

25/1980

## HIGH COURT OF AUSTRALIA — FULL COURT

**GRONOW v GRONOW**

Stephen, Mason, Murphy, Aickin and Wilson JJ

**14 December 1979 — [1979] HCA 63; (1979) 144 CLR 513; 54 ALJR 243; 29 ALR 129; 5 Fam LR 719; [1979] FLC 78,844 (¶ 90-716)**

**FAMILY LAW - INFANTS AND CHILDREN - FAMILY COURT OF AUSTRALIA - CUSTODY OF CHILD OF MARRIAGE - APPLICATION BY BOTH PARENTS FOR CUSTODY OF YOUNG DAUGHTER - JUDGE'S DISCRETION - PRINCIPLES TO BE APPLIED - WHETHER PRESUMPTION THAT MOTHER'S CUSTODY PREFERABLE - FUNCTION OF APPELLATE COURT ON APPEAL FROM EXERCISE OF DISCRETION: FAMILY LAW ACT 1975 (CTH), PT VII.**

The father appealed from an order of the Full Court of the Family Court which by majority reversed an order made by Evatt J granting him custody of the child (daughter 4½ years old) and granted custody to the mother. Both parties had a full-time profession, the father as a medical practitioner, the mother as a nursing sister. Evatt J had found that the qualities of the two parents were fairly equally balanced, each being able to provide properly for the child a comfortable and loving home and that each was a fond and devoted parent. In the end she regarded the factor that tipped the balance in favour of the husband as being the hostility which the wife felt to the husband and which she displayed in the presence of the child. The majority of the Full Court of the Family Court reversed this decision. Before the High Court it was argued that Evatt J had failed to take into account what was called the "mother principle", i.e. the principle or presumption that a young child, especially a girl, should be or remain in the custody of her mother. The Full Court had not adverted to this aspect of the matter but it was argued for the wife that its decision could be justified on that basis. The Full Court of the High Court unanimously allowed the appeal and set aside the order of the Full Court of the Family Court and restored the order made by Evatt J.

**"Mother principle"**

The Court held that there is no principle or presumption of law that a young child, particularly a female child, is best left in the custody of her mother. It is but a factor to be taken into consideration where relevant. Stephen J said: "The increase in the proportion of working mothers in the community has no doubt led to significant changes in the respective roles of husband and wife in family life: family life itself has much changed ... The learned primary judge undertook a searching analysis of all those qualities of each of the parties which might in any way relate to their respective suitability as custodian of their daughter. When this is done there can be little room for any presumptions: a full investigation of the relevant circumstances must necessarily provide a much more accurate assessment of the suitability of each parent than will any arbitrary presumption or rule, applied regardless of the infinite variability of human beings. In this case there was such an investigation. ... [H]er Honour concluded that matters were nicely balanced as between the competing claims of the mother and the father. For her Honour, in those circumstances, to have then given any weight, in favour of the mother, to some additional factor of 'maternal preference' would have been to distort, indeed to nullify, the whole process of conscientious evaluation which she was in the course of undertaking. It follows that, in my view, there was here no occasion for Evatt J to add any factor of maternal preference to the sum of considerations from which she arrived at her conclusion."

Mason and Wilson JJ said, Aickin J agreeing: "The principle invoked by the respondent – that a young female child is best left in the custody of the mother – is not, and never has been, a rule of law. It is, or was, a canon of common sense founded on human experience. The weight or value to be given to it has varied with the times and from case to case. In earlier days, when there was no role for a father in the upbringing of children and in the running of the household, the care and the upbringing of children was left almost entirely to the mother who was able to devote the whole of her time and attention to that responsibility and to household affairs. In this situation it

was natural that the so-called principle carried very considerable weight. ... But in recent times, particularly in the last 20 years, there has come a radical change in the division of responsibilities between parents and in the ability of the mother to devote the whole of her time and attention to the household and to the family. As frequently as not, the mother works, thereby reducing the time which she can devote to her children. A corresponding development has been that the father gives more of his time to the household and to the family. The consequence has been to diminish the strength of the principle or of the factual presumption as it has been applied by the courts.

... The effect of the alteration in the division of parental responsibilities, to which we have already referred reduces the strength of the factual presumption on which the courts formerly acted, but it does not, we think, eliminate the mother factor or reduce its significance to a consideration which is less than important. The precise weight to be given to it as a factor necessarily depends upon the circumstances of the particular case ... [W]e are not prepared to say that, in the circumstances of this case, where both parties worked full-time, Evatt J gave insufficient weight to the factor and thereby improperly exercised her judicial discretion."

Murphy J said: "Perhaps the greatest phenomenon of the mid-20th century in Australia and similar countries has been the movement of women into the industrial work force. That industrial change has been accompanied by a social change; many women have become part-time mothers. The attitude to property rights has changed in the direction of equality between the spouses, and this has been followed by a changed attitude to the roles of the spouses, including their rights and duties in relation to the care of children. In consequence, the 'mother' principle has been greatly weakened in recent times."

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