35/76

FAMILY COURT OF AUSTRALIA at MELBOURNE

LYTHOW v LYTHOW

Watson J

10 February 1976

FAMILY LAW – JOINT CUSTODY ORDER – ACCESS – MATTERS TO BE TAKEN INTO CONSIDERATION WHEN DETERMINING APPLICATIONS UNDER THE *FAMILY LAW ACT* 1975 – ADVERSARY PROCEDURES TO BE CUT TO A MINIMUM: *FAMILY LAW ACT* 1975, SS43, 61(1), 64(1), 97.

HELD: The wife to have general care and control of the child of the marriage and the husband to have access at specified times.

1. The *Family Law Act* (and particularly Part VII thereof) does not exist in a vacuum – it must be seen as implementative particularly in regard to children, of general community standards and norms. One such generally accepted norm is that a young child, particularly a female, needs the constant warmth and companionship of her natural or psychological mother. It follows from this that the natural mother should not be replaced in this all important role by another woman unless she is shown to be unfit for that maternal role. Unfitness is not always clearly measurable and there are times when the Court must seek to strike a delicate balance between partial unfitness and the need for a natural mother's caring and warmth.

2. The spirit of the *Family Law Act* and *Regulations* is clear. Adversary procedures are to be cut to a minimum. Only that conduct of the mother and father which touches upon their fitness to maintain their roles as natural parents is relevant. The Court and legal representatives of the parents, and the legal representatives (if any) of the child, are under an obligation to protect the rights of the child and to promote the child's welfare. Narrow adherence to the adversary system is not only non-productive but contrary to the duties imposed by the Act. The Court has the delicate but clear duty to see that as far as possible parents of a child who are to have a continuing relationship with the child, leave the Court with their self-respect unviolated by forensic aggression or curial denunciation.

3. Both parents must share in the life of C. She should not stay overnight in a residence with her maternal grandmother and Mr William Crawford. The apparently good relationship with her paternal grandmother should be maintained but not in conflict with her natural mother. The mother's housing, medical treatment and overall care and control of C require supervision, certainly for some time to come. The father and mother should retain joint custody of C to the extent they each have an equal say in C's future.

WATSON J: ... Section 42 of the *Family Law Act* provides that the Court shall exercise its jurisdiction in accordance with the Act. When compared with s25(2) of the repealed Act it will be seen that there is a clear indication by Parliament that the present Act should provide its own code of law in matrimonial causes; proceedings with respect to the custody, guardianship, maintenance access of or to a child of a marriage are a 'matrimonial cause': s4(1).

Section 43 requires that the Court in exercising jurisdiction under the Act shall, *inter alia*, have regard to:

> (a) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children; and
>
> (b) the need to protect the rights of children and to promote their welfare.

Section 61(1) provides that subject to any order of a Court for the time being in force, the mother and father of a child a marriage have the joint custody of the child. This provision dramatically breaks away from the common law which reposed custody in father.

Section 64(1) provides that in proceedings with respect the custody or guardianship of, or access to a child of the marriage the Court shall regard the welfare of the child as the paramount consideration.

This is a well known criterion and is well examined in the reported cases – see Toose Watson and Benjafield, *Australian Divorce Law and Practice*, paragraphs (729) *et seq*. I pause to note that the reported cases explore the constant shifts in community mores and opinions and reflect the increased psychological understanding by the courts of the dynamics of inter-relationships within the family. To that extent they should be read more as examples of how the courts seek to deal with varied sets of facts and relationships rather than as hard and fast precedents binding on later decision-makers. For example who today would dare to rely upon the strictures that poured forth from the Bench in *Besant* (1879) 11 Ch D 508 at 521?

Consistent with a general code which no longer seeks to assign fault in marriage breakdown, s101 empowers the Court to reject offensive, scandalous, insulting or humiliating questions. An interesting examination of the philosophic approach properly to be adopted by the Court where the code is based on irretrievable breakdown rather than fault is to be found in *Wachtel v Watchel* (1973) 2 LR 366; (1973) All ER 829.

The *Family Law Act* (and particularly Part VII thereof) does not exist in a vacuum – it must be seen as implementative particularly in regard to children, of general community standards and norms. One such generally accepted norm is that a young child, particularly a female, needs the constant warmth and companionship of her natural or psychological mother. It follows from this that the natural mother should not be replaced in this all important role by another woman unless she is shown to be unfit for that maternal role. Unfitness is not always clearly measurable and there are times when the Court must seek to strike a delicate balance between partial unfitness and the need for a natural mother's caring and warmth.

(b) The Hearing of Custody Applications.
Section 97 of the Act provides that the Court shall proceed without undue formality and shall endeavour to ensure that the proceedings are not protracted. Part VII of the Act, and in particular ss62 and 65, furnishes the Court with a wide range of interlocutory options to enable it to bring about a solution where there is a dispute concerning a nuptial child's future.

Regulation 36(4) provides that where an application relates to the welfare or custody of, or access to a child, the application shall be accompanied by an affidavit setting out shortly the arrangements proposed for the child, and the facts to be relied upon in support of the application.

Regulations 5 and 81 furnish the Court with a wide battery of pre-trial procedures, and in particular r81(2)(l) invites the Court to make orders with respect to any matter relating to procedure that will enable costs or delay to be reduced and will help to achieve a prompt hearing of matters at issue between the parties.

The spirit of the Act and Regulations is clear. Adversary procedures are to be cut to a minimum. Only that conduct of the mother and father which touches upon their fitness to maintain their roles as natural parents is relevant. The Court and legal representatives of the parents, and the legal representatives (if any) of the child, are under an obligation to protect the rights of the child and to promote the child's welfare. Narrow adherence to the adversary system is not only non-productive but contrary to the duties imposed by the Act. This view is not novel – see *Clarkson v Clarkson* (1972) 19 FLR 112. The Court has the delicate but clear duty to see that as far as possible parents of a child who are to have a continuing relationship with the child, leave the Court with their self-respect unviolated by forensic aggression or curial denunciation.

I have thought it useful to make these remarks in this case because there was, at least at the beginning, both in the pleadings and the advocacy, too much emphasis on the adversary system. However, in fairness to Counsel, particularly as the case developed and my espousal of the above principles became clear, Counsel adopted a most helpful and co-operative approach which enabled the Court to deal with the issues more succinctly and with less 'blood-letting' than may have been anticipated at the outset.

(c) The Facts in the Case
I only propose to mention the major facts in this case which have led me to the conclusions which follow. I wish to make it clear however that I have carefully perused and considered all the material placed before me. I have closely observed the demeanour of both parents. As the best interests

of C will be served by her seeing as much as possible of both her parents, I have deliberately refrained from mentioning any matter or criticism which would in any way unnecessarily seek to take away the father's or mother's self-respect.

C's father and mother intermarried at South Melbourne on 9th September 1972. At the time the groom was aged 21 and the bride 20. C was born on 6th February 1975. There has been considerable unhappiness in the marriage since about the time of the child's birth. There have been some episodes of violence. There have been partings and reconciliations. There has been considerable in-law interference on both sides, particularly by the wife's mother and her de facto husband. Unfortunately both these people appear to drink alcohol to excess and are aggressive and abusive in drink.

One difficulty created here is that the wife has a strong emotional tie with her mother which probably provides her with some emotional security. Yet at times this tie has been destructive of the marital relationship between husband and wife and either directly or indirectly inimical to the welfare of C.

On 29th December 1975, C's mother and father separated following an argument which involved the wife's mother. The wife went to stay with her mother. On 7th January 1976, the father called at that home, was permitted to see C and then decamped with the child. As indicated above both parents were before this Court on 12th January. There was an attempted reconciliation which failed.

The mother's fitness to look after her baby girl is challenged at two points —

(a) it is alleged that from time to time the mother neglected properly to care for her child.

(b) it is suggested that she suffers from a psychiatric condition which makes her a dangerous custodian of her own daughter.

The evidence before the Court as to the mother's neglect of C is not strong. Where both father and mother are young and both in full time employment their domestic responsibilities in the home must be seen as equal. Therefore if C was neglected while her parents were living together that may be as much the fault of the father as the mother. When Mrs Lythow was staying with her mother, the latter's intemperance and failure in domestic duties was probably the more dominant factor.

Mrs Lythow now knows the nature of the criticisms made against her. Her future care and control of C will be supervised. She will have supportive counselling and treatment. She holds a position of considerable trust and responsibility with other people's children. Before me she was well turned out, co-operative and responsive. I am not convinced that from henceforth she will subject C to substantial neglect. If she does Mr Lythow has his remedies.

Of great significance is Mrs Lythow's psychiatric problem. Because I had some concern for C's immediate safety in the care and control of her mother, I required that Dr Lloyd attend for cross-examination before and by me. Although he is somewhat inexperienced in the psychiatric field, I have no reason to do other than accept both his diagnosis and prognosis. Consequent upon an examination of his evidence I conclude:-

(a) under proper treatment, medication, counselling and supervision, Mrs Lythow represents no significant danger to C.

(b) the close emotional and physical relationship between Mrs Lythow and her mother is not only retarding Mrs Lythow's proper emotional development, but in plain words is not good for C.

I therefore propose to make a series of orders which reflect my thinking and conclusions and which will achieve the best result for C that is apparently possible at present. These orders will produce two corollaries of major significance, namely —

(a) there will almost certainly be a substantial weakening of Mrs Lythow's emotional link with her mother; and

(b) Mr Lythow must contribute to the maintenance of his child.

As to the first matter Mrs Lythow will need guidance and help well beyond the resources of this Court. She will need long term counselling and guidance. Her Solicitor (Mr Prendergast) is well known to this Court for his humane concern and perception of the value of counselling. I hope he can arrange for his client to be placed in the hands of an appropriate counsellor from the Red Cross or some similar agency to enable her to weather the emotional shoals that lie ahead.

As to the second matter it will be necessary for Mrs Lythow to obtain suitable accommodation for C and herself. Almost certainly this will be rented accommodation. In my view one-third of such rental can properly be regarded as one of the economic factors inherent in C's maintenance. There will be creche fees. A sum of $16.00 per week should be a reasonable assessment of the cost of food and clothing. Each parent should bear the costs equally. Therefore in due course Mr Lythow must be prepared to pay one-sixth of his wife's rent, one-half of the creche fees, and $58.00 general maintenance. I do not propose to make an order in these terms at present. I merely set forth guidelines for the assistance of the parties and their legal advisers.

(d) My Conclusions and Orders:
Both parents must share in the life of C. She should not stay overnight in a residence with her maternal grandmother and Mr William Crawford. The apparently good relationship with her paternal grandmother should be maintained but not in conflict with her natural mother. The mother's housing, medical treatment and overall care and control of C requires supervision, certainly for some time to come.

The father and mother should retain joint custody of C to the extent they each have an equal say in C's future.

I therefore order —

(1) That upon Mrs Lythow obtaining suitable accommodation for herself and C she is to have the general care and control of C for all periods other than as specified below.

(2) The suitability of the accommodation is to be determined by the Court welfare officer generally supervising these orders.

(3) Mrs Lythow is to undertake all treatment and medication reasonably ordered by a competent practising psychiatrist. She is to authorise the psychiatrist to report fully to the said Court welfare officer on all aspects of her psychiatric condition and treatment.

(4) These orders are to be generally supervised by a welfare officer attached to this Court. The welfare officer is hereby authorised to initiate proceedings under r112 if he is of the opinion that it is in C's interest to do so.

(5) Until Mrs Lythow obtains care and control in accordance with (1) hereof, she is to have access to C from 9.00 a.m. to 7.30 p.m. each Sunday.

(6) Once Mrs Lythow obtains care and control in accordance with (1) hereof, Mr Lythow is to have access from 9.00 a.m. each Saturday to 7.30 p.m. each Sunday, together with continuous access for 2 weeks in any calendar year during a period when he is on leave from employment.

(7) Times of access may be varied by agreement in writing. In particular at least one weekend's access should be forgone during, either the autumn or Spring school holidays to enable Mrs Lythow to take C away on a holiday.

(8) Neither Mrs Lythow's mother or Mr William Crawford is to stay overnight in any residence occupied by Mrs Lythow and C while C is there.

(9) C's name is to be removed from the passport of either or both parents. No application for a passport for C is to be lodged or granted without reasonable written notice to both parents.

(10) The father is to pay reasonable maintenance, the amount of which is to be fixed by written agreement or the further order of this Court.