his child. His visits to the school and the incident has informed this court that he has certain challenges regarding certain development needs of his child. He is not concerned about school fees or parent teacher meetings. He also seems not to be quite ready to have the hands on daily care of his son.

[55] I have not been able to find that he has is an alcoholic. That said however, even though I have discounted the evidence from his former employers as being inadmissible, I do believe the Petitioner and the teachers that he has come 'smelling of alcohol' and that he has been under the influence at times when he is expected to be prepared to care for his infant child. This child is still at a very young and tender age and this has raised some concern for the court.

[56] That said however, this is not a man who has behaved in such a way that he should be kept out of this child's life entirely or not be allowed to participate in important decisions related to the child's life.¹¹ It is also likely that having regards to his interests in the child that he would soon regularize his approach to his child's care. These are all matters inform the custody order I propose to make especially as it relates to the graduated access to the child.

¹¹ I have noted the approach taken in *Lianna Jarecki v Elvet Meyers BVIHMT No. 2007* and *Petra Cooper (nee KLVACOVA) v Peter Cooper BVIHMT No. 44 of 2011*.

[57] As regards his earnings and financial contribution, I find that he was not entirely truthful about that.

[58] With respect to the latter, he stated in his affidavit that he gave the Petitioner money 'throughout' to help support his son. Under cross-examination he said: "There was one week I gave her 1,500. I gave her 500 the first of the week and then towards Friday I gave her another thousand. There was another time I gave her 300, another time I gave her 500, then another time I gave her another 600, 700. Another time I gave her 1,100. And every single time I used to go to her job and give it to her." This was never put to the Petitioner when she gave evidence and having regards to how these answers were given, I am of the view that I cannot rely on this evidence.

[59] There was also some contradiction in his evidence related to his earnings. In his affidavit he stated that he currently makes '\$700.00 to \$800.00 per month. In cross examination, when he was asked what was his 'average take home last several months' he said about \$1500.00 to \$1800.00. Immediately after that he said that was for every three weeks. He actually goes on to say that he sometimes takes home more. When he was reminded about his statements in his affidavit he says that the '\$1500.00 to \$1800.00' was what he earned three months ago and what was in his affidavit was what he was earning now. In the view of the court he was clearly not being truthful about his earnings. I am of the view that his present earnings is closer to \$1500.00 I am not prepared to find that his earnings are any higher as I discern a tendency on his part to inflate his own prowess.

[60] With this in mind, I have considered that he is prepared to make the following financial contributions to the child's support, namely that he is willing to pay half of the child's uninsured medical expenses, half of his school fee and \$300.000 per month for maintenance.

[61] This is the order of the court:

1. Joint legal custody of the minor child LJC born on the 9th September 2013 is granted to the parties. The Petitioner shall have primary care and control of the child.
2. The Respondent shall have access in the following manner:
 - (a) He shall have supervised visits with the child during the period the child is between the age of 3 years and 8 year old. This shall include Mondays, Wednesdays and Fridays between 4 p.m. and 6 p.m. He shall be allowed to visit the child on the child's birthdays and special holidays during this period.
 - (b) The Respondent shall have overnight visits with the child during the period when the child attains 8 years until he is 18 years old. This shall include every other weekends and half of all school vacations.
3. The respondent is to pay to the Petitioner the monthly sum of \$400.00 for maintenance and educational expenses of the child until such time as he reaches 18 years of age and thereafter for a minimum period of three years from the date when he commences tertiary education.
4. The Respondent is to pay to the Petitioner half of all uninsured medical expenses for the child until such time as he reaches 18 years of age and thereafter for a minimum of three years from the date when he commences tertiary education.
5. The Parties shall bear their own costs.

[62] The court wishes to express its gratitude to the attorneys for their assistance in this matter.

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Darshan Ramdhani
High Court Judge (Ag.)