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## MAGCO LEGAL LESSONS #18

### LEGAL TOPIC: FACTORS CONSIDERED IN AWARDING CUSTODY

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## WHAT IS CUSTODY?

In a legal context, custody refers to more than just physical care and control or guardianship of a child. This physical care and control of a child would, of course, confer rights and responsibilities unto the custodial parent, but there's more, as the custodial parent, for instance, becomes financially responsible for the child and has a right to make decisions in relation to the education or religion of the child and so forth.

**The Family Law (Guardianship of Minors, Domicile and Maintenance) Act Chapter 46:08** defines "custody" as the right to possession and care of a minor

Where there are custodial disputes amongst parents, our Family courts take certain factors into consideration before making a final custody order. Why is this? -As you may already know, not every parent is fit to be a "parent" and because of this, the courts undertake that responsibility of



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placing a child in the best situation possible. The courts will strive to place the child with the parent who can best maintain their status quo and give the said child a good life overall. The over-riding consideration of the Courts is usually not what the Parents want, but rather, what is in the best interests of the child.

It is also important to note, particularly for fathers, that parents need not have ever been married in order to have custodial rights to a child. On that note, reference can be made to **Section 3 (1) of the Status of Children Act Chapter 46:07** which states:

*3. (1) Notwithstanding any other written law or rule of law to the contrary for all the purposes of the law of Trinidad and Tobago—*

*(a) the status and the rights, privileges and obligations of a child born out of wedlock are identical in all respects to those of a child born in wedlock;*

*(b) save as provided in this Act, the status and the rights and obligations of the parents and all kindred of a child born out of wedlock are the same as if the child were born in wedlock; but this provision shall not affect the status, rights or obligations of the parents as between themselves.*

Today we'll look at some of the main factors that the court considers when granting custody. It must be noted that each case is unique, and these may not be the only factors that play a role in your particular case.

## FACTORS TAKEN INTO CONSIDERATION BY THE COURT WHEN GRANTING CUSTODY

### ✚ The First and Paramount Consideration- The Welfare of the child

It cannot be emphasized enough that the overriding and paramount consideration that the court takes into account when making a custody order is **the welfare of the child**. We therefore cannot look at the following factors independently but as contributions to the welfare of the child.

**Section 3 of The Family Law (Guardianship of Minors, Domicile and Maintenance) Act Chapter 46:08** states as follows:

3. *Where in any proceedings before any Court—*

*(a) the legal custody or upbringing of a minor; or*

*(b) the administration of any property belonging to or held in trust for a minor, or the application of the income thereof, is in question, the Court, in deciding that question, shall regard **the welfare of the minor as the first and paramount consideration**, and shall not take into consideration whether, from any other point of view, the claim of the father or any right at common law possessed by the father in respect of such custody, upbringing, administration or application, is superior to that of the mother or the claim of the mother is superior to that of the father.*

In the Court of Appeal matter of **Dennis Forsythe v Idealin Jones SCCA 49 of 1999**, Harrison J.A., as he then was, said at paragraph 8: “A Court which is considering the custody of the child, ***mindful that its welfare is of paramount importance must consider the child’s happiness, its moral and religious upbringing, the social and educational influences, its psychological and physical well-being and its physical and material surroundings, all of which go towards its true welfare. These considerations, although the primary ones, must also be considered along with the conduct of the parents, as influencing factors in the life of the child and its welfare***”.

### **The Wishes of the Child**

A child may prefer one parent over another and as such, a child may wish to live with the preferred parent. The Court can take the wishes of the child into account depending on the child’s age, maturity and understanding. For instance, teenagers usually have the maturity and understanding to articulate their wishes in relation to custody whereas younger children are more easily influenced and may not be capable of making such independent assessments. However it is important to note that while the Court **may**, take account of the wishes of children in this regard, these wishes are never the final or determinative factor in such decisions. The Court will therefore draw its own inferences and would not necessarily be swayed only by the wishes of a young child.

**Charles v Charles TT 2004 HC 79**: *where the court is of the view that the child’s wishes are heavily influenced by an adult, this is taken into account in attaching (‘or not attaching’ Emphasis mine) weight to the child’s wishes.*

In the Barbadian case of **Haloute v Adamina BB 1992 HC 14**, the Court held that a fourteen (14) year old boy was old enough to be heard when considering making such a decision.

It is to be noted however, the welfare of the child will supersede his/her wishes. (**Daniel v Daniel TT 1991 HC 116**).

### **Accommodation and Financial Stability of the Home**

Another factor to be taken into consideration is the financial stability of the home of the potential custodial parent and the housing accommodation that the said potential custodian will be able to provide for the child. For example:

- Would the child be able to have his/ her own bedroom?
- Would the child be able to have proper meals everyday?
- Would the child have a proper area to do his/her studies?
- Would the custodian be able to afford books for the child?
- Location of accommodation and proximity to child's school; etc.

However, it must be carefully noted that just because one parent may be richer than the other, this does not mean that said richer parent is a more fit parent. In fact in some cases it is the complete opposite.

As stated in **Re McGrath [1893] 1 Ch 143**: “It cannot be merely because the parent is poor and the person who seeks possession of the child as against the parent, is rich; that the child ought to be taken away because its pecuniary position will be better.” In this case, the Court was clear that the welfare of a child is not measured by money alone or by physical comfort only. The word welfare must be construed in its widest sense.

In **Stanley Clarke v Madge Cary (1971) 12 JLR 637**, Smith J.A. stated that: “A child’s physical comfort is however, an important consideration when deciding what is in the child’s best interest. A child can be more comfortable in a poor home than he may be in a rich home.”

### **Religious and Cultural Backgrounds**

Another factor that will be considered is the religious and cultural upbringing of the child thus far, that is, whether the child’s religious and/or cultural practices will be undermined if they are placed with the potential custodial parent who may undermine or derogate from the child’s Faith and beliefs.

**Section 34 of The Family Law (Guardianship of Minors, Domicile and Maintenance) Act Chapter 46:08** provides:

34. *Upon application by a parent for the production or custody of a minor, if the High Court is of the opinion that the parent ought not to have the custody of the minor, and that the minor is being brought up in a different religion to that in which the parent has a legal right to require that the minor should be brought up, the Court shall have powers to make such order as it may think fit to secure that the minor is*

*brought up in the religion in which the parent has a legal right to require that the minor should be brought up; but nothing contained in this Act shall interfere with or affect the power of the High Court to consult the wishes of the minor in considering what order ought to be made, or diminish the right which any minor now possesses to the exercise of its own free choice.*

### Separation of Siblings

Yes, the court also considers whether the child has siblings. In most cases, the courts are reluctant to interfere with the status quo of the child and would hardly ever split siblings from one another if they have grown up together.

In the case of **Leong v Brambel [1965] 8 WIR 149**, Wooding CJ held that ***the court should avoid separating siblings.***

The case of **Charles v Charles (supra)** was an exception that concerned the custody of a child who had remained with her mother while her 4 siblings stayed with her father during the custody proceedings. ***The court noted that, although, to separate children of the family is often the least preferred option, the court must bare in mind that the status quo of separation has continued and that the middle child has articulated a deep love and strong bond with her mother and the court is of the view to remove her from her mother's care would cause irreparable damage to this child and would not be in her best welfare.***

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## Gender of the Child

By no means is there any presumption in law that mothers are preferred custodians where female children are concerned or that Fathers should be the preferred custodians for male children. Previously it used to be thought that the contributions that a mother can make to a child are said to be “special” and there appeared to be a definite presumptive bias in favour of Mothers in the award or grant of Custody and Daily Care and Control of children. In **Leong v Brambel [supra]**, the court held *with respect to young children, mothers have a special contribution to make at that stage of their growth and in the case of young girls, this is all the more so*. However, as we earlier discussed, this will depend on the ultimate welfare of the child.

However this position is changing as we have seen many instances of some Mothers being really terrible parents and we have also seen many cases of several different single Fathers being excellent custodial parents. In fact the attitude of the Courts and Judges and Magistrates has changed dramatically and there is really no automatic presumption anymore that a Mother will naturally make a better custodial parent than the Father. Both parties are now assessed equally on their own merits and the Court considers the welfare of the child as the ultimate decider.

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