

IN THE SUPREME COURT OF BELIZE A.D. 2019

ACTION NO. 54 of 2010

BETWEEN

SERGIO ALAMINA

PETITIONER

AND

NADINE ALAMINA

RESPONDENT

BEFORE the Honourable Madam Justice Sonya Young

Hearings

3rd October, 2017

23rd October, 2017

17th January, 2019

Written Submissions - 2019

Petitioner – 11th February

Respondent – 7th February

Oral Submissions

14th February, 2019

Decision

13th March, 2019

Mrs. Robertha Magnus-Usher SC for the Petitioner.

Mr. Jose Alpuche for the Respondent.

**Keywords: Family Law – Custody – Variation of Joint Custody Order –
Twelve Year Old Female Child – Father Wants Sole Custody – Best Interest
of the Child – Wishes of the Child – Delayed Social Inquiry Report – Families
and Children Act Cap 173**

JUDGMENT

1. There is no formula for making a decision in a custody matter where both parents love a child; where a union has broken and the adults have decided

to go their separate ways for their own betterment; where the child becomes the only glue that binds and that glue is stretched in ways it was not created to be. Some call this phenomena a battle. Here, opposing lines, which are often grounded more in fear, than love, are drawn. Weapons, sometimes forged in anger, pain and resentment are brandished, while we forget that a child can find no haven and has no place on a battle field of any kind.

2. It is in this space, that the Court, a virtual stranger, is called upon to tell that child what it considers to be in that child's best interest because the adults to whose care she has been entrusted have reached a place where they could no longer jointly make decisions that are best for her welfare. It is not an envious position; it requires the tribunal to make one of its most difficult decisions. A decision which does not relate to objects or adults. But rather to an evolving, young and fragile human being whose own wishes, though existent and valid, are sometimes unknown and unconsidered.
3. Wallace J. Mlyniec in **A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose, 64 Fordham L. Rev. 1873 (1996)** admits that *"The complexity of children cases, the imprecision of available standards, the process by which cases are adjudicated and the unpredictability of future events make decision making by judges very difficult. The accumulated and ever changing knowledge of science and the impact of societal changes on childhood and adolescence compound the difficulty, as does the simple need for efficiency in modern court systems. Notwithstanding this complexity, judges must strive in each case to provide justice."*
4. So now meet Kagan Alamina, the one who needs justice most. A brilliant, beautiful preteen, who excels at school and would easily be the apple of any parent's eyes. Articulate, confident and compassionate, she displays traits

which a Court requires to apply the law of the land to the rest of her childhood and to make a decision which will affect the rest of her life.

5. Privately, she has made her desires, joys and fears known to the Court in her effortless but earnest way. She spoke of family and friends, her boundless love for her parents, her siblings and her dog. She mentioned her past, her present and her hope for a bright future including excelling at the Primary School Examination. She knows with whom she wants to live and whether or not she wished to leave her mother's home. With no prompting she discussed her passport and where she thought would be best for it to be kept and why. The Court could comfort her only with the promise that whatever she revealed would be held in the strictest confidence and that her wishes would be considered.
6. The Court certainly appreciates that her wishes cannot simply be accepted as she has stated them. She is a pre-teen, capable of manipulation and manipulating. But at her age and with her intellect, this Court finds her to have sufficient maturity and sufficient mental capacity to make an informed and intelligent choice. Therefore, her views will be seriously considered amidst all the other evidence provided by both parents. On that note let us meet the parents.
7. Forty six year old Sergio Alamina was a divorcee when he married Nadine Lopez. She was twenty six years old. They had been in a relationship for some time. Their only child, Kagan, had been born to them some two years prior to marriage. They separated after one year and divorced after almost four years of marriage. A joint custody order was made by consent. Sergio was to have liberal access, particularly for three consecutive weekends each

month from end of school on Friday to return to school on the following Monday and during the week as he or Kagan requested. Both parties were to share access during the holidays and to alternate Christmas and New Year's days each year. Whenever Nadine was leaving Caye Caulker she was to leave Kagan in Sergio's care.

8. Sergio appeared to be a determined, hurting, but healing, man. Hard working and disciplined, he knows what he wants and insists it is also what is best for Kagan. He is now remarried with another child, and longs for Kagan to live permanently with him as part of a comfortably blended family.
9. He asks the Court to vary the existing joint custody order so that he could have sole custody and Nadine, could have access on alternate weekends from Friday after school to Monday morning at 8:00. He says Nadine has somehow erroneously formed the view that she has sole custody of Kagan.
10. For far too long, she has been making decisions and placing restrictions which deny him his Court ordered rights. She has continuously and repeatedly breached the Court Order and has even changed Kagan's name unlawfully, then secured a passport in the altered name. That passport was cancelled by Court Order and the new one is now temporarily in his custody. He wishes this to be permanent. He urges that Nadine's lifestyle and mindset are such that she can no longer act in Kagan's best interest.
11. Nadine is now a single mother of two as she has also had a child since the divorce. She seems to be a confident and intelligent woman. She has two jobs; managing a guest house and she owns or co-owns a business and works in an environment (a vape lounge) with which Sergio takes serious issue.

Although she shares custody with Sergio, she has had the primary care and control of Kagan since the divorce.

12. She says that she is a good mother. Kagan does exceptionally well at school, is well adjusted and thriving. This is testament to her love for and dedication to properly raising her. She makes no applications of her own but resists any change to the present custody order which will give primary care and control or sole custody to Sergio. She asks that the passport be left in the custody of Kagan's godmother Susan.
13. The issues for the Court to determine are:
 - 1. Whether a variation of the existing Court order would be in the best interest of the welfare of the minor Kagan Alamina.**
 - 2. Who should have custody of the minor, Kagan Alamina's passport.**

The Existing Order:

14. It was ordered by consent that:
 1. The Petitioner shall pay maintenance for the child KAGAN ALAMINA in the sum of \$650.00 monthly.
 2. That the Petitioner and the Respondent have joint custody of the child KAGAN ALAMINA with liberal access to the Petitioner.
 3. That the Petitioner has access to the child KAGAN ALAMINA three consecutive weekends each month (the Petitioner shall pick-up the child on Fridays at the end of the school day and return the child to school the following Monday morning) and during the week as requested by the child or the Petitioner.
 4. Upon the Respondent travelling away from Caye Caulker or outside of

Belize, the child shall be left with the Petitioner.

5. Access to the child on all holidays, including Christmas, summer and Easter, shall be jointly shared between the parties. Christmas day and New Year's Day shall be alternated each successive year.

The Law:

15. Section 3 of the Families and Children Act Chapter 173 (FACA) provides as follows:

“The principles in regard to children’s rights set out in the First Schedule to this Act shall be the guiding principles in the making of any decision affecting the child.”

16. Section 1 of the First Schedule informs that

“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.*

17. Section 3 then outlines the criteria for decision making in relation to the welfare of a child:

“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, health 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. Section 30 of the FACA deals specifically with custody of a child in proceedings before a court and mandates that the “paramount consideration” in

making a determination, is the “*welfare of that child*” and the Court “*shall not take into consideration whether the claim of the father, in respect of such custody, upbringing, administration or application is superior to that of the mother or vice versa*”,

19. In determining a child’s welfare the Court **must**, therefore, consider the physical, mental, material, educational and religious wellbeing, giving no special status to either a mother or father’s claim. While the factors outlined in section 3 **must** be considered when weighing the merits of each party’s claim, they are not the only considerations.
20. As stated in **Elements of Child Law in the Commonwealth Caribbean p177** “*Other considerations include, ... the wishes of the parents; conduct of the parents towards each other and towards the child; maintenance of the family unit; material standards and advantages which the child reasonably expects; or preserving the status quo in the child’s life.*” The Court must strive to take a holistic approach to the matter, determining the proper regard each subject must be given, according to the circumstances presented. Finally, the Court must consider the question of access to the unsuccessful party.
21. Where a party seeks to vary a custody order, it must also be proven that there has been so great a change in the circumstances relating to the welfare of the child that there exists a strong possibility of harm if the circumstances are allowed to persist.

The Petitioner’s Case:

22. Sergio says that Nadine has repeatedly and indiscriminately breached the existing custody order which had been made by consent. She holds the mistaken belief that as Kagan’s mother she has a superior right to Kagan and

that she has sole care and control. She has repeatedly voiced this belief and she acts accordingly. She neglects to consult him on serious issues.

23. She unilaterally decided to remove Kagan from Caye Caulker to live with her on San Pedro, when the order specified that whenever she, Nadine, was away from Caye Caulker, Kagan should be left in Sergio's care. Kagan's relocation has not only breached the Court Order but has also limited his ability to oversee her upbringing and ensure her stability and security. Nadine has, at times, refused him visitation as ordered and has also, without justification, disrupted his visitation period, (once even involving the police at midnight).
24. In the past, Nadine has refused to allow Kagan to eat lunch at his restaurant, preferring, instead, to send her to a friend. That has now changed and Kagan eats with him so he is able to see her during the week and to spend some time with her, Nadine admits to only leaving Kagan with Sergio when she has nowhere else to leave her.
25. She does not allow Sergio to take Kagan on trips abroad but admits to taking Kagan herself without informing Sergio. These unilateral variations to the Court order and restrictions imposed by Nadine, not only affects Kagan's relationship with him, but also her relationship with her siblings (his children).
26. He explains that Kagan has to commute every day, by boat, between San Pedro and Caye Calker. The commute is not only tiring but she is allowed to travel alone which is unsafe. She has exams coming soon, so it would be better if Kagan stayed in Caye Caulker since there would be extra lessons

and more school work. He complains that Kagan often attends school in old, tight clothing and dirty shoes. She sleeps in an area that was originally designated a living room. It is separated from her brother's 'space' by a curtain.

27. He further alleges that Nadine's lifestyle is unsavory and unsafe and puts Kagan at risk. She has had multiple relationships, some with persons of questionable character. For example, one who attacked her in her own home, then progressed to stalking her. She was mortally afraid of, and had to secure a restraining order against, him. She is now in a new, four month old relationship with an American and intends soon to marry. Sergio opined that this is an inordinately short period in which to get engaged. Clearly, neither she nor Kagan could know this person well. This could only be another demonstration of Nadine's hasty decision making.
28. He finds discontent with Nadine allowing Kagan to be present at the lounge where she works, which sells vape cigarettes and alcohol. The business closes at midnight, so Nadine gets home after midnight most nights. Kagan sometimes has to let herself in with a key hidden under the front door mat and then stay home alone. Even when a 'stalker' was threatening Nadine's life, and the restraining order had expired, she took no special precautions to ensure Kagan's safety.
29. Nadine had, without Sergio's knowledge or consent, changed Kagan's surname from Alamina to Lopez. Then she fraudulently obtained a passport for Kagan in this altered name. Sergio believes that she fully intended to take Kagan away from Belize (most likely the United States) and out of Sergio's life. She had threatened to do this repeatedly.

30. Sergio says that Nadine also involved Kagan in this deception because although Kagan knew that her name had been changed, she continued using Alamina at school and never informed him that her name had been changed. He says Kagan must have been acting pursuant to her mother's instructions.
31. He then refers to other instances when Kagan was involved in some deception of Nadine's design. Nadine had brought Kagan to this Court without the Court's directive and without informing him. Kagan had slept at his home the night before and had left there dressed and destined for school. When Kagan arrived at Court she was not in school clothes and was forced to miss a day from school because of the commute.
32. On another occasion, Kagan was expected to ride her bike to Sergio's home after school but Nadine instructed her otherwise. Kagan then left her bike on the beach in Caye Caulker and took the boat to San Pedro without informing Sergio who was left to search and worry. Nadine says she tried repeatedly to contact Sergio by phone but was unsuccessful. Sergio said he tried repeatedly to contact Nadine but could not.
33. Sergio refers to Nadine's violent temper and proposes that Kagan is afraid of her mother and feels constrained to do whatever her mother wants her to do. He says Nadine is retaliatory, sometimes irresponsible and vindictive. He directs the Court's attention to several public posts or advertisements on facebook which show a scantily or provocatively clad Nadine. He highlights a lewd comment made to one of these pictures and says that Nadine *"uses her sexuality to obtain anything one wants in life and I don't want my daughter thinking that way."*

34. All this, he postures, is demonstrative of Nadine's inability to act in Kagan's best interest and his need to safeguard Kagan's welfare. He longs to bring Kagan back to a familiar environment (Caye Caulker) to live. He wants to be able to properly protect her and give her the emotional stability she deserves, particularly as the upcoming years are challenging for an adolescent.
35. He says his wife and Kagan get along very well and she is instrumental in guiding Kagan on her hygiene and grooming. She purchases clothes for Kagan and they talk. He exhibits a number of pictures with them both looking happy and relaxed. He also discusses Kagan's close relationship with his youngest child and how they enjoy playing together
36. Sergio concludes that when it is convenient, Nadine has no difficulty leaving Kagan with him for extended periods of time. For example when she relocated to San Pedro she left Kagan for months (December, 2017 to February, 2018). Nadine only removed Kagan when he refused to continue paying child support to her.
37. Recently, he says, Kagan has been spending more time with him. He says that since September, 2018 she has stayed with him during the weekdays as well. This, he believes, proves that Nadine has no honest reservations about, and he certainly has no issues with, Kagan being with him on a more permanent basis.

The Respondent's Case:

38. Nadine says she is the sole proprietor of a business registered as Herban Vape Lounge which sells electronic cigarettes and accessories. She is also a

part owner of a business registered as Herban Vapor. She exhibits the registration certificate for Herban Vapor and a trade licence in her sole name for Herban Vape Lounge. She informs that she moved to San Pedro because her business prospects were better and launching the business there required her full time presence. She says that she explained this fully to Sergio. She does not state whether this was before or after the move.

39. Her focus is her children and her business. Although she stated that her understanding of the custody order was not that she could not take Kagan with her when she travelled away from Caye Caulker, she gave a litany of reasons why that interpretation would be unnecessarily restrictive and unduly harsh.
40. It would mean that she could not take Kagan anywhere outside of Caye Caulker. They would not be able to do much of what an ordinary Belizean family would do, like visit the zoo or attend a movie on the mainland or even cross the border into Chetumal. It would also mean that for purposes related to Kagan's health she would be unable to simply take her to a hospital off Caye Caulker.
41. She adds that it would also restrict her own activities since it would mean that she would have to ascertain Sergio's availability before she is able to make any plans of her own which involve traveling outside Caye Caulker. She has, however, made no application for a variation.
42. Counsel for the Respondent in his submissions urged the Court to give a more purposive interpretation to the order since the constricted "*interpretation and application is already proving to be detrimental to Kagan.*"

43. What is concerning is that Nadine also admits leaving Kagan with an experienced sitter whenever she (Nadine) travelled away from Caye Caulker. Even if a purposive interpretation is given, Nadine's own arrangements with a sitter are an admission of a breach of the custody order. This was not salvaged when under cross examination she attempted to qualify her statement by saying she only left Kagan with a baby sitter when Sergio was not available.
44. Nadine does admit to leaving Kagan with Sergio when she first relocated to San Pedro. This, she said, was because she was making arrangements for accommodations etc. and she did not want Kagan to be uncomfortable. She also wanted Kagan to remain in her same school where she had the chance of being valedictorian. All this was done in Kagan's best interest but never with an intention of leaving her permanently with Sergio. This is also an indication to the Court that Nadine well understood the Court order but choose to disobey it when it proved inconvenient.
45. Nadine also admits changing Kagan's name and securing a passport in that altered name. She said it was all done through ignorance and she has since apologized to the Court and Sergio. She also asked that she not be stigmatized or viewed as a bad mother by the Court for her actions.
46. Nadine denies being promiscuous or living a risky lifestyle but is not surprised that Sergio would attack her in this manner. In his submissions Counsel for the Respondent says what was presented was largely hearsay, false statements from unknown sources and an invasion of her private

conversations without her consent. While I agree with him in part there is also clear evidence of risqué photographs posted on Facebook.

47. Nadine adamantly refutes the allegations of instability. She says she is happily engaged to a Belizean national and has no intention of leaving Belize. She also refutes the allegation that she ever intended to destroy the link between Kagan and Sergio. She says that since Sergio's wife is a foreigner, perhaps it is Sergio who may spirit Kagan away. She opined that the custody application is only being made as Sergio no longer wishes to pay maintenance. Although her Counsel made submissions about Kagan not being *sickly, malnourished, or living in dire conditions*, the Court is certain that these are not the standards by which the Court makes a determination that the best interest of the child are not being met.
48. Nadine then speaks to the relationship Kagan shares with her baby brother and how attached he is to her. He waits at the pier for her arrival each day and they are constantly together. She also exhibits photographs of the children together. They are happy and seem well bonded.
49. On the other hand she says Kagan is of the view that her step mother does not like her very much. She refers to an episode concerning the use of her hairbrush and her having told Kagan she did not want to catch lice. This apparently greatly upset Kagan. If this was the most memorable of bad moments for Kagan, then perhaps it could well have been a joke which may have been taken out of context.
50. Later, Nadine spoke about Kagan overhearing her step mother on occasions saying that she did not want Kagan to stay at the home. Senior Counsel for

the Applicant urged that the portrayal of the stereotypical evil stepmother ought not to be believed. It was very telling that this very important piece of evidence never emerged during trial and came through an affidavit made one year after oral testimony had concluded and shortly after the social enquiry report was received.

51. Kagan continues to do exceptionally well at school. She is now preparing for the Primary School Examination and has lessons on the weekend. She would sometimes stay with Sergio on Friday night and return on Saturday after lessons. She has, however, not been staying more frequently with Sergio as he alleges. Moreover, Kagan travels on the express boat and the ride is only approximately 20 minutes in comfortable surroundings. This commute has never affected her school performance and she has never expressed being tired.
52. Nadine says she has not failed in her responsibility as a mother. She has never abandoned Kagan or left her unsupervised. She takes the best care of her, always ensuring that she is smartly dressed and groomed, that she has spiritual guidance through the Catholic Church and that her homework and projects are properly attended to. Kagan is healthy (Nadine cooks her the best meals) and happy and lives in a safe and comfortable environment. Her progress as a child and in school is testimony to the care she receives and the stable conditions under which she lives. She loves Kagan unconditionally and wants to be there to guide her into adulthood.

The Social Inquiry Report:

53. This Court made an order for the urgent preparation of a Social Inquiry Report on the 3rd October, 2017. That report was prepared on the 18th

October, 2018 with the interviews having been conducted some seven months prior. The report was so delayed that it has perhaps outlived much of its usefulness. This is most unfortunate.

54. The Court appreciates the constraints under which the Department of Human Services operates, but finds it imperative to indicate its disapproval at the inordinate delay and the difficulties this has engendered. The present matter relates to custody of a child, circumstances could have changed substantially and they did. Nadine is now engaged to be married. There is, obviously, nothing in the report about her fiancée or the dynamic which exists between him and Kagan or him and Nadine for that matter. There is nothing on the intended living arrangements after marriage.
55. The Court cannot but ponder whether the social worker's conclusion that joint custody be maintained, with care and control to the Respondent and liberal access to the Petitioner would have been otherwise if this development was considered. In any event, the report, being a valuable aid to the Court, has no binding effect. In **S v S [1980] 1 FLR 143** it was determined that although great respect should be given to the welfare report, the court was still obligated to consider all the circumstances and render its own decision.
56. In the report Kagan indicated that she is very close to her mother and liked her current living situation. She did not want to live with the Petitioner full time mainly because of her stepmother. There were no defined instances stated.

57. It is reported that Mr. Alamina acknowledged some tension between Kagan and his wife. He said this was because Kagan may consider her strict as she tried to instill good hygiene practices, moral values and principles in her. This was never revealed in his testimony to this Court. The report also stated that according to Mr. Alamina, Kagan did not know her name had been changed. Again this contradicted his testimony that Nadine had made a co-conspirator of Kagan in this deception.
58. What the Court finds to be excellent fodder for consideration, however, is the interview conducted with the Vice Principal at Kagan's school. She stated that while Sergio was supportive and would visit every now and then, though not consistently, Nadine was the most active of the two parents. She was involved in all the school activities and she was the one who checked up on Kagan most. It must be noted that Sergio lives on Caye Caulker where the school is, Nadine does not.
59. This obvious interest did not comfortably abide with Sergio's allegation that Nadine did not take good care of Kagan and often left her home alone and unsupervised. The Court also recalled Sergio's own complaint that when Kagan was at preschool Nadine was over protective, if not borderline obsessive. She sat at the school daily from the time she took her there until it was time for Kagan to leave. Could her interest wane so drastically with time?
60. Even more compelling was the Vice Principal's and the homeroom teacher's indication that Kagan was polite, helpful, responsible and respectful. Those are not the characteristics one would expect in a child whose parent or

parents are uninterested and uninvolved in proper rearing. Kagan's stellar academic performance cannot be overlooked either.

61. Sergio maintains that he helps in this regard and I fully believe him, but from his own testimony Kagan is with Nadine more and there is no complaint from the school about undone homework or slacking off. In fact, the Vice Principal lauds her achievements and dedication to her studies. Noticeably, she makes no complaint whatsoever about Kagan's appearance and hygiene.

Consideration:

62. Kagan is not a young child so there need be no emphasis on extreme youth which may sometimes shift the balance in favour of a mother. It is also clear that neither parent has a superior right to custody. In support of section 30 of the FACA (above), Senior Counsel for the Applicant presented **Rayden & Jackson on Divorce, 15th Ed, at page 1334** which states that "*there is no settled rule that a child of tender years should remain in the custody of the mother but obviously the care and supervision that a mother who is not at work can give is a very important factor: Re O Infante [1971] Ch 748.*" Counsel for the Applicant added "*Nadine is of course a full time working mother so the latter part of this dictum does not apply to her. It however demonstrates that a mother has no superior rights of custody to any child.*"
63. It must also be understood that even where a parent may be impeachable (not quite the best term) that does not create a presumption in law in that parent's favour. This is because the welfare principle is paramount. Counsel for the Respondent relied on **Linda May Gordon v Henry Goldbourne Gordon Divorce Action No 60 of 1978**, where Moe CJ as he then was,

decided the issue of custody in that case by giving the welfare of the infant first and paramount consideration.

64. More recently, in the case of **Wendy Simmons v Wilmot Simmons Action No 78 of 2009**, [TAB 3] Justice Legall referred to the above mentioned guiding principles in the FACA to determine the issue of custody. The Court has always been and will be guided by the welfare when considering matters of custody and care and control of a child.
65. The Court considers Kagan's wishes first. In **D v D (1958) 3 C.L. 479, CA** the Court allowed an eleven and a half year old girl to decide for herself and her very positive view was considered a most important factor. Kagan has expressed her preference clearly.
66. The Children Services Officer informs that "*Kagan is at the stage in her development whereby she is transitioning from the childhood stage of Industry v Inferiority to the adolescence stage of Identity v Role Confusion. This transition from childhood to adulthood is a most important stage. Children are becoming more independent, and are beginning to look at the future more intently. Children at this age also want to fit in and seek for a feeling of belonging.*"
67. **The Art of Parenting Training Guide** prepared by the Belize National Parenting Task Force, chaired by the National Committee for Families (NCFC) with support for UNICEF at page 214 explains the effects of separation on a 8-12 year old and a 12-16 year old as follows:
"8-12 years
Children in this age group are able to speak about their feelings. They experience a conflict of loyalty between each parent, and, if the conflict between parents is high, they may try to cope by rejecting one parent or trying to keep both happy by saying negative things about one to the other. They are also beginning to experience the world outside their family. They have sporting and other interests and social commitments. When you

make parenting arrangements you should take account of your children's interests and activities.....”

“12-16 years

In some respects adolescents are increasingly independent of their parents, even when parents are not separated. They need to be given time and space to work out their own reactions to their parents' separation. If pressured by either parent, adolescents are likely to react with anger and rejection.

They particularly need flexibility in arrangements to allow them to participate in normal adolescent social activities and school events.”

68. There are no issues raised about her religious or academic education. Kagan seems to be appropriately attended to in this regard. She is an A student and this needs to be protected. Although there was an issue raised on both sides about Kagan being absent from school and late for school, this was not so far from the norm or of such a magnitude that it demanded the Court's attention. It was certainly not a matter of interest for her Vice Principal or her homeroom teacher when they were interviewed by the Children Services Officer.
69. No real issues were raised with Kagan's discipline or health. Sergio was of the opinion that Nadine's involvement of Kagan in various deceptions encouraged her to become a liar. He offered no tangible evidence of this so I find no reason to make a judgment here. Sergio also raised non-specific issues about Kagan's hygiene which again I find to be negligible.
70. Financial considerations must also be discussed. Sergio is gainfully employed. The report states his income as averaging \$2,500.00 per month, according to the season. I do not know whether currently that holds true. It was not refuted. He continues to pay maintenance for Kagan of \$650.00 per month. He seems to be diligent in this regard except during a particular

period when he believed it proper (incorrectly so) to stop payment as Kagan was residing with him extensively.

71. Nadine is gainfully employed and earning. In the report, her income is said to be \$18,000.00 and fluctuates from month to month. I do not know whether this holds true now. Senior Counsel for the Claimant in her oral submissions sought to question whether she really was employed or owned her own business. However, in the written submissions she asked that any consideration of Nadine's ability to stay home to look after Kagan was not relevant since she was a "*full time working mother*" (see paragraph 62 above).
72. Some issue was raised about Kagan's uniform being old and ill fitting. But that seemed to be a hollow complaint which I really give no weight to. When Kagan was interviewed for the report she was well dressed and groomed. Neither the vice principal or the homeroom teacher raised Kagan's general appearance as a problem either. What I do consider is that at Sergio's home Kagan has an adequately furnished bedroom of her own. That house was considered safe and conducive for child rearing.
73. At her mother's apartment there are two bedrooms. Kagan currently sleeps on a bunk bed with her brother in the living room. The space is partitioned only by a curtain and Kagan had decorated it with art work and pictures. Nadine is said to have informed the social worker that she intended to install a wall and a door. But it appeared that the children would still continue to share. The home was also found to be safe and conducive for child rearing. I consider that Kagan is maturing and privacy would soon become an important factor for her as an adolescent.

74. Then there are siblings in Kagan's life on both sides and she seems to share a good relationship with them all. Her brother on her mother's side appears particularly close to Kagan and that is understandable as she spends more time with him. The Court will also consider the effect which breaking this bond may have.
75. The Court now turns to the character and conduct of the parents. Sergio says Nadine is violent. Nadine says Sergio is violent. There is record of an altercation between them where Sergio sought police assistance. They both accuse the other of allowing Kagan to be witness to violent acts perpetrated by or against either one or someone else. However, there is no evidence that either of them have visited this violence on Kagan or that she is in any danger of violence from either of them.
76. I cannot hold the stalker situation against Nadine; she is not responsible for anyone else's behaviour. Perhaps she needs to be more discerning but certainly she did what was necessary to protect herself and her children after the problem manifested. She sought a protection order and even tried to have it extended. Sergio also raised that Nadine has had multiple partners. I find no real proof of this. I also make no issue of her alleged sexual orientation.
77. By posting those photographs online Nadine has done what seems now to be the norm in some cultures. Some call it art, modeling and a woman's right to her body. But in Belize, no matter how open minded one may be, it is certainly not appropriate for a mother of young children to engage in this sexualized behaviour in a public setting. I remind that what is posted online remains forever online, Kagan will one day see it, if she hasn't already. It

does not set a good example for Kagan and it is a marked strike against Nadine in this exercise.

78. Her job as the owner of a vape lounge is no better or worse than Sergio's ownership of a Bar and Restaurant. Although Sergio's Senior Counsel sought to impress in her submissions that it was only a restaurant, Sergio's own testimony under cross examination revealed otherwise. The only difference between the two is that the patrons of a bar and restaurant are varied while Nadine herself admits that mainly adults come to the lounge. I state without reservation that that is no atmosphere for a pre-teen girl. It potentially exposes her to conversations and activities which may very well be inappropriate. Her going there after school and spending time there must be limited.
79. What Nadine raised against Sergio is that Kagan prefers to live with her as Kagan does not think Sergio's wife likes her. Notwithstanding, Kagan has stayed for extended periods in Sergio's home and seems no worse for wear. It simply does not ring true. Senior counsel for the Applicant insisted that there was really no evidence to support the allegation that Sergio's wife shared anything other than a happy, relaxed, relationship with Kagan. She said the assertion in the report that Kagan would run away if her living arrangements changed was not borne out by the evidence either. From time to time Kagan had lived predominantly with Sergio and she had never run away. I am minded to agree.
80. There will be moments of discord in every home and between any parent and child. This is normal in any relationship. Often times it may be more so with step parents. This does not mean that a dislike exists. There are two

concrete incidents outlined, neither of which demonstrates a clear dislike of Kagan by her step mother.

81. The issue of a step parent brings Nadine's intended nuptials into focus. While it must undoubtedly be a joyous occasion for Nadine the Court must still consider its effect on Kagan. It is here that the report would have been of great assistance. The Court is not left to speculate entirely since Kagan has discussed how she feels about the marriage and her soon to be step father.
82. The Court must also examine how both Nadine and Sergio have treated with the existing custody order. They have both sought to manipulate it as it suited them. Nadine far more so than Sergio, but he too wanted to cease paying maintenance without applying for a variation of the order of the Court or receiving Nadine's consent. She seemed only to be aware of the fact that Kagan was to live primarily with her and that Sergio was to pay maintenance. The terms which speak to Sergio's liberal access seemed to be non-existent as far as she was concerned.
83. The Court now considers the wishes of both parents. Sergio wants sole custody with specified access given to Nadine while Nadine wishes the consent order to remain. The Court fears that giving sole custody to Sergio may allow him to perpetuate behaviour which Nadine has consistently displayed when she had primary care and control. This can in no way be in Kagan's best interest. This view is not conjecture or speculation, it is grounded in the repeated behaviour of these adults and it speaks to the respect for each other which both parties seem to consider unnecessary in their dealings with each other.

84. Sergio was heard to say if he could not take Kagan out of Belize then neither could Nadine. There is no consideration in that for what would actually be in Kagan's best interest. When he was given access to Kagan's passport he proudly and happily took her to Mexico on a family outing. Kagan enjoyed herself immensely. Granted, he did inform Nadine of the upcoming trip but he gave her no information as to when they would leave, how long they were going for or where they would be staying. Nadine is Kagan's mother, she has a right to be properly informed as much as Sergio would have if the positions were reversed. The variation to the order which Sergio seeks, intends to give Nadine even less access to Kagan than he was originally ordered.
85. Nadine on the other hand behaves as if Kagan is her child only. Throughout her evidence she constantly referred to Kagan as 'my daughter' or 'my child'. So that when Kagan calls her saying she wanted to come home, she, as a parent, could deem it fit to tell a minor to come, without first informing or discussing the matter with the parent in whose immediate care and custody she was. This unacceptable behaviour also explains why Kagan would, unhesitatingly, leave Caye Caulker, abandoning her bike on a beach when her father was just across the street. The disrespect is contagious. Children learn behaviour from their environs.
86. Throughout her testimony, Nadine called Sergio "Kagan's father" only when she spoke of him fulfilling "*his duties as a father by at least providing maintenance for his daughter.*" This is very instructive as to her state of mind. It explains why she felt it appropriate to dictate when and for how long Sergio was to see Kagan; that Sergio's only duty as a father was to pay maintenance; that

the relationship he craved with Kagan ought not to be nurtured, but to be used as a weapon against him. Sergio eloquently expressed it; *“If a mother loves her daughter she would never try to keep her away from her father she loves. She keeps her away from me”*.

87. It also explains why she could see no wrong in changing Kagan’s name thereby removing any trace of Sergio and Kagan’s birthright from existence. As well as securing a passport in the altered name. Her Counsel asked the Court to consider that there was no evidence that she was attempting to take Kagan out of Belize. Although he highlights the absence of a plane ticket, this Court knows of no other purpose for a passport, beyond any other identification document.
88. The Court also found that the precise words Nadine used in relation to changing Kagan’s name were quite instructive; *“Regrettably I did not seek legal advice before doing so but my attorneys have explained the law to me and I must say that my intentions for doing so was not to injure the link between the Applicant and Kagan nor to destroy Kagan’s sense of self and identity. I have accepted the Court’s view and I apologize to the Court, the Applicant, and Kagan for my actions.”*
89. That statement is no acceptance of the Court’s view nor is it contrition for a serious wrong done. Rather it seeks to explain why the act was done and why she should not now be held responsible. Having considered this most irresponsible and selfish act the Court will order that Kagan’s passport should be left in Sergio’s custody.
90. It must be impressed that both parents play an important role in their child’s life. A child is entitled to access and contact with both parents. So when parent ‘A’ refuses the other parent access to their child, it really raises

serious questions as to parent 'A's fitness. Unless there is some good reason for doing this, the Court must find the more co-operative parent to be acting in the best interest of the child.

91. Finally, the Court considers the status quo. Senior Counsel for the Applicant presented *Marriage of Hobbs (1976) 2 Fam LR 11,380* in support of the point that a mother's maternal role is important but not a sufficient factor to displace the need for a father. However, it also offered significant guidance on disturbing the status quo. At **page 152** the learned judge referred to **In the Marriage of Jurss (1976) 9 ALR 455 at 459; 1 Fam LR 11,203 at 11,206** where " *Demack J made the following comment on the maternal role: "The only reason for any change is to gratify the natural and honest maternal concerns of (their mother). But I am required to regard the welfare of the children as the paramount consideration, and there is nothing shown to indicate that their welfare will be enhanced if they are given to their mother. They are well and properly cared for now, and their welfare is very well advanced and ensured by leaving them with their father."* There are some cases where the court must disturb a long standing arrangement for the welfare of the child. *In the Marriage of Watts (1976) 9 ALR 428; 1 Fam LR 11,266 and In the Marriage of Pringle (a Full Court decision delivered on 4 November 1976). Where this occurs the factors influencing the court should be spelled out. The court should not only state its reason for changing a long standing arrangement, its reason should relate to the circumstances of the case."*

Determination:

92. I am of the view that the original custody order needs to be revisited as Kagan is a lot older now. She must be allowed the freedom to develop her full character, personality and talents, all the things that make her special and unique. However, what I perceive in this matter before me is not so much a problem with the custody order as it is made, but a problem with

Kagan's parents understanding how to co-parent and particularly the importance of co-parenting in Kagan's best interest. As Legall J explained in **Wendy Simmons v Wilmont Simmons Belize Action No 78 of 2009** at paragraph 9:

“Joint custody casts the responsibility for matters in relation to the upbringing and welfare of the child on both parents. In a situation where there is animosity between the parents who find it difficult or impossible due to their personality, behaviour, or conduct to cooperate and work together in the interest of the welfare of the child, the court should be reluctant to make a joint custody order. Before the court makes a joint custody order, there ought to be evidence that shows a genuine and sincere willingness by both parents to work together in a harmonious and cooperative way in the exercise of their rights under an order for joint custody. In Nagel v. Schergevilch 1995 Canl 11 5914 C (SK QB), Rothery J, in the Saskatchewan High Court, Canada says that for joint custody orders to succeed, “the parents must have one another’s respect; they must share child rearing philosophy; each must be convinced that the other is a beneficial presence in the child’s life; they must trust one another to do what they would have done and they must cooperate to achieve common goals.”

93. There is, therefore, a level of mutual respect and reasonableness that is required. For simple guidance to Kagan's parents on what is expected with a joint custody order, I quote Sykes J (as he then was) in **F v D Claim No. 2012HCV00646 (Jamaica)**

117. Before announcing the final decision there is the need to distinguish between guardianship, custody and care and control. We, in Jamaica, have tended to use the expression custody as a synonym for guardianship. Broadly speaking, guardianship refers to the group of rights or perhaps, the bundle of powers that vest in the parents of children, regardless of whether the parents are married. Guardianship includes the duty to maintain and care for the child. Guardianship enables the guardian to make important decisions regarding the child's education, religious instruction, health. The right of custody is usually included as an incident of guardianship. The guardian usually has physical custody of the child. The law's default position is that the parents are the guardians unless there is some reason for this not being the case.

118. Custody, properly understood, means the right to physical care and control of the child. Care and control refers to who the child should live with. The person with care and control decides the day to day issues concerning the child. In Jamaica, we tend to use the expression custody as if it is an exact synonym of guardianship. In the vast majority of cases the distinction will not

matter.

119. In this case, no issue of guardianship has arisen and therefore both parents are the guardians of the children. The court is being asked to decide who should have custody. In determining this issue the court takes account of the fact that it is increasingly recognized that both parents, barring some exceptional circumstances, should have an input in the rearing and development of the child. Sole custody orders while made are not the norm in the Supreme Court. A sole custody order is usually made where the parent's relationship with each other has broken down to the extent that communication is impossible and the acrimony between the parents is such that it is having a significant detrimental effect on the child. Such an order ought not to be made unless counselling and mediation for the parents have been tried and have failed completely. In extreme cases, counselling and mediation may not be possible.

120. The welfare of the children requires that both parents be involved in their rearing and development. The court is unable to see that it is in the best interest of the children to grant sole custody to the father. The interest of the children is advanced by both parents having custody.

*121. In the present case, the order is one of joint custody with care and control to the mother. The mother and father are expected to be quite sensible about their arrangements for the children. It is not about them or their egos, or their pride but about the children. As Barnett CJ said in the Bahamas Supreme Court in **Oldfield v Oldfield** 2013/FAM/DIV/00128 at paragraph 21:*

All orders as to custody care and control of children are by definition interim orders. There is no such thing as a final order.

94. Although each of her parents claim that Kagan's progress is attributable to them, they seem reluctant to hold a civil conversation. I remind them that Kagan is intelligent and observant. In other jurisdictions where the facility for parenting classes is readily available my order would have directed that such be undertaken by both parents. This is because I find them both to love Kagan immensely. In their own way, they want to have unlimited access to her, while failing to appreciate that she is entitled to the affection of both of her parents equally.
95. But notwithstanding all that is happening, Kagan has shown a resilience. She is healthy, happy and thriving. She is doing well at school. She is about to sit one of the most important examinations of her life and I am reluctant to drastically disturb the status quo at this time. I am of the view that a change

of the magnitude requested by the Applicant may cause serious harm to her. I remind myself that the custody order was made by consent, which means both parties agreed. Although Nadine said she had no Counsel that was proven to be untrue as the order has Counsel named therein on her behalf. She was not at a disadvantage.

96. At that time they agreed to what they felt was in Kagan's best interest. I will allow the opportunity for them both to manifest their genuine interest in Kagan's wellbeing by substituting the existing custody order with one which is intended to better promote Kagan's own welfare. Her parents have demonstrated, in the past, their ability to do what is in Kagan's best interest. They both now have to make a committed effort towards making a space for Kagan where she will continue to thrive with some level of freedom. I have faith that they will try. It is far easier to nurture a child than to repair a broken adult.
97. Having done this, I will give a date for report beyond Kagan's examination so that her parent's progress could be considered. Because of the nature of this case and the orders made there shall be no order as to costs. I state finally that this is not about winning or losing, punishing or praising. It is about Kagan, to whom I hope justice has been done.
98. Although Senior Counsel for the Applicant tried to limit the Court's jurisdiction to either maintaining and enforcing the custody order as it was originally made or varying it only in accordance to the application currently before the Court, I cannot agree that that is the law. Section 20 of the FACA states:

(1) The Court may, upon the application of any of the parents of a child, make

such order as it may think fit regarding –

(a) *the custody of the child; and*

(b) *the right of access to the child of either parent; and*

(c) *any other matter affecting the child, having regard to the age and the best interests of the child and taking into consideration the conduct and wishes of the parents and the child.*

(2)

(3) *Where any order as to custody of the child or payment to a parent of a periodical sum for the maintenance of the child had been previously made by a court of competent jurisdiction, **the court may, if it thinks fit**, in the exercise of its power to make an order for the custody or maintenance of the child under this section, **discharge the previous order and substitute any order it may think fit.***”(Emphasis mine)

99. As Lord Scarman in the unanimous decision of the House of Lords in **Re E (A minor) (1984) 1 WLR 156** guides:

“A court in exercising jurisdiction must never lose sight of a fundamental feature of the jurisdiction namely that it is exercising a wardship not an adversarial jurisdiction. Its duty is not limited to the dispute between the party, on the contrary, its duty is to act in the way best suited in its judgment to serve the true interest and welfare of its ward. Its paramount concern is the welfare of its ward, it will therefore be the duty of the court to look beyond the submissions of the parties and endeavour to do what it judges to be necessary.”

Disposition:

1. The application by the Petitioner for sole custody of the minor child Kagan Alamina is dismissed.
2. The Custody Orders made by consent on the 29th September, 2011 are discharged and substituted as follows:
 - A. The Petitioner and the Respondent shall have joint physical and legal custody of the child Kagan Alamina.
 - B. That the child, Kagan Alamina will reside with the Petitioner and the Respondent for two alternating calendar weeks beginning on Friday at the end of the school day and ending on the Monday morning two weeks later.

- C. Until the completion of the Primary School Examination and during the Respondent's period of access, if the child Kagan Alamina has after school lessons on Saturday morning she shall remain in Caye Caulker with the Petitioner and transition instead on Saturday afternoon.
- D. The child Kagan Alamina is not to be present at the Respondent's place of business, the Herban Vape Lounge without the Respondent and in any event no later than 5pm.
- E. During their period of access the Petitioner and the Respondent may each take Kagan Alamina with them or allow her to travel, properly supervised, anywhere throughout the state of Belize.
- F. During their period of access the Petitioner and the Respondent may each make the day to day decisions regarding Kagan's wellbeing. Any important decisions must be discussed and be mutually agreed between them.
- G. The passport of the child Kagan Alamina shall remain in the custody and control of the Petitioner.
- H. The Petitioner may take the child, Kagan Alamina out of the state of Belize but prior to doing so he must inform the Respondent of the date, duration and destination, provide full address and contact information and ensure that the child Kagan Alamina makes regular contact with the Respondent.
- I. The Respondent may only take the child Kagan Alamina out of the state of Belize with the Petitioner's consent or by order of the Court. In either situation the Respondent must inform the Petitioner of the date, duration and destination, provide him with full address and contact information and ensure that the child Kagan Alamina makes regular contact with the Petitioner.

- J. If either party herein shall leave the state of Belize during their access period then the child, Kagan Alamina must be left in the care of the other party. This time will count as part of the two week court ordered access period of the party who has left the jurisdiction.
- K. Access to the child Kagan Alamina on Christmas Day and New Year's Day shall alternate each successive year.
- L. With the exception of paragraph G, M and N herein any paragraph of this Order may be varied with the mutual consent of the parties after discussion with the child Kagan Alamina.
- M. The parties are to report to the Court on the 10th June, 2019.
- N. Liberty to apply.

**SONYA YOUNG
JUDGE OF THE SUPREME COURT**