[2012] JMCA Civ 4

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO 11/2011

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA

BETWEEN	**D. H. S.**	**APPELLANT**
AND	**G. A. R.**	**RESPONDENT**

Miss Melrose Reid & Mrs Kayann Balli for the appellant

Miss Danielle Archer for the respondent

7, 20 December 2011 and 17 February 2012

PANTON P

[1] We heard this appeal on 7 December 2011 and gave our decision on 20 December 2011. We ordered as follows:

> "1. The appeal is allowed.
>
> 2. The order of the Resident Magistrate made on 18 January 2011 is hereby set aside.
>
> 3. The Resident Magistrate is to conduct a new hearing and to permit the appellant to be present at such hearing, and to give evidence if she so desires.

4. If the application is granted, the Resident Magistrate should include in the order specific detailed provisions as regards access to the appellant.

5. Costs of the appeal of $15,000.00 to the appellant.

6. The Matter is to be listed for hearing, and be determined by 31 March 2012."

[2] On 20 January 2010, His Honour Mr Oswald Burcheson, Resident Magistrate for Manchester, granted joint custody of two children to the parties, who are their parents, with care and control to the respondent father and liberal access to the appellant mother. On 18 January 2011, the learned Resident Magistrate varied that order and granted the respondent permission to remove both children from this jurisdiction to reside with him in Canada subject to the following conditions:

(a) The children are to return to Jamaica on their Summer and Christmas vacations subject to any scholastic obligations which may arise.

(b) The respondent agrees to return both children to the jurisdiction of this court within one year of this order so that the court may assess their development/progress.

(c) There be liberty to apply.

This varied order is the subject of this appeal.

[3] At the commencement of the hearing of the appeal, Miss Melrose Reid, for the appellant, sought and was granted permission to argue one ground of appeal which read thus:

> "The learned Resident Magistrate erred in law in hearing the matter in Chambers on affidavit evidence and in the absence of the appellant."

This ground represents a consolidation of the eight original grounds of appeal filed on 28 January 2011.

[4] The relevant factual circumstances giving rise to the appeal are not in dispute. The hearing of the application took place before the learned Resident Magistrate in Chambers in the absence of the appellant, although her then attorney-at-law was present. The appellant was in the precincts of the court but was not invited to be present at the hearing. She was however invited to be present at the delivery of the decision. She accepted that invitation and promptly gave verbal notice of appeal when the decision was handed down. Thereafter, a stay of the order was granted by the Resident Magistrate. Miss Reid advised us that the children are still within the jurisdiction.

The taking of the evidence in affidavit form

[5] Miss Reid submitted that the Resident Magistrate had no jurisdiction to hear the application in affidavit form. Consequently, the proceedings were a nullity. She said that the Resident Magistrate is a creature of statute and may only do that which the statute specifically authorizes. She cited section 183 of the Judicature (Resident Magistrates) Act (hereafter referred to as the Act) and the recent decision of this court in ***Metalee Thomas v The Asset Recovery Agency*** [2010] JMCA Civ 6.

Section 183 reads:

> "On the hearing of any action, or in any other proceeding, civil or criminal, before a Court, all persons adduced as witnesses may be examined upon oath, or, in those cases in which persons are allowed by law to make affirmation instead of taking an oath, on solemn affirmation."

Section 2 of the Act defines "Court" as the Court in which the Resident Magistrate sits in the exercise of the civil or criminal jurisdiction assigned to him as such.

[6] In ***Metalee Thomas*** this court (per Karl Harrison, JA) confirmed the importance of section 183 of the Act as regards the trial of issues in the Resident Magistrates' Court and held that by ignoring the provision of the section, the Resident Magistrate had deprived the appellant of her right to have the "real question in controversy" determined at a trial.

[7] There is merit in the submission of Miss Reid. For there to be a determination of a matter on the basis of affidavits, statutory authority is required. In addition to the authorities relied on by Miss Reid, reference may also be made to the Resident Magistrates' Court Rules particularly Order XVI rule 3 which reads thus:

> "Except where otherwise provided by these rules, the evidence of witnesses on the trial of any action or hearing of any matter shall be taken orally or on oath; and where by these rules evidence is required or permitted to be taken by affidavit such evidence shall nevertheless be taken orally or on oath if the Court, on any application before or at the trial or hearing so directs."

Order XXXIII rule 7, in referring to proceedings in equity (section 105 et seq of the Act) and under the Settled Land Act, first enacted in 1888, provided thus:

> "Upon the hearing of any petition or application under this order, unless the Judge shall otherwise direct, the facts relied upon in support of or in opposition to such petition or application shall be proved by affidavit."

This rule appears to be the only clear provision in the rules that allows a Resident Magistrate to rely on affidavits in the determination of a matter. So, it would seem that unless a law makes specific provision for reliance on affidavits, the normal practice in the Resident Magistrate's Court should be followed. Order XXXVI rule 20 puts it beyond doubt in providing thus:

> "The general practice of the Court prescribed by these Rules shall apply to all proceedings whatsoever authorized by any Law to be commenced or taken in a Resident Magistrate's Court, except and so far as such practice may be inconsistent with the provision of any such Law."

[8] In the instant case, the Resident Magistrate was required to have any report made put in evidence by the maker, and the latter ought to have been available to clarify such aspects of the report that may have been in need of clarification as well as for cross-examination, if required, by the opposing party. That not having been done, the proceedings were flawed.

[9] The procedural defect was made worse by the fact that the appellant was not given the opportunity to give evidence. It is clear that she wished to give evidence, and this wish should not have been denied.

Conducting the proceedings in Chambers

[10] Miss Reid has complained that the proceedings were held in Chambers. This complaint is rather puzzling as proceedings of this nature ought to be held away from the glare of the public. Cases of this nature require sensitive treatment. We have left behind those days, when the entire community used to be in attendance to hear the details of the happenings in family matters before the courts. The Resident Magistrate was therefore clearly right in conducting the proceedings in Chambers.

[11] In view of the failure to allow the appellant to give evidence, the appeal has to be allowed. The order of the Resident Magistrate is therefore set aside and a new trial ordered. There is no reason why the new proceedings may not be held before the same Resident Magistrate as the order that he made was one that was crafted by the attorneys-at-law, and not necessarily of his total making. At the new trial, the opportunity is to be given to the appellant to give evidence and be cross-examined, and the reports are to be admitted in the manner stated earlier. Finally, if the Resident Magistrate were to arrive at a decision to grant the custody request, more specific details will have to be incorporated in the order than happened in respect of the order that is being set aside.