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FAMILY COURT OF AUSTRALIA at CANBERRA

In the Marriage of BURTON

Evatt CJ, Ellis SJ and Smithers J

5 October, 13 December 1979 — [1979] FLC 78,129 (¶90-610)

FAMILY LAW – CUSTODY – APPLICATION FOR CHANGE OF CUSTODIAL PARENT – NO ONUS ON EITHER PARENT TO DEMONSTRATE ADVANTAGE OR DISADVANTAGE OF CHANCE – STATUS QUO IS MERELY ONE OF THE FACTORS TO BE CONSIDERED – ERROR OF LAW IN EXERCISE OF DISCRETION: *FAMILY LAW ACT* 1975, S64(1).

Upon separation of the parties, the mother left the common home in Bermagui and took up residence with the two daughters of the marriage, aged eight and four years, in Melbourne. Thereafter the father consented to the mother having custody of the children. Some 10 months later the husband sought custody of the children alleging that the mother's environment was unsuitable to their upbringing. The trial judge held that there was a legal onus upon the husband to demonstrate a positive advantage to the children flowing from their removal from the mother's environment and that the husband had failed to discharge that onus.

Upon appeal, the two principal arguments were (a) that that the trial judge had made an error of law in holding that there was such an onus upon the husband, and (b) that the trial judge had erred in adopting the "preferred" role of the mother.

HELD: (i) For a court to re-open an earlier custody order, it would need to be satisfied that there was some changed circumstance which would justify such a serious step, some new factor arising or at any rate some factor which was not disclosed at the previous hearing and which would have been material. In the circumstances, the trial judge had been correct to adjudicate the matter.
***Gilder v Gilder* (unrep, Supreme Court of Victoria, Barber J), followed.**

(ii) Once such circumstances have been shown, then the general principles of s64 apply. No legal onus rests upon a party with whom the child is residing to show that a change would be detrimental to the child and no legal onus rests upon a party seeking a change to justify the change either by establishing that a change would be positively advantageous to the child or in any other way. An existing status quo is but one factor to be weighed with all other factors relevant in determining a particular case. When weighing that factor, the quality of the status quo would require examination and if a long standing status quo is disturbed the factors which influenced the court to reach that conclusion should be clearly. In the circumstances, the trial judge had erred in the exercise of his discretion as his determination arose from an error of law; the appeal should be allowed and the proceedings remitted for rehearing.

EVATT CJ, ELLIS SJ and SMITHERS J: On the question of the "preferred" role of the mother, in determining a custody application the court must regard the welfare of the child as the paramount consideration and that each case must be considered in the light of all the facts and circumstances particular to that case. The principal grounds argued before us were grounds 3 and 5, ground 3 being in the following terms:

> "His Honour erred in finding that there was an onus on the husband as a matter of law and that there was an onus on the facts for the husband to demonstrate a positive advantage to the children to be removed from the mother's environment."

In his judgment his Honour said:

> "Whilst I find both parents are suitable persons to have custody of the children, the children have been with the wife since the parties separated nearly two years ago, apart from periods of access with their father. The onus lays on the husband to demonstrate the positive advantage to the children to be removed from the mother's environment in Melbourne and returned to the husband at Bermagui. Considerations relevant to such a change of care were referred to (FLC at 75, 679) of the judgment in *Hayman and Hayman* (1976) 28 FLR 51; 14 ALR 216; 2 Fam LR 558; [1976] FLC 74,673 (¶90-130). See also *Raby and Raby* (1976) FLC ¶90-104, at 75,482-4; 2 Fam LR 11,348 at 11,353-6. I do not think the husband had discharged the onus on the material put before me."

There are a number of cases in which Courts have considered whether there is any special onus upon an applicant for custody to show special reasons for re-opening the issue of custody when that issue has already been the subject of an order. Perhaps the best expression of the principle is that by Barber J in *Gilder v Gilder* (unreported, quoted in *Hayman and Hayman*) where he said that to re-open an earlier order he would need to be satisfied that there is "some changed circumstance which will justify such a serious step, some new factor arising or at any rate some factor which was not disclosed at the previous hearing and which would have been material".

At pp7 and 8 of the record his Honour dealt with this issue as follows:-

> "I was satisfied from affidavits filed on behalf of the husband in August 1977 that there were new facts and circumstances affecting the welfare of the children that justified the husband asking the court to adjudicate again on the question of their custody. Mr Burton said in evidence that the reason why he agreed in November 1976 to his wife having custody was that he did not want his marriage to fail; he believed there was hope of a reconciliation, but that if there was a contested hearing this would not happen. However, he subsequently became alarmed at the bad language being used by both children."

In this, his Honour applied the correct principle and in our view he did not err in deciding to adjudicate on the matter. Once the court is satisfied that there are circumstances which make it necessary to reconsider the issue of custody, then the general principles of s64 apply. In some cases however, one finds reference to such matters as the status quo and the onus on a party to discharge a burden in relation thereto.

One such case is *Hayman and Hayman, supra*, to which his Honour referred and in which in their joint judgment Murray and Lusink JJ said:

> "We would comment with respect to the trial judge that it is our view that there was no onus on the husband to show that a change would be detrimental to the child. It is for the wife who was seeking the change to establish that it would be positively advantageous to M to be removed from his father and his family and returned to her."

Whatever may be sought to be read into that joint judgment of Murray and Lusink JJ in *Hayman and Hayman*, we are of the view that no legal onus rests upon a party with whom a child is residing to show that a change would be detrimental to the child and no legal onus rests upon a party seeking a change to justify the change either by establishing that a change would be positively advantageous to the child or in any other way. An existing status quo is but one factor to be weighed with all other relevant factors in determining a particular case. When weighing that factor, the quality of the status quo would require examination and if a long standing status quo is disturbed, the factors which influenced the Court to come to that conclusion should be clearly identified. It may be that had his Honour weighed up the competing factors he would have found that the merits of the father's case were outweighed by those of the mother, including any adverse effects on the children of changing their environment. It does appear to have been an evenly balanced case in many ways. The uncertain consequence of changing custody may well have been a factor which would have tipped the balance in favour of the wife. This is not, however, the same as finding that the husband had to discharge an onus. We cannot speculate on these matters nor can we as a Full Court properly evaluate the competing merits of the parties. On a consideration of the trial judge's judgment as whole, we are of the view that his Honour determined the proceedings in favour of the wife by the application of a wrong principle, namely that an onus lay upon the husband to demonstrate the positive advantage to the children if they were removed from the mother's environment in Melbourne and returned to the husband at Bermagui and his finding that the husband did not discharge that onus.

Ground 5, the second principal ground argued on behalf of the husband, relates to the so called "preferred" role of the mother, it being argued that his Honour adopted that suggested principle. We are unable to accept that ground of appeal as his Honour, in dealing with this matter, specifically referred to *Raby and Raby* and acknowledged that he was bound by that decision, being a decision of the Full Court of this court. Mr Hamilton submitted in the course of argument that *Raby and Raby* was incorrectly decided and although he did not pursue that argument, he referred to *Kades v Kades* (1961-62) 35 ALJR 251 and *Lovell v Lovell* [1950] HCA 52; (1950) 81 CLR 513 particularly pp522 and 523; [1950] ALR 944. The Full Court in *Raby and Raby* (FLR

at 425 *et seq*; 2 Fam LR at 11,357 *et seq*) under the heading "Maternal or paternal reference" considered the so called "preferred role of the mother" and concluded (FLR at 427; 2 Fam LR at 11,360):

> "We are of the opinion that the suggested 'preferred' role of the mother is not a principle, a presumption, a preference, or even a norm. It is a factor to be taken into consideration where relevant. We do not agree with many of the strictures poured forth by Chisholm and Petrie; on the other hand we do not agree with the approach suggested by Glass JA. We would with respect generally adopt the approach set forth by Demack SJ in *In the Marriage of Jurss* (1976) 9 ALR 455; 1 Fam LR 11,203; [1976] FLC 75,181 (¶90-041). A child's relationship with both its natural parents is a factor of great significance. Having regard to its age and sex the ability of either parent to provide proper care and control and to promote the welfare of the child, and the fitness of that parent to discharge these roles, is obviously a matter for close examination in each case."

In reaching that opinion, the Full Court considered both *Kades v Kades* and *Lovell v Lovell*. We are unable to accept the submission that *Raby and Raby* was not correctly decided. It is true that the Full Court did not refer in its judgment to *McManus v McManus* (1969) 13 FLR 449; (1970) ALR 186; 67 SR (NSW) 54 but such an omission, particularly having regard to the consideration of other authorities in a like vein, does not detract from the conclusion reached.

In determining a custody application the court must regard the welfare of the child as the paramount consideration. The *Family Law Act* does not specify which matters are to be considered as relevant to the welfare of the child. Each case must be considered in the light of all the facts and circumstances particular to that case. We do not accept the proposition that a father who seeks to have custody of a young child, be the child male or female, must begin with the handicap of first establishing some disqualifying factors against the mother. One parent should not be preferred over the other solely on the basis of sex.

However cases do arise where the extreme youth of the child gives immediacy to the parental bond, particularly the maternal one: *Raby and Raby* FLR at 423; 2 Fam LR at 11,356. An example of such a case was *Sanders and Sanders*, (1976) 26 FLR 474; 10 ALR 604; 1 Fam LR 11,433; [1976] FLC 75,363 (¶90-078) where the child was but eleven weeks old as at the date of the judgment. In such cases, the immediacy of the maternal bond is a factor to be weighed when assessing the competing proposals and, in a particular case, that factor may be more significant than other relevant factors. This does not mean that the father in such a case must establish some disqualifying factors against the mother but merely emphasizes that the paramount consideration, the welfare of the child, must be determined in the light of all the facts and circumstances particular to that case.
