

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2016/0211

BETWEEN:

SHERVON LEWIS

Claimant

and

INDIRA BUTLER

Defendant

Appearances:-

Ms. Derriann Charles and Ms. Stacey Ann Aberdeen for the applicant Claimant.
Mr. Nassibou Butler for the Defendant.

2017: July 14th

JUDGMENT

- [1] **WARD, J.:** By Fixed Date Claim form the claimant seeks an order that he be granted joint custody and access of a minor child born on the 22nd November, 2005 out of a relationship he shared with the defendant between 2002 and 2005 while they were both pursuing studies at Florida Memorial University.
- [2] The applicant/defendant has taken a point in limine asserting that the claimant is not properly before the court. It is said that by commencing this claim by Fixed Date Claim Form the claimant is in breach of Part 8, CPR 2000 which precludes matters relating to access and joint custody of a child from being commenced in this way.
- [3] The defendant buttresses this submission by referencing the provisions of Part 2.2(3)(a) which expressly provides that the CPR 2000 does not apply to family

proceedings. Therefore, counsel submitted, that the Fixed Date Claim should be struck out as an abuse of process. In support of this proposition the applicant/respondent relies on the authority of **Alexandros Evangelidis v Bernadette Auguste**¹

- [4] It is said that the claimant's recourse ought to have been by way of application to the High Court for directions on rules of procedure.
- [5] In oral and written submissions, the claimant submitted that Section 16 of the Guardianship, Custody and Access to Children Act gives standing to a father or mother to make an application to the court for an order for custody, access and maintenance.
- [6] It is said that the section does not specify the exact nature of the application, thus the Fixed Date Claim Form is an appropriate process to commence proceeding of this nature.
- [7] The claimant further submits that the court has the jurisdiction under section 34 of the Guardianship, Custody and Access to Children Act to give directions.
- [8] While conceding that Part 8, CPR 2000 stipulates the type of matters that may be commenced by way of Fixed Date Claim Form, the claimant submits that the defendant has not challenged the claimant's application in the right way, which the claimant submits should be an application to strike invoking the court's inherent jurisdiction.
- [9] The claimant submits that it would be unjust and detrimental to the good administration of justice, would cause substantial hardship and substantially prejudice the rights of the claimant to entertain the application to strike at this late stage.
- [10] The claimant relies on the authority of **Hannigan v Hannigan**² for the proposition that a court will not strike out an application due to a procedural defect.

¹ SLUHCV2011/1118

² [2000] All ER (D) 693 (CA)

[11] In response, learned counsel for the defendant, Mr. Butler maintained that the Guardianship, Custody and Access to Children Act does not avail the claimant because by virtue of Section 8(2), the mother of a child born out of wedlock is deemed to be the sole guardian of the child unless and until the paternity of the child has been registered pursuant to the Registration of Births, Deaths and Marriages Act.

[12] He submitted that the court cannot take cognizance of any assertions of paternity in the supporting affidavits of the parties and cited **Wendy Hilda Carter nee Marsden and Michelle Amanda McCree**³ in support of this proposition. Accordingly, submits counsel for the defendant, the claimant lacks the status to bring the application before the court.

Discussion

[13] It is uncontroversial that this application before the court is in the nature of family proceedings.

[14] Part 2.2(3)(a), CPR 2000 expressly provides that the Civil Procedure Rules do not apply to family proceedings. This rule was the subject of interpretation in **Alexandros Evangelidis v Bernadette Auguste**⁴ which bears similarities to the instant case.

[15] In that case the claimant filed a Fixed Date Claim seeking an order granting the claimant and defendant joint custody of their minor child and granting the claimant reasonable access to the said child.

[16] The defendant filed an application seeking to strike out the claim. The claimant challenged the defendant's right to make such an application at that stage of the proceedings.

[17] Belle, J reviewed the statutory framework provided in St. Lucia for claims of that nature and concluded that the claim should have been brought in the District Court

³ No. 43 of 2000

⁴ SLUHCV2011/1118

Constituted as a Family Court. He therefore struck out the Fixed Date Claim as an abuse of the court and declined to exercise an inherent jurisdiction.

[18] In Saint Christopher and Nevis the High Court undoubtedly has the jurisdiction to entertain an application by a father for custody and access to a child pursuant to the Guardianship, Custody and Access to Children Act, No. 39 of 2012.

[19] However, it is equally clear to me that the Fixed Date Claim is not the means by which such an application may be made since CPR Part 8.1(5) restricts the nature of proceedings that may be commenced in this way. Family proceedings are excluded.

[20] When read with Part 2.2(3)(a) the combined effect of their purport leads ineluctably to the conclusion that a claim of this nature may not be commenced by Fixed Date Claim.

[21] The question remains: does the claimant have *locus standi* to make an application for an order for custody and access to a child?

[22] The Guardianship, Custody and Access to Children Act makes provision at section 16 for an application to be made to the court for custody and maintenance of a child.

[23] Section 16.(1) provides:

“(1)The Court may on the application of the father or mother of a child (who may apply without next friend) or of an interested party make such Order regarding

(a) The legal custody of the child; and

(b) The right of access to the child by the applicant or any other person”

“Father” is defined in the interpretation section as meaning a biological or adoptive father.

[24] In my view, on a proper construction of this section there is no requirement that an applicant must establish paternity before he can make an application to the court. It would be strange if this were so when a mere interested party would have *locus standi* to bring an application.

[25] The defendant invokes section 8(2) to argue that the claimant must be declared the father before proceedings may be brought against or by the person claiming to be the father.

[26] Section 8 provides:

“(1) Unless the Court otherwise orders the following are joint guardians of a child

- (a) The father of the child;*
- (b) The mother of the child.*

(2) Subject to the provisions of this act, the mother of a child born out of wedlock shall be the sole guardian of the child unless and until the paternity of the child has been registered pursuant to the Registration of Births, Deaths and Marriages Act.”

[27] In my view, section 8(2) is not intended to regulate the procedure by which access to the court is secured nor to prescribe the persons who are entitled to bring an application for custody of a child. It is merely declaratory of those persons who may automatically be entitled to guardianship of a child unless the court orders otherwise.

[28] Accordingly, I am unable to accept the submissions of learned counsel for the defendant that this section makes it a condition precedent that the claimant must establish paternity in order to have *locus standi* to make an application for custody and access under section 16.

[29] It appears to me that the defendant does not in her affidavit in response deny that the claimant is the father of the child; indeed she admits it. Even if this admission may not suffice in law to establish paternity, which it is not necessary to decide at this point, they certainly suffice to demonstrate that the claimant is at the very least an interested party within the meaning of section 16.

[30] In my view the claimant therefore has *locus standi* to move the court. The question whether he will ultimately succeed in obtaining the orders sought may depend on whether he can establish paternity but that is not the issue that engages the court at this stage.

[31] In view of the conclusions I have reached, the only remaining question is: what is the procedure by which the court may be moved?

[32] It is accepted that while the Guardianship, Custody and Access to Children Act provides that an application may be made to the High Court, the exact procedure by which this may be achieved is ill defined.

[33] Part VII of the Act deals with jurisdiction and procedure among other matters. Section 34 provides:

“Rules may be made in the manner prescribed under the West Indies Act or the Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act relating to the procedure of the High Court under this Act.”

[34] No such rules have been enacted. The Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act provides that in default of local provisions relating to practice and procedure, the jurisdiction of the High Court shall be exercised as nearly as may be in conformity with the procedure, law and practice in England. Section 16 of the Guardianship, Custody and Access to Children Act mirrors section 9 of the then UK Guardianship of Minors Act.

[35] It has been said that in the pursuit of justice procedure is a servant not a master.

[36] It therefore falls to the court to give directions as to how to proceed.

[37] **IT IS HEREBY ORDERED:**

1. The Fixed date Claim is struck out as an abuse of the process of the Court;
2. The claimant is at liberty to file an originating summons supported by affidavit.
3. There be no order as to costs.

Trevor M. Ward, QC
Resident Judge

By the Court

Registrar