

02/1980

## FAMILY COURT OF AUSTRALIA at ADELAIDE

*In the Marriage of HOUSTON and SEDORKIN*

Marshall SJ

13 July 1979 — [1979] FLC 78,725 (¶90-699)

**FAMILY LAW - APPLICATION FOR CUSTODY OF CHILDREN OF THE MARRIAGE - FINDING BY COURT THAT A SUBSTANTIAL CHANGE HAD OCCURRED SINCE THE MAKING OF THE PREVIOUS CUSTODY ORDER - MATTERS TO BE TAKEN INTO ACCOUNT IN DETERMINING SUCH AN APPLICATION - BEST INTERESTS OF CHILDREN SERVED BY GRANTING CUSTODY TO THE APPLICANT WIFE: FAMILY LAW ACT 1975, SS64(1), (7).**

On a wife's application to reverse an order made 18 months previously, which gave the husband custody of the three children, the Court discharged the existing order and gave custody to the mother. The Court set out the following guidelines in such cases:

**1. A custody order is subject to discharge or variation in the light of material changes in circumstances since the date of the existing order.**

**2. An inquiry directed to changed circumstances necessarily involves a consideration of the set of circumstances that existed at the time when the current order was made and it is necessary to have regard to the reasons for judgment of the judge at the previous hearing. However, it is unnecessary to consider whether that judge would or would not have reached the same conclusion in the light of changed facts or circumstances proved in the subsequent trial.**

**3. Whilst in an inquiry of this nature the starting point is usually the order or the reasons for judgment of the original judge, there may be cases where a Court hearing a subsequent application may admit evidence of events prior to or at the time of the previous hearing (for instance such matters as cross-examination on previous evidence and matters of substance not placed before the trial Judge at the original hearing or not referred to in his judgment).**

**4. The inquiry is a positive one directed to the best interests of the children, and the party seeking the discharge of a current order for custody should place before the Court evidence which demonstrates a material change in circumstances such as to warrant the discharge or variation of the current order. This is of particular relevance in a case where a relatively short period of time has elapsed since the date of the making of the current order.**

**5. It is the duty of the judge to consider all of the relevant facts and circumstances and to exercise his discretion having regard in particular to s64(1)(a): "The Court shall regard the welfare of the child as the paramount consideration".**

**In the present case the Court found that there had been a substantial change in the relevant circumstances since the date of the previous order and that the best interests of the children now and in the foreseeable future would be best served by giving their custody to the wife.**

**MARSHALL SJ:** In this application Barbara Juno Sedorkin formerly Houston (hereinafter referred to as "the wife") seeks to discharge an order made by Mr Justice Gun granting David Jack Houston (hereinafter referred to as "the husband") custody of the three children of the marriage L born 27th September 1969, and D and H (twins born on 31st January 1972). The wife asks that his Honour's order be reversed and that she be awarded custody of the children.

The parties married on 11 September 1968, separated on 16 October 1975 and an Order Nisi for dissolution of marriage was pronounced on 15 February 1977. On 1 December 1976 the husband filed an application for custody of the said children. That application was opposed by the wife and resulted in a hearing at which both parties were represented by counsel. On 18 November 1977 Mr Justice Gun delivered written reasons for judgment and awarded custody to the husband with access to the wife.

At the hearing of the wife's present application the husband elected not to be represented by counsel. Before embarking on a discussion of the merits and reaching a conclusion in accordance with the provisions of s64 of the *Family Law Act* it is relevant to consider the matters that arise for consideration when the Court is asked to reverse a custody order made previously following a contested hearing. Section 64(7) of the Act provides that: "A court may discharge or vary an order under this section, or may suspend any part of the order and may revive the operation of any part so suspended." In this case it is agreed that the starting point is the judgment of Mr Justice Gun delivered on 18 November 1977.

His Honour's final conclusion was:

"As I have previously said the children have now settled down with the applicant and their lives have become stable. I do not think that it would be proper in all the circumstances to take the risk of handing them over to the respondent having regard to my doubts as to her ability to cope and as to the stability of her relationship with Sedorkin. Putting it another way, I do not think that I would be justified in changing the custody of the children at the present time. However, I would emphasise that no order for custody is ever final. A substantial change in the circumstances of the parties or the children could easily result in an order changing custody. For these reasons I make an order that the applicant have the custody of the three children of the marriage. I order that the respondent have access to the children each alternate weekend from 6pm on Friday until 6pm on Sunday. I also order that the respondent have access to the children for half of the school holidays."

The wife's application to discharge the existing custody order was filed on 31 October 1978. Two Court Counsellor's reports are before the Court. Both counsellors gave evidence before me and the other witnesses were the parties and Mr Sedorkin. Matters not in issue between the parties are:-

1. The accommodation and the financial resources available to each party is quite satisfactory.
2. Whilst the wife did express some interest in a compromise solution that would result in L being with her mother and the two boys with their father, both parties agree that it would be contrary to the best interest of the children to divide their custody.
3. That whatever the result of the custody application the children will continue with their present schooling arrangements.

Mr Sedorkin impressed me as a sincere young man who is genuinely fond of the children and who is willing to accept responsibilities towards them. Despite his youth, and notwithstanding his early history, I feel that he has had and will continue to have a good influence on the wife and the children. The wife was an impressive witness. She has a very strong if somewhat over-emotional love for the children and, there is no good reason why I should doubt her evidence as to how she intends to care for the children now and in the future should she be successful with her custody application. She recognizes the continuing role of the husband in the lives of the children and I accept her evidence that she will co-operate on access matters if she gains custody. Her demeanour in the witness box was restrained and reasonable; and she exhibited no signs that I could interpret as a continuation of the mental problems that have afflicted her in the past. I accept her evidence that she has recovered from those problems and that she is no longer in need of medical care. In my view she enjoys the love of her children.

The husband over-simplified the problems regarding the children and there is no doubt that he is over-confident, over-bearing and relatively insensitive to some of their real needs. I am very disturbed by his efforts to manipulate the custody issue by informing the children that he would not have any more to do with them if the wife obtained custody. He is an intelligent man and I am not inclined to make any excuses for that behaviour on his part. It placed an intolerable burden on the children and in effect took a rather mean advantage of the love that they feel for him. On the other hand he has been in many respects a caring and loving parent. This is amply demonstrated by the fact that all of the children love him and wish to keep in contact with him. Despite his obvious faults, and he did little to conceal them, the husband is a person with some very commendable qualities. In his own way he has made considerable sacrifices in order to fulfil his duties as the custodial parent but his attitude on many other matters has been quite uncompromising and in my view contrary to the best interests of the children. An obvious example of this is to be found in the evidence regarding the access problems that developed from time to time. The main fault for this most unsatisfactory state of affairs must be attributed to the

husband who failed and still fails to recognize that the wife has a continuing role in the lives of the children.

However, in favour of the husband, I must record that he, at a fairly late stage, reversed his stand that he would have no further contact with the children if the wife obtained custody. Whatever the motive for his late change of heart on this subject I am pleased to accept that declaration on his part and it gives me greater confidence in the future relationships between the children and their father. Some of the wife's complaints regarding his alleged lack of care for the children particularly in respect of health matters may have been exaggerated a little but on an overall view of the evidence on these matters I find that the husband has been somewhat harsh and unbending in his attitude to the children and that they would benefit from a more caring and sympathetic form of care.

In the circumstances of this case the evidence as to what any of the children may have said to the respective parties regarding the custody issue and the comments of the children on the same subject to the Court Counsellor must be treated with considerable caution. As I have already stated the husband took an unjust and unkind attitude towards the children on this subject and placed the children under very considerable emotional pressure.

In cases such as this where the children have been in the custody of one parent for a reasonable length of time and where they are reasonably well settled in that environment the Court must give careful consideration to all the relevant facts and circumstances and form a considered opinion as to whether the alternatives offered by the wife offer positive advantages relating to the children's present and future welfare such as would justify a change in custody.

I turn now to a consideration of the question of whether the wife has demonstrated any material or substantial change in the relevant circumstances since the date of Mr Justice Gun's order. Whereas his Honour has considerable doubts to the ability of the wife to cope with the care and control of the children because of her state of mind and her relationship with Mr Sedorkin, the evidence before the Court satisfied me that the wife is now happily married to Mr Sedorkin, that she has recovered from her former mental problems and that she is able to provide a stable, caring and loving environment for the children. Mr Sedorkin is in regular employment and he is capable and willing to fulfil an effective support role to the wife and the children.

Whilst the husband's circumstances are substantially the same, his statements to the children on the custody issue placed them in a most difficult position and his unbending attitude to the wife on access matters must have had an adverse effect on the children. Notwithstanding his contribution to the material welfare of the children he has continued to involve them in the bitterness that exists between the parties and in effect used them as weapons against the wife. I am prepared to concede that he may have taken those attitudes in the belief that he could, in the long term, serve the best interests of the children but on an overall and impartial view of the facts such conduct on his part is not what I would expect of the average caring and loving parent. These children have been through a very difficult time and one of the matters that I must consider is which of the competing claims is likely to bring to the children some greater degree of protection from the seemingly incurable bitterness that the husband entertains towards the wife. If the wife obtains custody I am confident that she will allow generous access to the husband but, on the other hand, I am sure that a continuation of the husband's custody will undoubtedly involve the children in further squabbles on that subject. Having regard to all of the evidence before the Court I am satisfied that there has been a substantial change in the relevant circumstances since the date of the last order and that the best interests of the children now and in the foreseeable future would be best served by giving their custody to the wife. Under her custody they will receive tender loving care and enjoy the degree of emotional rapport that is so important to their development.