

SMITH v. LOPEZ

SUPREME COURT (Kneller, C.J.): September 3rd, 1993

Family Law—children—custody—joint custody appropriate if in child's best interests and conflict between parents unlikely—terms of separation agreement important consideration but may be overruled—parent's adultery no bar to custody

The husband applied for an order for joint custody of his son in divorce proceedings commenced by the wife.

The parties were married for six years. When the wife was pregnant with their child, they separated at the instance of the husband, who had formed another relationship. The wife left the matrimonial home and went to live with her parents.

The parties signed a separation agreement, under which the wife was given custody, care and control of the child, with reasonable access for the husband. She accepted a lump sum from the sale of their flat and in exchange renounced any claim for maintenance for herself or the child, and personal property was divided between them. The parties obtained orders relating to the husband's access to the child from the Stipendiary Magistrate when they could not agree on arrangements.

The wife continued to live with her parents and supported the child on her earnings. Ultimately, she petitioned for divorce. She had formed a relationship with another man and planned to remarry. She opposed her husband's application for joint custody.

The husband submitted that (a) the separation agreement had been a temporary measure, intended to remain in force until they could agree final arrangements for custody; (b) the wife had in the past ignored the agreement as to reasonable access, necessitating recourse to the magistrates' court; and (c) he now wished to have a formal voice in his son's future upbringing.

The wife submitted in reply that (a) the court should give effect to the terms of the separation agreement, upon which both parties had taken legal advice; (b) arrangements for access by the husband had in the past been frustrated by her solicitor's failure to communicate requests for access to her; and (c) although the husband had abandoned her during pregnancy, he would always have a say in their child's upbringing, and did not need a court order to that effect.

Held, awarding joint custody to the parties:

Taking into account all the circumstances of the case and having as its paramount consideration the welfare of the child, the court concluded that

an order for joint custody was the most appropriate. It was best for the child if both parents decided matters relating to his education and religious upbringing, and it was as well to set this out in a court order rather than leaving it to chance. Care and control would remain with the wife, with reasonable access for the husband. The court had considered their wishes, bearing in mind that in such matters, the claim of neither parent was superior to that of the other. The terms of the deed of separation were an important consideration but could be overruled, and adultery by the husband was not of itself a reason to deprive him of custody. Although joint custody was, generally speaking, undesirable, as it was likely to lead to conflict between parents, the court was satisfied that these parties had displayed a mature attitude and would continue to do so (page 105, lines 20–41; page 106, lines 16–40).

Cases cited:

- (1) *Dipper v. Dipper*, [1981] Fam. 31; [1980] 2 All E.R. 722, applied.
- (2) *Edgar v. Edgar*, [1980] 1 W.L.R. 1410; [1980] 3 All E.R. 887.
- (3) *Jussa v. Jussa*, [1972] 1 W.L.R. 881; [1972] 2 All E.R. 600, applied.
- (4) *N v. N (Consent Order: Variation)*, [1993] 2 FLR 868; [1994] 2 F.C.R. 275.

J.J. Neish for the petitioner;
H.K. Budhrani for the respondent.

25 **KNELLER, C.J.:** Terence Louis Lopez is the father of Anthony Keith
 Smith Lopez, born on March 6th, 1990. Gillaine Philomena Smith is
 Anthony’s mother. His father and mother were married on June 25th,
 1987 at the Cathedral of St. Mary the Crowned in Gibraltar. They began
 their married life by hurrying off on honeymoon with another newly
 30 married couple, Mr. and Mrs. James Hernandez. Mr. Lopez and Mr.
 Hernandez were colleagues in an organization with, I think, the dire
 sounding name of Terminal Management Ltd., which I think has
 something to with the local airport. The result of that post-nuptial
 excursion was not ideal.

35 Mr. Lopez began to woo Mrs. Hernandez and she responded. So Mr.
 Lopez and Ms. Smith separated on August 3rd, 1989 when Ms. Smith
 was two months pregnant by him. Mr. Lopez told Ms. Smith he no longer
 loved her. Mr. Lopez and Ms. Smith signed a separation agreement on
 December 22nd, 1989. This set out, among other things, the following
 facts:

40 1. Mr. Lopez left the matrimonial home (probably 17, Market Lane,
 Gibraltar) on August 3rd, 1989 because unhappy differences had arisen
 between them.

2. Ms. Smith was to have the custody, care and control of their child
 after the child’s birth.

45 3. Mr. Lopez was to have reasonable access to that child at agreed

times and days and in default they would go to the magistrates' court for further orders.

4. Their Austin Metro went to Mr. Lopez, as did their video cassette recorder.

5. Ms. Smith was to have their Derby 50 motor cycle. 5

6. Ms. Smith was to keep their wedding presents.

7. She kept the £17,530 realized by the sale of the flat which Mr. Lopez and she had partly paid for at 6B, Malvasia House, Vineyards, Gibraltar.

8. In return, Ms. Smith renounced any claim for maintenance for herself or for the child which she and Mr. Lopez were expecting (Anthony). 10

9. Mr. Lopez and Ms. Smith would not claim anything else from one another.

All of which was devised by counsel, namely, Mr. Ellul for Ms. Smith and Mr. Budhrani for Mr. Lopez, and seemed to be the best that could be done for Anthony, yet unborn, and his parents. Mr. Lopez and Ms. Smith were unable to agree on access and went back to the Stipendiary Magistrate on December 14th, 1990 and July 19th, 1991 for further orders. 15

Ms. Smith discarded Mr. Ellul and briefed Mr. Neish, who drew up, filed and served her petition for the dissolution of her marriage and custody, care and control of Anthony with reasonable access for Mr. Lopez, just as their earlier agreement had provided. The marriage had broken down irretrievably. 20

Now by his summons in chambers dated April 23rd, 1993, Mr. Lopez asks this court to make these orders, namely that: (a) custody of Anthony be granted to Mr. Lopez and Ms. Smith jointly; (b) care and control of Anthony be granted to Ms. Smith; and (c) Mr. Lopez have reasonable access to Anthony. 25

Ms. Smith opposes Mr. Lopez's application for their joint custody of Anthony. Let me set out, in brief, her reasons for doing so. Mr. Lopez left her when she was two months pregnant by him. Why? He said he no longer loved her. She was given custody of Anthony (and care and control of him with reasonable access to him by Mr. Lopez) by the agreement of December 22nd, 1989 and orders made by the learned Stipendiary Magistrate on December 14th, 1990 and July 19th, 1991. She admits that Mr. Lopez did not have access to Anthony after they separated but, she explains, this was because his pleas for it were by letter and her lawyer did not pass them on to her. Mr. Lopez now has reasonable access according to the agreement and the Magistrate's orders. 30 35 40

Anthony lives with Ms. Smith at her parents' home in Jumpers Building. He attends the "Tiny Tots" nursery at South Barracks. He is what is nowadays called a happy and well-adjusted child. Ms. Smith is a clerk in Barclays Bank here. She supports and maintains Anthony.

Then Ms. Smith goes on to declare that when the decree absolute is 45

signed she intends to marry Mr. James Hernandez, a director of Terminal Management Ltd., and then Anthony will be with them in what she calls “a family unit” at 6C Malvasia House, Vineyards, which is a three-bedroomed flat. She and Mr. Hernandez will give Anthony the best care, attention and education any child could have.

5 So why does Mr. Lopez ask for an order for joint custody now? He says Ms. Smith left the matrimonial home on August 3rd, 1989 when she was two months pregnant. The agreement that Ms. Smith should have sole custody of their unborn child was to remain until he and Ms. Smith agreed on a final order as to the legal custody of the child. Ms. Smith ignored the clause relating to Mr. Lopez’s reasonable access, so he had to apply to the learned Magistrate for access. Ms. Smith has, over the years, become reasonable over access. Mr. Lopez wants an order for joint custody now because he wants to have a say in his child’s future. He is Anthony’s father.

10 Ms. Smith has insisted that she did not want Mr. Lopez to pay her any maintenance for herself or for Anthony. She accepted £17,530 instead when the matrimonial home was sold. Mr. Lopez intends to take out some sort of insurance for Anthony’s future.

15 The law on all this is as follows:

20 1. This court must consider the circumstances of each case.

2. The adultery of the father or mother is not of itself a reason for depriving either of custody of the child.

25 3. The claim of one parent is not superior to that of the other.

4. Their wishes should be taken into account.

5. A covenant in a deed of separation, like any other fact, is an important consideration in deciding what is best for a child.

6. A joint custody order is appropriate if the parents are of such a calibre that it is unlikely that it will lead to conflict between them over the child: see *Jussa v. Jussa* (3).

7. Neither parent has an overriding right to the child of their marriage. Parents should agree on the religious upbringing, education and any other matter concerning their child. Splitting custody, care and control is undesirable generally but may be useful in some cases. The court will have to decide such matters if the parents cannot agree: see *Dipper v. Dipper* (1).

8. An agreement by the father and mother set out in a consent order must be given appropriate weight and in most cases that would be substantial: see *N v. N (Consent Order: Variation)* (4) and *Edgar v. Edgar* (2).

9. The welfare of the minor is the first and paramount consideration.

See generally 13 *Halsbury’s Laws of England*, 4th ed., para. 932, at 439.

Returning to the circumstances of this application, I make these findings: Anthony is about 3½ years old now. I think that Mr. Lopez and

Ms. Smith, his parents, love him dearly and Anthony should know that throughout his life. Mr. Lopez and Ms. Smith seemed to have selected the wrong partner for one reason or another. Consequently, Mr. Lopez walked out of his marriage to Ms. Smith, which says little for the sanctity of his marriage vows in the Cathedral of St. Mary the Crowned. He and Ms. Smith agreed in writing that Ms. Smith should have sole custody of Anthony. I give due weight to that agreement.

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Ms. Smith is due to marry Mr. Hernandez and Anthony will be cherished by both. She knows Anthony will always be her son and Mr. Lopez's son. She is anxious for Anthony's future because she fears that Mr. Lopez will try to disrupt Anthony's religious upbringing, education and other matters. Mr. Lopez is anxious in case the marriage of Ms. Smith and Mr. Hernandez will lead to his losing all contact with Anthony. This is unlikely, according to the affidavits.

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Mr. Lopez is also worried that he will not be consulted about Anthony's religious upbringing, education and other matters. Ms. Smith, I apprehend, feels that Mr. Lopez forfeited that privilege or right, although out of her good nature she hints that Mr. Lopez will in fact continue to have such privileges or rights. Her counsel supports her by references to authority that a father does not lose his rights if he does not have custody of his child. So, it seems to me, he might as well have it set out in an order for joint custody.

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The answer is one for the exercise of the discretion vested in this court. As usual, the discretion is to be exercised judicially and not according to my whim, fancy or prejudice. Mr. Lopez and Ms. Smith produced Anthony. He needs them both throughout his life. Mr. Lopez left his mother for another woman. This is not to his credit. He has left the other woman. That is not to his credit. Ms. Smith is to marry again but that is understandable in the circumstances which I have outlined. Mr. Lopez and Ms. Smith entered into a written agreement about the sole custody of Anthony. I give great weight to it.

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What, however, taking all that into account, is the best for Anthony? His parents do not agree. They come to this court. Well, weighing one thing with another, applying the law to the facts and doing the best I can, I hold that Anthony's custody should be jointly held by his father and mother. This will be the best for him.

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My order is to be that the application be granted as prayed. Joint custody of the child of the marriage will be given to his father and his mother. Care and control of him will go to his mother, with reasonable access to him for his father. No order as to costs.

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Order accordingly.