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FAMILY COURT OF AUSTRALIA at PARRAMATTA

In the Marriage of HALL

Evatt CJ, Asche SJ and Hogan J

3 August, 27 November 1979

(1979) 29 ALR 545; 5 Fam LR 609; [1979] FLC 78,814 (¶90-713)

FAMILY LAW – MATRIMONIAL CAUSES – CUSTODY – APPEAL FROM DECISION GRANTING CUSTODY TO WIFE – EVIDENTIARY NATURE OF A FAMILY REPORT – FACTORS TO BE CONSIDERED – RELEVANCE OF DEPRIVATION OF A PARENTAL FIGURE AND SOPHISTICATION OF ENVIRONMENT – CONJECTURE OF FUTURE NEEDS OF CHILD – AGE OF CUSTODIANS – SIGNIFICANCE OF STATUS QUO: FAMILY LAW ACT 1975 (CTH), SS62(4), 64(1)(a), R117.

The parties were married on 25 March 1972. There is only one child of the marriage. In 1977 the parties separated and the husband took custody of the child and has retained custody ever since. On 21 April 1977 the husband filed an application seeking custody of the child. A family report was obtained. After the hearing of evidence but before judgment a second apparently conflicting report was obtained. On 13 January 1978 the trial judge notwithstanding the second report granted custody to the husband. On appeal the Full Court remitted the application for rehearing so that the dramatic changes in the child's welfare referred to in the second report could be investigated. On 24 April 1979, upon rehearing, custody was granted to the wife. The trial judge heard evidence of two further family reports one of which described the wife's house as sophisticated in decor and furnishings. An appeal was made from that decision by the husband.

HELD: (i) The registrar has no power to give an assurance that the contents of a family report will not be disclosed to the parties.

(ii) A family report should be admitted into evidence as a court document treating the counsellor as an officer of the court and as a court witness: reg 117(b) and (c).

(iii) The court does not accept a family report *per se* but may be assisted by it in its investigations.

(iv) The court has the advantage which a counsellor does not have, to weigh the evidence and observe the demeanour and credit of the witnesses before coming to its ultimate conclusions.

(v) A counsellor who has prepared a report may be cross-examined as an expert witness. This is provided in reg 117.

(vi) Further, as a matter of public policy, the opportunity to test part of the evidence, in this case a family report, must not be denied.

In the Marriage of Harris (1977) 3 Fam LN No. 33; 29 FLR 289 applied.

(vii) The court in making its decision as to what is best for the child's welfare must take into account the particular circumstances and the alternatives. The deprivation of one parent is a general fact which must remain neutral until the court's deliberations are made.

(viii) The court must have regard to the specific terms in s64(1)(a).

(ix) Generally, a "sophisticated" environment will not be preferred for the welfare of the child to an "unsophisticated" environment.

(x) The court must proceed cautiously when viewing a child's future on a conjectural basis.

(xi) A child should not be removed from surroundings where he is well and happy on the basis that in many years to come one party might deal better with teenage problems which may or may not arise.

(xii) It is not a *prima facie* assumption that the "status quo" should not be altered although it is a matter frequently given much weight.

(xiii) The totality of evidence must indicate that it is for the welfare of the child that the environment be changed.

(xiv) Having regard to the present happy and secure position of the child and the undue weight given by the trial judge to the "sophistication" of the wife's household, the advanced years of the paternal grandmother and conjectural problems in the husband's household in a long-term view, the appeal was allowed and custody remained with the husband with generous access to the wife.
