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## SUPREME COURT OF NEW SOUTH WALES — COURT OF APPEAL

**McLAUGHLIN v McLAUGHLIN****Reynolds, Bowen and Glass JJ A****15 January 1973****FAMILY LAW – CUSTODY – DIVIDING CHILDREN OF FAMILY – CHILD OF TENDER YEARS – SUCH CHILD DEPRIVED OF CUSTODY OF THE MOTHER – WHETHER JUDGE IN ERROR.**

The respondent father had been given custody of the four children of the marriage by an ancillary order in divorce proceedings. In this matter, the appellant mother sought custody of the four children or alternatively the 2 younger children, or as an ultimate alternative, custody of the youngest child, a female of tender years.

[Editorial note: The judgment of Reynolds JA may be of some interest on the question of depriving a female child of tender years of the mother's care and the further question of dividing the children of the family in custody matters. Bowen JA followed the general tenor of Reynolds JA's judgment. Glass JA agreed with Reynolds JA.]

**HELD: Order that the mother have the custody of the youngest child Lauren.**

**The mother was shown to be generally steady and reliable – no attack was made on the type of life she led. It was not suggested that she did not *bona fide* believe the welfare of her children would be best served by her care. There was no question but that she can and would provide a suitable home for her daughter. Why then would it not be in the best interest of the young girl to be brought up by her mother and have the untold benefits that only a natural mother can bestow? The consideration that the family would be divided by such an order was not decisive. The evidence indicated that the family had been, in the past, in two groups, the two eldest and the two youngest and a regrouping would not necessarily work any greater disadvantage. This girl should not lose her mother; she need not necessarily lose her brothers and her father. A mother's access to a young daughter is not of great value. In this case it has been shown to have none. If the mother had the custody of the girl, not only would the girl's welfare be advanced, but so would that of the boys because the mother would lose the bitterness brought by total deprivation of the family she bore and would have a better chance of having two parents in a real sense.**

**REYNOLDS JA:** ... What troubles me is the question whether his Honour accorded too little weight to the circumstance that, by his orders, a female child of tender years was deprived of a mother's care. In his original judgment, his Honour did not advert to this consequence of his order and the powerful factual considerations involved. This can be well understood for he was making a temporary order and the adulterous episode was recent. I have read the three judgments and do not understand these to include a finding that the appellant was unfit as a mother or incapable and unwilling to bring up her own female child of tender years. He found she had been indiscreet in her association with the co-respondent by allowing the children to become aware of it and said her conduct in this respect left much to be desired. He thought that she would fail to conceal from the children her poor opinion of their father and that her behaviour in flouting the Court's order indicated irresponsibility and immaturity. These criticisms no doubt are valid but they do not support a finding that she is an unfit mother and His Honour, as I observed, was not prepared to describe her as such.

His Honour said:—

"Both the younger children are in good health and it would be a mistake to make any alteration to the present situation when that situation appears to be inducing an improvement in the elder children and none is needed in respect of the younger ones. As I have said before, I see no reason for dividing the family; the elder boys need the father's discipline and the younger children are not suffering from remaining in his custody."

The mother has worked at two occupations, as a nursing aide in geriatric hospitals and as a stenographer. She is shown to be generally steady and reliable – no attack was made on the type of life she leads. It is not suggested that she does not *bona fide* believe the welfare of her children will be best served by her care. There is no question but that she can and will provide a suitable home for her daughter. Why then would it not be in the best interest of the young girl

to be brought up by her mother and have the untold benefits that only a natural mother can bestow? The only answer that can be made in the present case is that it would mean a division of the family. I cannot think that consideration is, in this case, decisive.

The evidence indicates that the family has been, in the past, in two groups, the two eldest and the two youngest and a regrouping will not necessarily work any greater disadvantage. This girl should not lose her mother, she need not necessarily lose her brothers and her father. A mother's access to a young daughter is not of great value. In this case it has been shown to have none. I would be confident that if the mother has the custody of the girl, not only will the girl's welfare be advanced, but so will that of the boys because the mother will lose the bitterness brought by total deprivation of the family she bore and will have a better chance of having two parents in a real sense.

His Honour said this in his recent judgment:

"That the *dictum* of Lord Romilly MR in *Austin v Austin* (*supra*) was in 1865 a proper approach to the problem cannot, with respect to his Lordship, be gainsaid. If that approach were relevant to the present situation I would need to be convinced (and I am not yet) that most mothers today are better custodians of their children than the father. This may to some extent be due to the advance that has been made in the education of husbands and fathers in domestic chores and duties in relation to the upbringing of children which one hundred years ago were performed only by women. It is not infrequently that I have before me cases where husbands in modest circumstances are rearing successfully small children, sometimes a family of three, without any female assistance whatever; not only pursuing their normal employment but also doing cooking, washing and all other household duties. The children in the present case are better served by the father's supervision than the mother's and that he provides more material security for them than the mother is without doubt."

It seems to me that this approach is to fail to accord due weight to the special relationship that exists between a woman and a daughter, not only during the childhood years but during adolescence and which endures after the necessity for custody has long since gone. I think this was error and that this Court should intervene and order that the appellant should have the custody of the child, Lauren.

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