IN THE COURT OF APPEAL OF BELIZE AD 2015

CIVIL APPEAL NO 3 OF 2013

ABRAHAM TECK Appellant

v

KEILA TECK Respondent

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BEFORE

The Hon Mr Justice Samuel Awich	Justice of Appeal
The Hon Mr Justice Christopher Blackman	Justice of Appeal
The Hon Mr Justice Murrio Ducille	Justice of Appeal

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M Balderamos-Mahler for the appellant.
M Trapp-Zuniga for the respondent.

October 14, 2015 and March 18, 2016.

AWICH JA

[1] I have read in draft the judgment of Blackman JA. I concur entirely.

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AWICH JA

BLACKMAN JA

[2] The primary issue on this appeal is the sole custody order of the infant child of the marriage in favour of the respondent mother made by **Benjamin CJ** on November 13, 2012. The other concerns relating to maintenance for the respondent mother and summer vacation access would also be addressed.

Background to the Appeal.

[3] In December 2011, in Action No. 187 of 2011 Mrs. Teck (the respondent) petitioned for the dissolution of her marriage on the grounds of the respondent's adultery and/or cruelty, maintenance for the child and self, sole custody of the child, Amali Teck, with access to the appellant father, and costs.

[4] In his Answer the appellant asked that the prayers as set out in his wife's Petition be dismissed, cross-petitioned on the ground of his wife's cruelty, and sought joint custody of the child of the marriage with the child continuing to reside with the mother and with communication, access, and visitation with the child of the marriage being granted to him on such terms as the court should deem just.

[5] Prior to the divorce hearing on February 2, 2012, the respondent abandoned her prayer for dissolution on the ground of her husband's cruelty and Mr. Teck withdrew his cross-petition. As a result, the Decree Nisi was granted on that day, and made absolute on March 23, 2012.

[6] On February 28, 2012 the respondent by Summons sought an Order for legal custody of the child of the marriage with access to the appellant father on alternate Saturdays and Sundays from 9:00 a.m. to 6:00 p.m. each day and costs. In his response, the appellant filed an Affidavit in which he repeated the prayers set out in his Answer and again asked for joint legal custody with the child continuing to reside with the mother and with open or liberal communication, access and visitation being granted to him.

[7] After a further exchange of affidavits, the matter was heard by **Benjamin CJ** on May 15, 2012 with closing submissions on October 5, 2012, after which the learned judge indicated that he would give his decision on Friday October 19, 2012.

[8] On November 13, 2012 the learned Chief Justice issued an Order in the following terms:

(a) *Custody of the child, AMALI TECK, is granted to the Petitioner:*

(b) The Respondent shall have access to the child on the following terms:

(i) On alternate weekends on Saturdays from 9:00 a.m. to 6:00 p.m. and/or on Sundays from 9:00 a.m. to 6:00 p.m.;
(ii) Telephone access after school hours on school days up to 9:00 p.m. and between 6:30 a.m. and 9:00 p.m. on days other than school days;
(iii) For two (2) weeks of the child's Christmas vacation, such period to include the Christmas public holidays for 2012 and every other year thereafter and to include New Year's Day for 2014 and every other year thereafter;
(iv) for one (1) week of the child's school Easter vacation;
(v) on the child's birthday in 2013 and each alternate year thereafter;
(vi) For Father's Day in each year notwithstanding paragraph a. above;
(vii) For the birthday of the Respondent in every year.

3. The Respondent shall pay the sum of $1,250.00 for the maintenance of the child commencing on the 30th day of September, 2012 and said sum shall be paid on the last day of each month until the child attains eighteen (18) years.

4. The Respondent shall pay the sum of $1,750.00 per month for the maintenance of the Petitioner commencing on the 30th day of September, 2012 and said sum shall be paid on the last day of each month.

5. The Respondent shall pay all tuition fees and other school expenses for the child commencing forthwith.

6. Liberty to both parties to apply regarding paragraph 2 above (access).

7. Costs of the Petitioner to be taxed, if not agreed.

[9] By notice dated January 30, 2013 Mr. Teck appealed the decision and order of the learned Chief Justice in relation to the orders (a), b(i), 3, 4, 5 and 7 as shown above,

as well as failure to provide for access during the summer vacation. The grounds of appeal advanced in support of the appeal, are, inter alia:

> *(1) The learned Chief Justice erred in law or acted upon a wrong principle when he made an Order granting sole custody of the child of the marriage to the Respondent, particularly as the evidence was not sufficient to justify or warrant such an Order and particularly as the law and practice in the jurisdiction and the application of same to the facts at hand would lead to an Order of joint custody.*
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> *(2) The learned Chief Justice erred in law or acted upon a wrong principle when he made an Order for the Appellant to have access with the child of the marriage on alternate weekends during daytime hours only, particularly as the evidence was not sufficient to justify or warrant such an Order and particularly as the Appellant was ordered to have access for two weeks during the Christmas holidays and one week during the child's Easter break.*
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> *(3) The learned Chief Justice erred in law or acted upon a wrong principle when he made an Order for the Appellant to have access on alternate weekends on Saturdays "and/or" Sundays, which could create uncertainty and would unfairly leave the question of the days of access and application of the Order within the discretion of the Respondent.*
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> *(4) The learned Chief Justice erred in law or acted upon a wrong principle when he ordered the maintenance sum for the child of the marriage, namely $1,250.00 per month plus all tuition and other school expenses, such sum being excessive and unreasonable based on the evidence and facts presented to the court and the means and circumstances of the Appellant.*
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> *(5) The learned Chief Justice erred in law or acted upon a wrong principle when he refused for the Appellant to lead oral evidence as to his means, expenses, and financial circumstances regarding the maintenance being sought by the Respondent.*

(6) Further, or in the alternative, that the decision of the learned Chief Justice was unreasonable and could not be supported having regard to the evidence before the Court, including the following:

(a) The evidence before the court that the child was born in wedlock.

(b) The evidence before the court that the Appellant was a good father who provided for his child and cared for his child.

(c) The evidence before the court that both the Appellant and Respondent worked outside of the home for most of the marriage and both shared parental responsibility for the child.

(d) The evidence before the court that the child resided with both parties until the time of separation, namely April of 2011.

(e) The evidence before the court that both parties communicated regarding the child and both shared parental responsibility for the child even after separation of the parties.

(f) The evidence before the court that the Appellant was always an integral part of the child's life and wished to continue doing so.

(g) The evidence before the court that the Appellant and Respondent were able to communicate and cooperate regarding the child.

(h) There was no evidence before the court to suggest any harm or risk of harm to the child by the grant of joint custody or overnight weekend access.

(i) There was no evidence before the court to justify the learned Chief Justice granting sole custody to the Respondent or ordering alternate weekend access during daytime hours only or for Saturdays "and/or" Sundays.

(j) There was not sufficient evidence before the court to justify the excessive maintenance sums ordered for the child of the marriage and the Respondent.

(7) The decision of the learned Chief Justice was against the weight of the evidence presented to the Court.

(8) The decision was such that a court viewing the circumstances reasonably could not properly have so decided.

[10] Regrettably, although more than three years has elapsed since the Order of November 13, 2012, there has been no written decision by the learned Chief Justice to enable this Court, and more importantly, the parties, to understand the rationale underpinning the several orders listed above. The multitude of the grounds of appeal is a direct consequence of the fact that no judgment has been rendered to explain the orders. Further, the several orders made were also imprecise and led to arguments between the appellant and the respondent.

[11] **Lord Phillips of Worth Matravers M.R.** remarked at page 388 in the opening paragraph of the English Court of Appeal decision in the conjoined appeals of ***English v Emery Reimbold & Strick Ltd, DJ & C Withers (Farms) Ltd v Ambic Equipment Ltd and Verrechia (trading as Freightmaster Commercials) v Commissioner of Police of the Metropolis*** [2002] 3 All ER 385, that in ***Flannery v Halifax Estate Agencies Ltd*** [2000] 1 All ER 373, [2000] 1 WLR 377 the court allowed an appeal on the sole ground that the judge had failed to give adequate reasons for his decision. This was despite the fact that his judgment was 29 pages in length. The trial had involved a stark conflict of expert evidence. The judge had preferred the expert evidence of the defendants to that of the plaintiffs, without explaining why. As a result, a retrial was ordered. In November 2012, **Lord Neuberger**, President of the Supreme Court in delivering the First annual BAILII Lecture commented that:"*Judgments are the means through which the judges address the litigants and the public at large, and explain their reasons for reaching their conclusions. Judges are required to exercise judgement - and it is clear that without such judgement we would not have a justice system worthy of the name - and they give*

their individual judgement expression through their Judgments. ***Without judgment there would be no justice. And without Judgments there would be no justice, because decisions without reasons are certainly not justice: indeed, they are scarcely decisions at all."*** (emphasis added)

[12] We adopt without reservation the remarks of **Lord Neuberger** cited above as well as the comments of **Henry LJ** in ***Flannery*** [2000] 1 All ER 373 at page 377, [2000] 1 WLR 377 at page 381 on the general duty to give reasons:"(1)*The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties—especially the losing party—should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in Ex p Dave) [1994] 1 All ER 315) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case ... (2) The first of these aspects implies that want of reasons may be a good self-standing ground of appeal. Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself."*

[13] Notwithstanding the temptation of adopting the foregoing observation of **Lord Phillips of Worth Matravers M.R.** of allowing the appeal on the sole ground that the judge had failed to give adequate reasons for his decision, we consider doing so would be a dereliction of duty and a denial of due process as *the parties—especially the losing party—should be left in no doubt why they have won or lost*.(see ***Flannery*** supra).

The Custody Issue

[14] Against the unsatisfactory state of affairs recited above, we heard the appeal on October 14, 2015, as we considered that it was harmful for custody and maintenance of the child to remain subject to arguments and bitterness for three years and counting.

[15] Mrs. M. Mahler-Balderamos Counsel for the Appellant submitted that the main issue for determination was whether the court should have granted an order for sole custody as opposed to an order for joint custody.

It was her contention that the learned Chief Justice had erred in law or acted upon a wrong principle when he made the Order granting sole custody of the child of the marriage to the Respondent, particularly as the evidence was not sufficient to justify or warrant such an Order. Moreover, the law and practice in Belize and the application of the same to the facts of the instant case should have led to an Order of joint custody. The evidence before the court was that the Appellant was a good father who provided for his child and cared for his child with the child residing with both parents until they separated in April of 2011. Counsel further stressed that the appellant had always been an integral part of the child's life and wished to continue doing so and in any decisions regarding her welfare.

[16] Mrs. M. Mahler-Balderamos submitted that the applicable law in Belize relating to children and their status, rights and responsibilities is the Families and Children Act, Cap. 173 of the Laws of Belize (The Act). Section 3 of the Act provided that the guiding principles in the making of any decision affecting a child are the principles as set out in the First Schedule to the Act. Those principles as set out in paragraph one of the FIRST SCHEDULE of The Act are that:

> "1. *Whenever the state, a court, a Government agency or any person determines any question with respect to -(a) the upbringing of a child; or (b) the administration of a child's property or the application of any income arising from it;* ***the child's welfare shall be the paramount consideration.(emphasis added)"***

[17] It was further noted that at paragraph 3 of FIRST SCHEDULE that in determining any question relating to circumstances set out in subparagraphs (a) and (b,) of paragraph 1, the court or any other person shall have regard in particular to- (a) the ascertainable wishes and feelings of the child concerned considered in the light of his or her age and understanding;(b) the child's physical, emotional and educational needs;(c) the likely effects of any changes in the child's circumstances; (d) the child's age, sex, background and any other circumstances relevant in the matter; (e) any harm that the child has suffered or is at the risk of suffering; (f) where relevant, the capacity of the

child's parents, guardians or others involved in the care of the child in meeting his or her needs.

[18] Mrs. Balderamos further submitted that the learned Chief Justice did not properly apply the factors as set out by law to the facts that were before the court. In particular, she noted that at the time of trial, there had been no order for any Social Inquiry Report to be undertaken nor had the child been interviewed by the court to ascertain the wishes and feelings of the child as stipulated at paragraph 3(a), shown in the preceding paragraph. Counsel further submitted that the provisions of sections 20 and 30 of The Act reinforced the principle that the court in any proceeding before any court regarding the custody of the said child, should regard the welfare of the child as the first and paramount consideration. In the circumstances of the instant matter and the evidence which had been led to as to the father's interest and commitment to his daughter, Counsel urged that the order by the learned Chief Justice granting sole custody to the respondent mother, should be set aside, and the appropriate order to be made, should be that of joint custody, with care and control to the respondent mother, with reasonable access to the appellant father.

[19] In support of her submissions, Counsel cited a number of authorities which affirmed the principle of an order for joint custody, with care and control to the mother, with reasonable access to the father. See ***Plant v. Plant*** (1982) 4 FLR 305; ***Caffell v. Caffell*** [1984] FLR 169; ***Riley v. Riley*** (1986) 2 FLR 429 and the Belizean Supreme Court decision in ***Taslim Ackerley v. Robert Ackerley*** Action No 205 of 2009.

[20] In her rebuttal, Mrs. Zuniga Counsel for the respondent submitted that the evidence before the court was sufficient to justify the learned trial judge granting sole custody of the child of the marriage to the Respondent as the affidavits of the respondent filed on her behalf, detailed evidence that clearly impressed the learned Chief Justice and led to him exercising his discretion to grant sole custody to the respondent. Moreover, the trial judge had had the benefit of seeing the demeanour of both parties and the rigorous cross examination of the respondent mother by counsel for the father. Consequently, Counsel submitted that it could be supposed from the Order that the learned Chief Justice found her to be a credible witness. Counsel

referred to the observations of **Carey JA** in CIVIL APPEAL NO. 12 OF 2001 ***RUPERT RITCHIE and BARRINGTON WRIGHT v RAQUEL RODRIGUEZ and RISELA RODRIGUEZ*** (by next friend Adi Rodriguez) where he had adopted, with approval, the statement in ***Watt or Thomas v. Thomas*** [1947] A. C. 484 that:

> ".. *When a question of fact has been tried by a judge without a jury and it is not suggested that he has misdirected himself in law, an appellate court in reviewing the record of the evidence should attach the greatest weight to his opinion, because he saw and heard the Witnesses, and should not disturb his judgment unless it is plainly unsound. The appellate court is, however, free to reverse his conclusions if the grounds given by him therefor are unsatisfactory by reason of material inconsistencies or inaccuracies or if it appears unmistakably from the evidence that in reaching them he has not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight and bearing of circumstances admitted or proved. . ."*

[21] It should be said that the above statement in ***Watt or Thomas v. Thomas*** has no application to the instant case, in that there is no judgment of the court for which this court or any other, for that matter to *attach the greatest weight to his opinion*. If, as the citation in ***Watt*** states that an *appellate court is, however, free to reverse his conclusions if the grounds given by him therefor are unsatisfactory by reason of material inconsistencies or inaccuracies*, a fortiori, that Court is also free to reverse orders made in the absence of a reasoned judgment. Consequently, for the reasons given in paragraphs 9 to 11 above, and the several cogent authorities cited by Counsel for the appellant, we allow this ground of appeal and set aside the sole custody order of November 13, 2012. In its place we order that with immediate effect, AMALI TECK the infant child of the parties, be placed in their joint custody, with care and control to the respondent mother, with reasonable access to the appellant father.

ACCESS

[22] The order for access made by the learned Chief Justice in November 2012 has been varied from time by subsequent orders, thereby improving on the provisions of the

earlier order. At this time, the outstanding issue is that of access during the school's summer vacation. The parties have been unsuccessful in agreeing the terms of such access. In the result, having regard to the equitable principle that equality is equity, we order that with effect from the 2016 summer vacation, the summer vacation is to be shared equally, with the appellant father having the option of determining which period he wished to select. Thereafter, in succeeding years, the period for access shall alternate between the parents. In the interest of clarity, if Mr. Teck opts for the first half of this year's vacation period, then next year, his allocated period would be the second half of the vacation. The parties are granted liberty to apply to a Judge of the Supreme Court to determine any issues which may arise from this Order.

MAINTENANCE

[23] We are of the opinion that there are inequities in the maintenance order made by the learned Chief Justice which required the respondent to pay the sum of $1,750.00 per month for the maintenance of the wife, commencing on September 30, 2012 and thereafter on the last day of each month. The respondent wife in this appeal is a relatively young woman, capable of working and that capability should have been reflected in the order of the Court. Moreover, the court should be guided by the clean break principles in providing for the party of the union who seeks maintenance.

[24] We grant leave to both parties to present new evidence in relation to this ground of appeal. It is desirable that such evidence be subjected to the inquiry that is better carried out at the trial court as we are of the view that this Court is not the appropriate body to undertake that exercise. Accordingly, we remit the issue to a Judge of the Supreme Court other than the Chief Justice, and direct that the trial judge deals with the matter expeditiously.

[25] In summary therefore, the following orders are made:

(a) With immediate effect, AMALI TECK the infant child of the parties, to be placed in their joint custody, with care and control to the respondent mother, with reasonable access to the appellant father;

(b) The issue of access for the Summer Vacation is as detailed in paragraph 22 hereof;

(c) The issue of maintenance for the wife to be determined as directed in paragraph 24 hereof;

(d) Each party to bear their own costs of this appeal.

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BLACKMAN JA

DUCILLE JA

[26] I have read in draft the judgment of Blackman JA. I also concur.

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DUCILLE JA