[2025] JMCA Misc 1

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE DUNBAR GREEN JA
THE HON MRS JUSTICE G FRASER JA (AG)

PARISH COURT CIVIL APPEAL COA2024PCCV00004

In the matter of an appeal by way of case stated

AND

IN THE MATTER OF an application by JC pursuant to sections 2, 3, 4 and 7 of the Children (Guardianship and Custody) Act

BETWEEN	**JC**	**APPLICANT**
AND	**THE CHILDREN'S ADVOCATE**	**INTERESTED PARTY**

Ms Bolivia Cole instructed by Charlene Ann Soares & Associates for the applicant

Mrs Kaye-Anne Parke for the interested party

1 October 2024 and 7 February 2025

Family law - Appeal by way of case stated - Petition for legal guardianship and custody - Jurisdiction of the Family Court where there is no surviving parent - Children (Guardianship and Custody) Act - Children (Guardianship and Custody) Rules - Judicature (Family Court) Act - Judicature (Parish Courts) Act

Family law - Establishing jurisdiction of the Family Court - Evidentiary requirements - Order XVI of the Parish Court Rules

P WILLIAMS JA

[1] I have read in draft the judgment of my sister, Dunbar Green JA, and agree with her reasoning and conclusion. There is nothing that I wish to add.

DUNBAR GREEN JA

Introduction

[2] This matter was referred to the Court of Appeal by way of a case stated, pursuant to section 254 of the Judicature (Parish Courts) Act ('JPCA'), by Her Honour Miss Pamella Blackhall ('the learned judge of the Family Court'), presiding in the Regional Family Court for the parishes of Saint James, Hanover and Westmoreland.

Factual background

[3] The factual background is extracted from the learned judge of the Family Court's statement of the case (names and some details are omitted to protect the identity of the child):

> "1…The matter is referred primarily on a point of law with respect to the Court's power to appoint the Petitioner as Legal Guardian and or to make a custody order in her favour in the circumstances where the subject child has no parent alive. The jurisdiction issue was raised on August 2, 2023 when Counsel Mrs Parke appeared as the Guardian ad Litem in respect of the minor child DDS. Additionally, this ambiguity has been a perennial issue amongst judges and practitioners alike whereby varying interpretation [sic] to the statute regarding the Court's jurisdiction is opined.
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> …
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> 3. In the matter at bar, the application for guardianship of the child DDS born on the **27th of June 2008** was brought by way of petition on behalf of the '*de facto guardian'* [JC] with no named Respondent. At the filing of the application, the Attorney-at-Law was advised by a Court's Office staff that the Family Court does not have jurisdiction, however, upon due [sic] to Counsel's persistence the matter was filed in December 2022 and listed before the Court on January 9,

2023. The circumstances of the case, is [sic] that both parents of the child DDS are deceased. In light of the novel circumstances, the Court made an order for the Attorney-at-Law for the Child Protection and Family Services (CPFSA) to act as Guardian ad Litem for the child DDS and for CPFSA to provide a Social Enquiry Report (SER). Locating the child's paternal relatives and acquiring the father's death certificate proved challenging and caused a lengthy delay. This further delayed the SER requested from CPFSA and the matter from progressing as expeditiously as it should. The death certificate was eventually provided on July 12, 2023. On that same date the court was advised that the Attorney-at-Law for CPFSA could not act in the capacity of Guardian ad Litem and so Mrs Kaye-Anne Parke, Attorney-at-Law of the Office of the Children's Advocate (OCA) was appointed instead.

4. In the instant case the child has no parent alive and the matter was brought by a 'next friend', a maternal relative as the Petitioner, pursuant to sections **2 (c), and 3, of the Children (Guardian and Custody) Act**, herein after referred to as **CGCA**, with the supporting regulation of the **CGCA, sections 105, 106 and 107 of the JPCA**,[sic] on the strength of that an application under the CGCA can be brought before the Family Court within the geographical location where any of the parties resides. Also on the basis that **section 4 of the Judicature (Family Court) Act** confers the jurisdiction of the Family Court to hear matters concerning the family, which include matters relating to the Guardianship and custody of Children as provided for in the Schedule.

5. This matter is indeed a peculiar one because DDS was placed in the actual custody of the applicant at an early age whilst both parents were alive but neither of the child's parents appointed her Legal Guardian before their death. The petition was filed without a named respondent, the Court therefore deemed it necessary to appoint to the child, a Guardian Ad Litem to represent the child's interest and also the said child was named as the Respondent in the matter. This was done pursuant to **section 5** of the Children Guardianship and Custody Regulation, **section 106** of the Judicature (Parish Court) Act, 6th Paragraph and **section 106** and **107** of Appendix **D** of the Parish Court Rules. DDS was summoned to appear, she did and stated her wishes to remain

in the care and custody of the Petitioner, who has been responsible for [sic] child's education, maintenance and upbringing.

6. The affidavits filed showed that the petitioner [JC] is a netball coach and is the child DDS's maternal cousin. Child's mother [SM], died on the 18th day of June 2019. DDS's father [FS] died on the 2nd day of April 2020. Both the affidavits filed and the SER confirmed that the child DDS was placed in the care of the Petitioner, whilst both parents were alive. Mother predeceased Father [FS] but before and after her passing, father played no significant role in DDS's life nor did he object to the arrangement for child to reside with [JC]. There were no formal or legal arrangements as between mother, father and [JC] for child's welfare. The Petitioner has provided for the financial, emotional and spiritual well-being of DDS since child has been in her care. DDS resides with [JC] since child was at a tender age. She is now 15 years old, and attends High School. She has her own bedroom and is the only child in the care of [JC].

7. The Petitioner [JC] being in actual physical custody and control of child DS [sic] became her '*loco parentis*'. She therefore sought the Court's permission to formalise the arrangement to appoint her Legal Guardian of the said child. This would enable her to carry out all legal acts that a parent can do on behalf of their child and more particularly to be able to apply for passport, visa and health card for child. In addition to caring for DS [sic], the applicant also wishes to be able to take child with her when she travels both for work overseas with her netball engagement and leisure when child is on holidays. The agency with responsibility of child's welfare in our case, the Child Protection Family Service (CPFSA) carried out an investigation, made their assessment, confirmed the Petitioner's assertions made in her affidavit and in their recommendation, agreed that granting the application would promote and protect the child's best interest."

[4] The learned judge of the Family Court recounted the submissions of counsel, at paras. 8-15 of the statement of case, as follows:

"8. Counsel appearing on behalf of DS [sic] having accepted that the petitioner satisfies the requirement that would promote the welfare of the child, opined that the court lacks

jurisdiction to grant the application to appoint a Legal Guardian. Having raised the preliminary point, and ventilated the point the Court was not inclined to agree with Counsel. However, Counsel Mrs Parke did not relent she went on further to say that only the Supreme Court has jurisdiction and as a creature of statute, the judge of a Family Court is not empowered by section 3 of the CGCA to grant the application where [the] child has no parent alive and neither parent before their death named a testamentary guardian or did so otherwise. She also pointed out that the applicant is not a parent and section 7 of the CGCA does not apply to her, therefore, custody could not be granted to her.

9. Counsel for the Petitioner on the other hand did not share Counsel's view. She stated that, pursuant to **section 2(c) of the CGCA, and section 4 of the Family Court Act**, the Family Court, has jurisdiction in the matter. The Court having assessed the situation and realising that both Counsel were not in *ad item* [sic] on the question of law in respect to the Court's jurisdiction and noting that there is no precedence [sic] dealing specifically with the Family Court's jurisdiction in appointing Legal Guardian in these novel circumstances, invited both Counsel to make further argument in writing on the preliminary point raised in support of their view on the notion that the matter may be referred to the Court of Appeal by way of case stated to resolve the issue.

10. Counsel Mrs K. Parke of the Office of the Children's Advocate, expounded her position and posited in her written submissions that the court as constituted lacks jurisdiction to appoint the applicant Legal Guardian of the child DS [sic], though the Petitioner's suitability is unquestionable. In her reasoning she stated that because both parents are deceased the Supreme Court is the only court that can appoint a 'Legal Guardian,' because it has inherent jurisdiction. She also questioned whether the Family Court has the jurisdiction to grant custody orders in favour of the Petitioner who has no standing, given that both parents are deceased.

11. She further submitted that the **CGCA** only addresses the discretion of the Court, pursuant to section 3 which states; [sic]

> *'when one parent is alive no guardian has been appointed by the other before he/she died and*

> *or if the guardian or guardians appointed by the father or mother is or are dead or refuses or refuse to act, the court may if it thinks fit appoint a guardian to act jointly with the mother /father'.*

Counsel's [sic] emphasised that the interpretation to be given to this section of the CGCA is for the guardian and the surviving parent to act jointly mother or father [sic], whoever is alive. The crux of the submission is that the Court must apply the literal and not the purposive approach 'staying within the four corners' of **section 3 of the CGCA**. She argued that the application cannot be heard in the Family Court where both parents of a child are deceased as it lacks jurisdiction.

12. On the other hand, Counsel for the applicant in her submissions stated as follows:

> *'**Section 3 of the Children (Guardianship and Custody) Act gives** the Court the power to appoint, if it thinks fit, a guardian to act jointly with a surviving parent. Furthermore, **section 4 (6)** in summary states that where a Guardian is so appointed by the Court to act, he shall continue to act as guardian after the death of the surviving parent. Furthermore, **section 6c (3) of the Judicature (Family Court) Act** states summarily that in relation to exercising the jurisdiction of the Court and to the execution of other functions of his office, each Judge shall, without prejudice to anything provided by or under this Act, have mutatis mutandis like authority, powers, privileges and immunities as appertain or would but for this Act, appertain to the office of Resident Magistrates of each of the parishes. Which translates to mean all necessary changes having been made'.*

13. She further submitted that the Court should be guided by Rules which established that it is the jurisdiction of the Supreme Court to hear matters only where the Family Court's monetary equity jurisdiction has been exceeded, as set out in section 105 of the JPCA. She also referred to the **Guardianship and Custody of the Children Rules, 1957,**

> **paragraph 2 of page 224 and sections 106 and 107 of the JCPA** at paragraph 17 of her written submissions…She further submitted that, none of these provisions states that the Court is limited to hear and determine [sic] matters concerning the Guardianship of a child where both parents are deceased.
>
> 14. In her submissions, Counsel for child [sic] stated that the Petitioner has standing to apply for custody of the minor child and referred to section 7 which states that the matter of custody applied to parents' rights and where guardianship is satisfactorily considered. It is the latter reason why there was no invitation for submissions on the matter of custody care and control, as the Petitioner has already assumed the role of child's guardian with actual physical custody, care and control. The interpretation section of the Child Care and Protection Act states, '*guardian', in relation to a child, includes any person who, in the opinion of the court having cognizance of any case in relation to the child or in which the child is concerned, has for the time being the charge of or control over the child'.*
>
> 15. Counsel Mrs Parke in her submission [sic] referred to the Supreme Court's inherent jurisdiction at section 20 of the CGCA. This concerns the Court's power of that Court [sic] to appoint and or remove guardian [sic]." (Bold and italics as in the original)

[5] The learned judge of the Family Court then stated her view on the matter. These are the salient points, beginning at para. 15 of the statement of case:

> "15…Although the removal of Legal Guardian was not expounded on it is another aspect of the Court's jurisdiction that may need to be resolved. There are two provisions in relation to the removal of guardian [sic]. In the substantive Act, the CGCA section 8 gives the authority to remove a guardian to the Supreme Court alone. However, section [sic] 105 and 107 of the JCPA also confers [sic] such powers to the judge of the Parish Court which included a Family Court Judge. When read together with section 106, the only limitation on these Courts, would be, where there is property exceeding the equity jurisdiction of the Court. Section 105 of the JPCA [sic], states that the Family Court or Parish Court has jurisdiction in *proceedings relating to the maintenance or advancement of infants, or for the appointment, or removal*

or substitution of trustees or guardians, in which the property of the infant, or the trust premises or property, shall not exceed in amount or value the sum of three million dollars [My emphasis]

16. Section 106 gives similar power and authority to the Family Court and the Parish Court as the Supreme Court, as stated below.

> '*In all such suits or matters the [Judge of the Parish Court] shall, in addition to the other power and authorities which shall be possessed by him under this Act, have, for the purposes of the jurisdiction hereby conferred, all the powers and authorities of a Judge of the Supreme Court; and the Clerk, Bailiff, or other officers of the Court, shall, in all matters in which the Court has jurisdiction under section 105, discharged any duties which an officer of the Supreme Court can discharge, either under the orders of a Judge or the practice of that court; and all officers of the Courts shall, in discharging such duties, conform to any [Parish] Court Rules now in force, and subject to such rules, and so far as such rules may not extend, shall act as the [Judge of the Parish Court] may direct'*

17. Given that the CGCA is a later Act and section 20 of that Act states that the Supreme Court alone has such authority, there seem [sic] to be an anomaly which can affect the interpretation and the application of the law. In the reading of the Bill Parliament acknowledge [sic] the lacuna at section 8 but has failed to address it. Section 35 of the Interpretation Act also suggest [sic] that there is a lacuna in the law as it stipulates thus;

> *'Where by or under any Act a power to make any appointment is conferred, then, unless the contrary intention appears, the authority having power to make the appointment shall also have power to remove, suspend, reappoint or reinstate any person appointed in exercise of the power'*

> This would suggest that any Court that has the power to appoint a Legal Guardian also has the power to remove a Legal Guardian. In my opinion, the Superior Court could consider the issue and give a direction due to the conflict between the two Acts.
>
> 18. Based on the application and submission [sic] on behalf of the Petitioner all that seem [sic] to be required of the court is to formalise the guardianship arrangement that has existed with the child for almost her entire life, by appointing the applicant as Legal Guardian of the child so that she can exercise the same rights that her parents could, had they been alive and capable of exercising those rights. Therefore, it is my considered view that the Family Court has jurisdiction to appoint guardians, pursuant to sections 2, 3, 4 and 18 of the Children (Guardianship Custody) Act, section 3 (b) of The Guardianship and Custody of Children Law 1956 (60 of 1956) Regulations, sections 105, 106 and 107 of the JPCA." (Italics and underlining as in the original)

[6] It was also the learned judge of the Family Court's opinion that the Family Court has the jurisdiction to designate an individual as legal guardian of an orphaned child if that individual has actual care and physical control of the child, provided that the appointment serves the best interests of the child and remains within the parameters of the Family Court's equitable jurisdiction as outlined in rules 3(b) of the Guardianship and Custody of Children Rules, 1957 ('the GCC Rules'). She further stated that page 104 of the Jamaica Hansard of Friday, 6 November 1956, captures Parliament's intention for the Family Court to have jurisdiction to appoint a legal guardian. An interpretation otherwise could lead to unreasonable consequences, she opined (applying **OO v BK and Others** [2023] CCJ 10 (AJ) BB, concerning statutory interpretation).

Questions referred for the opinion of this court

[7] The questions referred for the opinion of this court are:

> "(1) Whether the Family Court has the jurisdiction, to grant the application for Legal Guardianship, where the child has no parent alive and there is no estate or there is estate below Three Million Dollars?

(2) Whether the Family Court has jurisdiction to appoint Legal Guardian where one parent is deceased and the other is unknown or mentally or medically incapable and there is no estate or there is estate below Three Million Dollars?

(3) Is the Petitioner [JC] who resides in Saint James entitled to make an application to the Saint James Family Court

(a) To be appointed Legal Guardian of the child DDS?

(b) For Custody Order in respect of the child DDS whose parents are deceased?

(4) Whether [the] Family Court has jurisdiction to grant custody, where both parents agree to give custody to an interesting [sic] party who is a relative or a non-relative?

(5) Whether the duty to determine jurisdiction, or who falls within the provision of a statute is a matter to be adjudicated on based on evidence given on oath before a court?

(6) There are two statutes that allow for the removal of Legal Guardian [sic] section 8 of the Children (Guardian Custody) Act which gives the authority to the Supreme Court alone and sections 105 and 107 of the Judicature Parish Court Act, which also confers [sic] such powers to the Parish Court, [sic] how must these statutes be applied?"

Summary of submissions

For the applicant

[8] Ms Cole reiterated the submissions made in the Family Court, emphasising that the Family Court's jurisdiction is limited only in cases where the child's property exceeds the monetary limit of $3,000,000.00. In the instant case, with the child being without property and both parents having died, the monetary restriction does not apply. Rather, the equitable jurisdiction of the Parish Court can be invoked to grant the relief sought. Counsel relied on section 105 (particularly the 6th para.) of the JPCA.

[9] She also contended that sections 4(1) and (2) of the Judicature (Family Court) Act ('JFCA') give a judge of the Family Court jurisdiction to hear matters in relation to, but not limited to, the CGCA.

For the Children's Advocate/Guardian ad litem

[10] Mrs Parke's submissions on the question of custody mirrored those before the learned judge of the Family Court. I will not repeat them, save to say counsel relied on **Cable and Wireless Jamaica Limited v Eric Jason Abrahams** [2020] JMCA Civ 45, and **B and C v The Children's Advocate** [2016] JMCA Civ 48 ('**B & C**'), for the argument that the plain and ordinary meaning of section 3 of the CGCA is that the Family Court can only intervene if one parent outlives the other.

[11] Counsel further argued that section 20 of the CGCA gives the Supreme Court unlimited jurisdiction to grant legal guardianship applications and, in the same token, supports the view that sections 3 and 4 of the CGCA were intentionally restrictive. Counsel went on to explain that the Supreme Court inherited the jurisdiction of the Court of Chancery to remove guardians where no property is involved (**In re McGrath (infants**) (1893) 1 Ch 143 cited). Further, the Supreme Court stands as the *parens patriae*, (father of the country) and, as such, holds wide and unrestricted powers over matters concerning children, including guardianship. Also, although the CGCA gives some powers to the Family Court in respect of guardianship, those powers were never intended to be exhaustive. Thus, whereas sections 105 and 107 of the JPCA restrict the Parish Court's powers of appointment and removal of guardians to an estate with value below $3,000,000.00, no restriction exists in relation to the Supreme Court.

[12] Counsel, therefore, argued that the proper course for the applicant is to seek leave to have the application for legal guardianship and custody heard under the inherent jurisdiction of the Supreme Court. Counsel relied on sections 3, 7 and 20 of the CGCA to support her submissions.

Discussion

[13] I will now address each question posed by the learned judge of the Family Court, slightly reformulated in some instances for ease of understanding. The answers given by

this court will apply not only to judges of the Family Courts established under the JFCA but also to judges of the Parish Courts when exercising jurisdiction in family law matters.

(1) Whether the Family Court has jurisdiction to grant an application for legal guardianship where there is no parent alive, there is no estate, or the estate is below $3,000,000.00

[14] The established method of statutory interpretation is to give words their ordinary and natural meaning as a first step. In cases where this leads to ambiguity, other presumptions of meaning may be considered. This principle was reiterated by this court in **Special Sergeant Steven Watson v The Attorney General and Others** [2013] JMCA Civ 6, para. [19], where Brooks JA (as he then was) approved the following excerpt from Lord Reid in **Pinner v Everett**, page 2581:

> "[19] …
>
> > 'In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature, that it is proper to look for some other possible meaning of the word or phrase. We have been warned again and again that it is wrong and dangerous to proceed by substituting some other words for the words of the statute.'"

[15] It is also worth considering what was said in **R (O) v Secretary of State for the Home Department, R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department** [2022] UKSC 3, by Lord Hodge. He approved a statement by Lord Reid of Drem in **Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG** [1975] AC 591, 613, that the court "[seeks] the meaning of the words which Parliament used". Lord Hodge also approved Lord Nicholls of Birkenhead's observation in **R v Secretary of State for**

the Environment, Transport and the Regions, Ex p Spath Holme Ltd [2001] AC 349, 396, that "[s]tatutory interpretation is an exercise which requires the court to identify the meaning borne by words in question in the particular context". Lord Hodge added that the meaning of words is contextual, so words and phrases are to be "read in the context of the section as a whole" as well as "in the wider context of a relevant group of sections", considering also that "[o]ther provisions in a statute and the statute as a whole may provide the relevant context".

[16] Applying this approach, it is the plain meaning of section 4(1) of the JFCA that the Family Court has jurisdiction to hear matters relating to the CGCA. It is also clearly expressed in section 2 of the CGCA that the term "Court" refers to both the Supreme Court and the Family Court, as applicable.

[17] Generally, as regards the question of jurisdiction to appoint legal guardians, section 3 of the CGCA states:

> "3. (1) On the death of the father of a child, the mother, if surviving, shall, subject to the provisions of this Act, be the guardian of the child, either alone or jointly with any guardian appointed by the father. When no guardian has been appointed by the father or if the guardian or guardians appointed by the father is or are dead or refuses or refuse to act, the Court may if it thinks fit appoint a guardian to act jointly with the mother.
>
> (2) On the death of the mother of a child, the father, if surviving, shall, subject to the provisions of this Act, be guardian of the child, either alone or jointly with any guardian appointed by the mother. When no guardian has been appointed by the mother or if the guardian or guardians appointed by the mother is or are dead or refuses or refuse to act, the Court may if it thinks fit appoint a guardian to act jointly with the father."

[18] The plain meaning of this section is that the existence of at least one living parent is a prerequisite for the court to assume jurisdiction. So, in circumstances such as the instant case, where both parents are deceased and no guardian was appointed before

their deaths, neither the Family Court nor the Supreme Court has any jurisdiction over guardianship under this section.

[19] However, the Supreme Court, unlike the Family Court, has an inherent, unlimited jurisdiction to appoint and remove guardians. This is recognised in section 20 of the CGCA which states, "[n]othing in this Act shall restrict or affect the jurisdiction of the Supreme Court to appoint or remove guardians". In addition to the savings clause in section 20 of the CGCA, section 8, expressly confers on the Supreme Court jurisdiction to "remove…any testamentary, or any guardian…and… appoint another guardian in place of the guardian so removed". Section 4 of the CGCA deals with the appointment of testamentary guardians. Such a guardian is appointed during the lifetime of a parent and may act jointly with a surviving parent and continue to act after the death of that parent.

[20] When section 3 of the CGCA is read in the context of sections 2, 4, 8 and 20, it is evident that the Family Court's jurisdiction over legal guardianship is constrained by section 3 to cases involving a living parent in contrast to the Supreme Court's unlimited jurisdiction.

[21] Brooks JA (as he then was) provides a very helpful exposition on the jurisdiction and wide powers of the Supreme Court in **B & C**, at paras. [19] to [23], as follows:

> "[19] **The Supreme Court does have an inherent jurisdiction to appoint and remove guardians for children. The jurisdiction of that court, in this context, has a rich history. That history includes the history of the Court of Chancery**, which had exclusive jurisdiction in equity, providing relief where the common law offered no remedy. It is a history that is not without some uncertainty, but the more accepted view, in this context, is that **the jurisdiction of the Court of Chancery, over children, was founded on the prerogative of the Crown as *parens patriae*.**
>
> [20] The term *parens patriae* is defined in the ninth edition of Black's Law Dictionary as meaning:

> '…parent of his or her country'…The state regarded as a sovereign; the state in its capacity as provider of protection of those unable to care for themselves…'

Based on that doctrine, the Sovereign was regarded as having the right to make decisions concerning people who were not able to take care of themselves.

[21] The Crown's prerogative was delegated to the Lord Chancellor in England, who, at that time, was the King's Chief Minister. The prerogative eventually came to be exercised by the Court of Chancery. **In this jurisdiction, there was also a Court of Chancery. Its status and powers in relation to children were very similar to its English counterpart. Its operation was concisely set out in Mackintosh v Mackintosh (1871) Eq J B Vol 2 p 113 (reported in Vol 1 of Stephens' compilation of Supreme Court decisions of Jamaica and Privy Council decisions 1774-1923, at page 1068).** In that case, Lucie Smith VC said, at page 1069 of Stephens' compilation:

> '...In this Island the judicial business of the Court of Chancery is by virtue of local enactment transacted by the Vice-Chancellor, and the records show repeated instances of the jurisdiction in cases of infants having been exercised by my predecessors. When letters of guardianship come to be granted they will be issued by the Chancellor under the broad seal, which is in his custody, but the question of the individual to be chosen as guardian is a judicial question, to be determined by the Vice-Chancellor in due course of law and practice.'

[22] **The Court of Chancery existed as a separate entity in England until the promulgation of the Judicature Acts 1873-1875. The Court of Chancery was then merged with other courts into the High Court of Justice, which, along with the Court of Appeal, constituted the Supreme Court of Judicature of that country.**

> [23] **That merger was replicated in this jurisdiction in 1880, by the Judicature (Supreme Court) Law…**" (Emphasis added)

[22] Section 27 of the Judicature (Supreme Court) Act identifies the Court of Chancery, among others, whose combined jurisdiction, power and authority vest in the Supreme Court.

[23] The case of **In re McGrath** illustrates the jurisdiction, derived from the Court of Chancery, over infants who were not wards of the court and who had no property. In that case, a Roman Catholic father passed away, leaving behind a widow and infant children. Under the Guardianship of Infants Act 1886, the widow appointed a guardian for the infants. The guardian chose to have the infants educated as Protestants. The father had not left any instructions regarding the religious education of the infants and had shown indifference to the subject. The infants were not wards of the court and did not have any property. Nevertheless, the England and Wales Court of Appeal exercised jurisdiction and determined that there were special circumstances which justified a deviation from the general rule that infants should be raised in their father's religion. The court, believing that it would not be in the infants' best interest to intervene, declined to remove the guardian from the guardianship or to appoint another guardian to act jointly with her.

[24] Returning to the instant case, as DDS has no living parent or guardian appointed before her parents' death, the Supreme Court is the only court with the jurisdiction to determine whether to grant an application for legal guardianship and custody. As indicated earlier, the Family Court, which is a creature of statute, can only exercise the limited jurisdiction to appoint a legal guardian under section 3 of the CGCA, but the prescribed circumstances do not exist for it to do so as there is no surviving parent or appointed guardian prior to the parents' death.

[25] This court's attention was specifically drawn to rules 2-3 of the GCC Rules, which expressly incorporate section 105 of the JPCA and Order XXXIII of the Parish Court Rules ('the PCR').

[26] Rules 2-3 of the GCC Rules state:

> "2. **In these rules 'the Law' means the [Children (Guardianship and Custody) Act]** and, all amendments thereto. (Emphasis added)
>
> 3. Any application under the Law shall be deemed to come within the Equity jurisdiction of the Court and may be disposed of in Chambers by a Judge or by a [Parish Judge], as the case may be, as follows:-
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> …
>
> (b) In a [Parish] Court by petition under Order XXXIII of the [Parish] Court Rules:
>
> (i) **Where there is pending any action or other proceeding relating to the property of the child** (emphasis added), the petition shall be instituted in such action or proceeding and in the matter of the child;
>
> (ii) Where there is not pending any action or other proceeding as aforesaid, then the petition shall be intituled in the matter of the child:
>
> Provided that when the application is made in a [Parish] Court under 3 (b) (i) hereof **the limitation of the jurisdiction of a [Parish] Court as set out in the sixth paragraph of section 105 of the [Judicature (Parish Courts) Act], shall be observed**:
>
> Provided also, that if in the course of hearing an application under rule 3 (b) (i) hereof it shall appear to the [Parish Judge] that the limit of his jurisdiction has been exceeded he shall

then observe the directions set out in section 197 of the [Parish Courts Act]." (Emphasis added)

[27] Sections 105 -107 of the JPCA provide that:

"105. Every Court shall have and exercise jurisdiction in the suits or matters hereinafter mentioned, that is to say-

…

6th In all proceedings relating to the maintenance or advancement of infants, **or for the appointment, or removal or substitution of trustees or guardians, <u>in which the property of the infant, or the trust premises or property</u>, shall not exceed in amount or value the sum of three million dollars**.

106. In all suits or matters the Judge of the Parish [Court] shall, in addition to the other powers and authorities which shall be possessed by him under this Act, have, for the purposes of the jurisdiction hereby conferred, all the powers and authorities of a Judge of the Supreme Court; and the Clerk, Bailiff, or other officers of the Court, shall, in all matters in which the Court has jurisdiction under section 105, discharge any duties which an office of the Supreme Court can discharge, either under the orders of a Judge or the practice of that Court; and all officers of the Courts shall, in discharging such duties, conform to any Parish Court Rules now in force or thereafter to be in force, and subject to such rules, and so far as such rules may not extend, shall act as the Judge of the Parish Court may direct.

107. With respect to the Court in which proceedings in equity shall be taken –

…

6th. **Proceeding** for the maintenance or advancement of infants or **for the appointment, removal or substitution of trustees or guardians in which there may be no defendant, shall be taken either in the Court within the parish <u>in which the</u>**

> **property of the infant or the trust property or any part thereof may be situated or in which the applicant or applicants or any one or more of them shall reside or carry on business**." (Emphasis added)

[28] Section 197 of the JPCA states:

> "If, during the progress of any suit or matter within the equitable jurisdiction of the Court, it shall be made to appear to the Judge of the Parish Court that the subject matter exceeds the limit, in point of amount, to which the jurisdiction of the Court is limited, it shall not affect the validity of any order or decree already made, but it shall be the duty of the Judge of the Parish Court to direct the said suit or matter to be transferred to the Supreme Court, and thereupon the said Court shall have power to regulate the whole of the procedure in the said suit or matter when so transferred:
>
> Provided always, that it shall be lawful for any party to apply to a Judge of the Supreme Court, at Chambers, for an order authorizing and directing the suit or matter to be carried on and prosecuted in the Parish Court, notwithstanding such excess in the amount of the limit to which jurisdiction in the matter is hereby given to the Court; and a Judge of the Supreme Court, if he shall deem it right, may summon the other parties or any of them to appear before him, and after hearing such parties, or in default of the appearance of all or any of them, shall have full power to make such order."

[29] It is also necessary to set out the relevant provisions of Order XXXIII as they seem to give context to section 105 et seq.

> "**Petition by Guardian or Trustee of Infant, or next friend**
>
> 3. Where any guardian or trustee of any infant petitions for an order relating to the maintenance or advancement of such infant, he shall file his petition at the Office of the Clerk, and where any person as next friend of any infant petitions on behalf of such infant for an order upon or against the guardian or trustee of such infant, he may file his petition at the Office of the Clerk, and leave thereat as many copies thereof as there are guardians and trustees. And in such petition shall

> be stated the names, addresses and descriptions of the petitioner, and of all the persons to whom such order is intended to relate, and shall also state the nature of the guardianship or trust, and how created, of the property to which the trust relates, and the substance of the order which the petitioner seeks to obtain."

[30] It is my view that there is nothing in any of these provisions that enlarges the jurisdiction that is given to a judge of the Family Court, under section 3 of the CGCA, in legal guardianship petitions. If both parents have died, the Family Court has no jurisdiction to consider a petition for legal guardianship of a child.

[31] I make these further observations. First, rule 2 of the GCC Rules establishes that reference to 'the law' means the CGCA. Second, rule 3(b) indicates the form in which a matter is to be brought when property is involved or, in those instances, when the proceeding does not involve property. Third, rule 3(b) also elaborates on the procedure by referencing Order XXXIII of the PCR, and section 105 of the JPCA, which establishes that when property is involved, the Parish Court only has jurisdiction if the value is less than $3,000,000.00. Fourth, section 107(6) of the JPCA means that the selection of the Parish Court to deal with a proceeding for appointment, removal or substitution of trustees or guardians in which there may be no defendant can be determined by the location of the property, the parish in which the applicant resides or where the applicant carries on business. Fifth, the reference to the appointment or removal of guardians under these provisions is purely contextual; that is, those petitions involved with the property of infants valued less than $3,000,000.00, and in circumstances akin to those delineated under Order XXXIII of the PCR (by implication, if the property of the child exceeds that amount, the Supreme Court would assume jurisdiction). Sixth, if while hearing an application under rule 3 (b) (i), the Parish Court judge exceeds the limit of that court's jurisdiction, this can be remedied by an application to the Supreme Court under section 197 of the JPCA.

[32] In response to this question, therefore, the Family Court's jurisdiction to grant legal guardianship petitions is distinctly different from the limited jurisdiction granted to

the Parish Courts (and by necessary implication the Family Courts) to treat with petitions involved with the property of children up to a certain threshold and the supervision of any such property under section 105 et seq. of the JPCA. In other words, the proceedings under the JPCA are discrete from those under the CGCA and they are not to be conflated.

[33] As both of DDS' parents have died, the petitioner, JC, has no *locus standi* to bring a petition for legal guardianship in the Family Court. The Supreme Court would be the appropriate venue for bringing such an application, with the leave of that court.

(2) Whether the Family Court has jurisdiction to appoint a legal guardian where one parent is deceased, and the other is unknown or mentally or medically incapable and there is either no estate or an estate below $3,000,000.00

[34] Section 3 of the CGCA presupposes the existence of a surviving parent, enabling that parent to act alone or in partnership with an appointed guardian to ensure the child's wellbeing, whereas section 4 considers guardians appointed by testamentary documents. The question implies that there were no testamentary guardians appointed.

[35] There is no provision in the CGCA for circumstances where a parent is mentally unstable, medically incapable or unknown. In such circumstances, there would, in effect, be no parent to invoke the provisions in section 3. As indicated earlier, the Parish Court jurisdiction under section 105 of the JPCA can only be invoked in circumstances limited by, among other things, the nature of the petition and where the child has an estate valued below $3,000,000.00. The Supreme Court would, therefore, have jurisdiction over the question of legal guardianship. Its powers are not circumscribed by the existence or non-existence of property.

[36] This is not to say that the Family Court would be powerless in relation to the care and protection of the child in any of those circumstances. There is the provision in section 14(2)(b) of the Child Care and Protection Act ('the CCAPA'), where a child is brought before the court under that section, to grant a fit person order committing the child to the care of "any fit person, whether a relative or not, who is willing to undertake the care of the child". One of the circumstances in which a child would be in need of care and

protection is if he or she "(a) [has] no parent or guardian, or having a parent or guardian unfit to exercise care and guardianship…" (section 8(1)). The person who is considered fit and proper for these purposes, "shall, while the order is in force, have the same rights and powers and be subject to the same liabilities in respect of the child's maintenance as if he were the child's parent…" (section 26). This is not to say that the effect of a fit person order is necessarily the same as the grant of legal guardianship.

[37] The short answer to this question, therefore, is that the Family Court lacks jurisdiction to appoint a legal guardian in the circumstances described in the question.

(3) Is the petitioner who resides in Saint James entitled to make an application to the Saint James Family Court to be appointed legal guardian or for a custody order?

[38] Considering my determination on the previous questions, the petitioner, not being a parent, has no *locus standi* to bring a petition for legal guardianship in the Saint James Family Court. In other words, the Saint James Family Court lacks jurisdiction to grant the legal guardianship petition in the circumstances described. Entitlement to make such an application cannot be derived from the child being taken over by or simply put in the care of someone who is not a parent.

[39] The same principles apply to custody. An application for custody, under section 7(1) of the CCGA, can only be made by a parent. Section 7(1) states that "[the] Court may, upon an application of the mother or father of a child, make such order as it may think fit regarding custody of [the] child...". This section gives the Family Court and the Supreme Court concurrent jurisdiction. However, given the circumstances of DDS' case, the application for legal guardianship and custody cannot be made in the Family Court as there is no statutory basis to permit it. It can only be made in the Supreme Court by invoking the inherent jurisdiction of that court. Further, in answer to the question, where the petitioner lives would not give the Family Court jurisdiction, in this instance, since the jurisdiction is not geographical.

(4) Whether the Family Court has jurisdiction to grant custody, where both parents agree to give custody to an interested party who is a relative or a non-relative

[40] By virtue of section 2 of the CGCA, the Family Court has the jurisdiction to grant custody applications at the instance of specified applicants. Pursuant to section 7(1) of the CCGA, either parent of a child has the right to submit the application, and the Court may grant any order it deems suitable. It is the submission of such an application, by either parent, that gives rise to the Family Court's jurisdiction and not merely that the parents agree to give custody to an interested party. Even so, the Court will take account of parental wishes, but its paramount concern is the welfare or best interests of the child (see section 18 of the CCGA, **In Re McGrath (Infants)**, and **Dennis Forsythe v Idealin Jones** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 49/1999, judgment delivered 6 April 2001).

[41] In answer to the question, the Family Court would have jurisdiction in the circumstance described.

(5) Whether the determination of jurisdiction, or who falls within the provision of a statute is to be based on evidence given on oath before a court

[42] I interpret this query to be about whether evidence in the Family Court/Parish Court must be given by oral testimony (under oath or affirmation). To be clear, I do not think this court is being asked whether the determination of the Family Court's jurisdiction in any matter is purely a question of fact, which it obviously is not.

[43] Section 6A of the JFCA establishes Family Courts outside the Corporate Area, including the Family Court for Saint James. The jurisdiction of these courts is set out in sections 6A and 6B(1) as follows:

> "6A-(1) Courts of Record, to be called Family Courts, shall be established in such regions outside the Corporate Area as the Minister may, from time to time, by order designate, and such Courts shall have such jurisdiction and powers as may be conferred upon them by virtue of this Act or any other law.
>
> …

> 6B-(1) The provisions of subsections (1), (2) and (4) of section 4 shall apply *mutatis mutandis* to each Court established under section 6A in respect of the jurisdiction of such Court."

[44] For these purposes, the relevant provision is section 4(4) which provides:

> "4
>
> …
>
> (4) Subject as otherwise provided by or under this Act, the like process, procedure and practice as relate to the exercise of jurisdiction of a [Parish] Court, and otherwise to the conduct of its business, shall be observed, in so far as they are applicable (with necessary adaptations), in relation to the exercise of jurisdiction, and otherwise to the conduct of business, of the Family Court and, without prejudice to the generality of the foregoing, the judgments and orders of the Family Court and the attendance of persons before it, whether as accused persons or witnesses or otherwise, may be enforced accordingly."

[45] The effect of section 4(4) is that, unless otherwise stated or in cases where necessary adjustments are made, the Family Court functions with the same processes and procedures as the Parish Court. This is also reflected in section 9(2) of the JFCA, which states:

> "(2) Without prejudice to the generality of the provisions of subsection (4) of section 4, where no other provision is expressly made by this Act or by rules, pursuant to this section, the procedure and practice for the time being prescribed by rules for [Parish] Courts shall apply to a Family Court, so far as such rules may be appropriate and with such variations as the circumstances may require."

[46] In the case of **Metalee Thomas v The Asset Recovery Agency** [2010] JMCA Civ 6, Harrison JA, at para. [35], sets out the procedure which governs evidence in the Parish Court. He states:

> "[35] The practice which prevails in the [Parish] Court is that witnesses must be examined upon oath or affirmation when they give evidence in court. This is envisaged by section 183 of the [JPCA] and Order XVI rule 3 of the [Parish] Court Rules. Rule 3 states as follows:
>
> > '3. 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 on oath; and where by these rules evidence is required or permitted to be taken by affidavit such evidence shall nevertheless be taken orally on oath if the Court, on any application before or at the trial or hearing, so directs.'"

[47] In answer to the question, evidence which goes to the Family Court's jurisdiction must generally be given orally, under oath or affirmation (see the Oaths Act). Even where the rules permit affidavit evidence, the court retains the discretion to mandate that such evidence be given orally (see also **Gary Morgan v Natalie Williamson-Morgan** [2016] JMCA Civ 53 para. [31], and **Merrick Nichols v Keisha Foster** [2024] JMCA Civ 2, para. [22]).

(6) Reconciling section 8 of the Children (Guardian Custody) Act which confers powers on the Supreme Court to remove testamentary and court-appointed guardians, and sections 105 and 107 of the Judicature Parish Court Act which confer power on the Parish Court to appoint and remove guardians

[48] As indicated earlier, the Supreme Court has an inherent jurisdiction to appoint and remove guardians. This power is unrestrained by the CGCA, reinforced by section 8, and expressly codified in section 20. Conversely, the jurisdiction conferred on the Parish Court to appoint and remove a guardian, under sections 105 and 107 of the JPCA is narrow. The exercise of the power, thereby, is contingent upon the child being in possession of property valued at no more than $3,000,000.00 and confined to an application dealing with a child's estate or trust property. Therefore, the Parish Court's jurisdiction to appoint and remove guardians is not at large, and the powers conferred on it, under sections 105 and 107 of the JPCA, are not akin to those of the Supreme Court.

[49] Therefore, there is no conflict between section 8 of the CGCA and sections 105 and 107 of the JPCA. The former reinforces the Supreme Court's inherent jurisdiction over legal guardianship matters, and the latter provides a very limited jurisdiction to the Parish Court/ Family Court in specified circumstances.

Conclusion

[50] A right to legal guardianship and custody can only be established by a person with *locus standi* petitioning or applying to the appropriate court. In circumstances where there is no available parent, the Family Court has no jurisdiction to appoint a legal guardian as envisioned by the petitioner's application. It, however, has jurisdiction to appoint and remove guardians where a child has an estate below $3,000,000.00 in the circumstances and for the purposes of sections 105-107 of the JPCA and Order XXXIII, rule 3 of the PCR. That jurisdiction is based on, among other things, the existence of property.

[51] Given the death of DDS' parents, any application for legal guardianship and custody of her will have to be made in the Supreme Court. Since the petitioner is DDS' maternal cousin, she does not have the legal standing to pursue either an application for legal guardianship or custody of her in the Family Court. As indicated before, she may invoke the inherent jurisdiction of the Supreme Court.

[52] Accordingly, I propose that the case stated for the opinion of this court be answered as hereunder:

> Question 1. The Family Court has no jurisdiction to grant an application for legal guardianship and custody where the child has no living parent. The provisions under the JPCA, which were adverted to, are discrete and should not be conflated with jurisdiction under the CGCA to grant an application for legal guardianship and custody.

Question 2. The Family Court has no jurisdiction to appoint a legal guardian where the surviving parent is unknown, or mentally or medically unfit to parent the child.

Question 3. The petitioner, JC, is not entitled to make an application to the Saint James Family Court to be appointed legal guardian for DDS. Residence cannot determine jurisdiction where, statutorily, it does not exist. She is also not eligible to apply for custody.

Question 4. The Family Court has jurisdiction to grant custody on the application of one or both parents in the best interests of the child.

Question 5. Evidence which goes to the Family Court's jurisdiction must be given by oral testimony, unless there are rules which permit otherwise.

Question 6. There is no conflict between sections 105 and 107 of the JPCA, and section 8 of the CGCA.

[53] I would also propose that the following consequential order be made:

The case shall be returned to the Regional Family Court for the parishes of Saint James, Hanover and Westmoreland, for termination by that court, given its lack of jurisdiction to hear and determine the petition for legal guardianship and custody of DDS.

G FRASER JA (AG)

[54] I, too, have read the draft judgment of Dunbar Green JA and agree with her reasoning and conclusion.

P WILLIAMS JA

ORDER

(1) The court answers the questions posed by the learned judge of the Family Court as follows:

Question 1. The Family Court has no jurisdiction to grant an application for legal guardianship and custody where the child has no living parent. The provisions under the JPCA, which were adverted to, are discrete and should not be conflated with jurisdiction under the CGCA to grant an application for legal guardianship and custody.

Question 2. The Family Court has no jurisdiction to appoint a legal guardian where the surviving parent is unknown, or mentally or medically unfit to parent the child.

Question 3. The petitioner, JC, is not entitled to make an application to the Saint James Family Court to be appointed legal guardian for DDS. Residence cannot determine jurisdiction where, statutorily, it does not exist. She is also not eligible to apply for custody.

Question 4. The Family Court has jurisdiction to grant custody on the application of one or both parents in the best interests of the child.

Question 5. Evidence which goes to the Family Court's jurisdiction must be given by oral testimony, unless there are rules which permit otherwise.

Question 6. There is no conflict between sections 105 and 107 of the JPCA, and section 8 of the CGCA.

(2) The case shall be returned to the Regional Family Court for the parishes of Saint James, Hanover and Westmoreland, for termination by

that court, given its lack of jurisdiction to hear and determine the petition for legal guardianship and custody of DDS.