

14/78

FAMILY COURT OF AUSTRALIA AT HOBART

In the Marriage of FITZGERALD and ROBINSON

Wood J

20 January 1978 — (1978) 30 FLR 550 (note)

FAMILY LAW – CUSTODY – WISHES OF THE CHILDREN – WHETHER CHILDREN SHOULD BE SEPARATED – WHETHER STATUS QUO SHOULD BE PRESERVED.

Divorced parents each applied for the custody of their children, a boy of 12 and a girl aged nine. The father had been caring for the children for 18 months. The mother had suffered from a mental breakdown but was now recovered and had remarried. The father, however did not approve of the new husband and considered him to be a bad influence on the children. The matter of custody was not finally determined at the time of the decree nisi as his Honour was unable at that time to determine what arrangements would be in the best interests of the children.

The questions for determination were whether the children should continue to remain in the custody of their father with their mother having access to them, or whether they should both be transferred into the custody of their mother, or whether the Court should give effect to their wishes and place the son in the custody of his father and the daughter in the custody of her mother, notwithstanding that such a course would be contrary to the wishes of both parents, who did not want to see the children separated.

HELD:

1. **Order that the custody of the son be committed to his father and the custody of the daughter be committed to her mother, but with each parent to have liberal access to the other child and with the children enabled to be together as much as possible. Further order that the order was not necessarily final and, should either child wish at a later date, it would be reviewed.**

2. **In the Family Law jurisdiction something a child has to say about its own welfare cannot be described as hearsay. The focus of the investigation is on the child itself primarily, its welfare and its rights. The jurisdiction is one where the child is placed in relation to the court in a rather special position distinct from that of other parties and here, is where the distinction lies between this type of case and cases in which the jurisdiction of the court is concerned primarily with a conflict between parties. With its welfare the focal point of enquiry it would indeed be strange if the child were to be placed in a less advantageous position with regard to the admissibility of evidence than that in which a litigant in other jurisdictions is placed.**

WOOD J considered that, despite their youth, the children were able to understand the implications of their wishes and had had over 18 months to evaluate the situation. During that time they had lived with the father, but had frequently stayed with the mother and her new husband. Because of this overlapping of access the principle of not upsetting the status quo was not significant. He therefore ordered that the custody of the son be committed to his father and the custody of the daughter be committed to her mother, but with each parent to have liberal access to the other child and with the children enabled to be together as much as possible. His Honour also stated that the order was not necessarily final and, should either child wish at a later date, it would be reviewed.

But this is a case in which the children have themselves very forcibly expressed their wishes, and it is a matter to determine the extent to which those wishes should be acted upon by the Court. They are, neither of them, over the age of 14, so that the provisions of s64(1)(b) do not apply. It has been constantly reiterated in the cases that the Court should not too readily act upon the wishes of young children because of their inability to take an overall view of their situation and make determinations which are in their best interests. However, the Court can, in a proper case have regard to the wishes of children and act upon them if it sees fit. Some of the authorities were referred to by McCall J in *Cartledge and Cartledge* (1977) FLC (90-254) where his Honour says:

"In the past the wishes of a child have always been a relevant factor in determining the custody of a child provided the child is of reasonable age. (See, for example, *Hodge v Hodge* (1965) 7 FLR 94-

95 per Gibbs J) ... any positive wish is a wish that the Court should take into account. (*Mazur and Mazur* (1976) FLC (90-132 at p75,631)."

One of the determinants, however, is whether the child whose wishes are under consideration has been able to make as reasonable an appraisal of the situation as its age will permit and, if so, in a case where there is little to choose between the competing proposals of the parents, a well-founded expression of the child's desires can frequently be the determining factor in resolving the issue of the child's placement. I refer to the decision of the Full Court in *N. and N.* (1977) FLC (90-209) where, in the course of her judgment, the learned Chief Judge said of the decision appealed from so far as it related to this aspect of the matter:

"While his Honour thought that the wishes expressed by the children were not conclusive in the matter, nevertheless they do assume great significance when, as we consider, this matter is so evenly balanced."

It is, however, always a matter for the trial Judge to examine carefully the expressed wish and the basis upon which it has been made. It does not always follow that the expressed wishes of a child will be acted upon, even when they appear to have been well thought through. An example of this is found in the judgment of Demack J in *Cattanach and Leavens* ((1977) FLC 90-246) where his Honour in dealing with the custody of a boy aged 12 and a girl aged 10 comments at p76,328 of those particular children:

"I am aware that the children are too young to express reliable opinion but they are not too young to display strong dependence upon their parents."

In making that comment, His Honour, seems to me to be distinguishing between the situation in which the wishes of a child can be acted upon by reason of being soundly and reliably based, and the situation where the reason for the wishes is indicative of a strong dependence upon a particular parent, although the wishes themselves may not have been expressed with a depth of understanding which would make the Court feel confidence in acting upon them.

If I may express what I believe his Honour was there saying, it seems to me that he was drawing a distinction between wishes which of themselves are well-founded and can properly be acted upon, and wishes which are evidence of a strong dependence upon, or emotional attachment to, a parent. In the latter case, the Court would not place much or any weight upon the expressed wish of the child, but it would place weight upon the strong dependence evidenced by that wish.

(Reference: CCH Publications/p77057/Fitzgerald and Robinson 1978 PLC (90-401))