15/78

FAMILY COURT OF AUSTRALIA at ADELAIDE

In the Marriage of E (TA and LA)

McGovern J

27 January 1978 — [1978] 31 FLR 171; 4 Fam LR 1

FAMILY LAW – CUSTODY OF CHILD – ADMISSIBILITY OF CHILD'S EVIDENCE – WHETHER HEARSAY – ACCESS NOT FREELY GRANTED IN TERMS OF PREVIOUS ORDER.

A step-aunt and uncle (the interveners) sought to reverse an existing custody order arguing that the four year old child should be committed to their custody and alleging that the father was guilty of committing indecent acts with the child. The child's representative interviewed the child and the parties and supplied counsel for the parties with particulars of the information gathered, on which information they might cross-examine the opposing parties if they desired.

HELD: That despite the alleged statements of the child regarding the father's alleged indecent acts there was no reliable evidence to support that claim and that matter should be disregarded by the Court. On the question of admissibility in the family law jurisdiction something a child had to say about its own welfare could not be described as hearsay. Such evidence must be given only the weight it deserved.

McGOVERN J: Before proceeding to examine the respective claims of the parties, however, I think that I should give my reasons for having ruled that the evidence of the child's alleged complaints was admissible. Mr Margaritch both at the outset and throughout the trial strenuously objected to the admissibility of this evidence. He contended that evidence of complaints of this nature were admissible only in criminal proceedings and that this rule as to complaints did not apply in civil cases. *De B. v De B.* [1950] VicLawRp 44; (1950) VLR 242; [1950] ALR 547 and *Anderson v Anderson (No.3)* (1965) QWN 15. He argued that the present application came within the civil category of cases and, therefore, the ordinary rules as to hearsay evidence applied and that the alleged complaints of this child were inadmissible. He argued further that, if my finding was against him on the question of admissibility, the standard of proof applied should be the standard in civil matters, subject to the rule of prudence that any tribunal should act with much care and caution before finding that a serious allegation is established; *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336; [1938] ALR 334; 12 ALJR 100. Mr Margaritch further argued that, if evidence of alleged complaints by the child were allowed, the terms of the complaint should not be, and he relied for this proposition on *R v Wallwork* (1958) 42 Cr App Rep 153 and the criticism of the *dicta* in that case in *Cross on Evidence* at p250 where the following passage occurs:

> "It is submitted that these *dicta* ought not to be followed and that, where the prosecutrix does not give evidence, no witness should be asked about the fact of a complaint having been made because the result of doing so is, in the words of Hawkins J in *R v Lillyman*, 'an objectionable mode of introducing evidence indirectly which, if tendered directly, would be inadmissible'."

In the present case we are concerned, not with criminal or ordinary *inter partes* civil proceedings, but with an application for custody made under s64 of the *Family Law Act* 1975-1977, which by sub-sec (1) gives the Court a wide discretion and requires it to regard the welfare of the child as the paramount consideration. This provision, as Mason J said in *Reynolds v Reynolds* (1973) 1 ALR 318 at 323; (1973) 47 ALJR 499 with regard to s85 of the *Matrimonial Causes Act*, "makes it clear that the nature of the Court's jurisdiction in custody is very different from ordinary *inter partes* litigation and that all the rules applicable to that class of litigation are not appropriate to custody proceedings (see *Official Solicitor to Supreme Court v K and Anor* (1965) AC 201; (1963) 3 All ER 191)." His Honour went on to say in that case at p325:

> "The admissibility in custody proceedings of statements made by children of the kind in question is a difficult subject. The relationship which exists between a child and its parent is plainly a relevant consideration and the wish of a child (of reasonable age) to live with one parent rather than the other

> is a matter to be taken into account by the Court, although the weight to be given to it will depend upon the circumstances of the case".

And further:

> "There may be some cases in which it is desirable or indeed necessary, for a Court to receive evidence in that form in order to determine the relationship which exists between parent and child. But I would reject the notion that the Court is always bound to receive such evidence."

The distinction between the nature of the court's jurisdiction in matters to do with the welfare and custody of children and that of courts in most other jurisdictions is made even clearer by the presence in the *Family Law Act* of s43(c) which stipulates, as one of the principles to be applied by this Court in such matters, the following:

> "The Family Court shall, in the exercise of its jurisdiction under this Act or any other Act, and any other court exercising jurisdiction under this Act shall, in the exercise of that jurisdiction have regard to
> (c) the need to protect the rights of children and to promote their welfare."

The same question of admissibility is touched on by Evatt CJ and Pawley J in their joint judgment in *Lyons and Bosely* delivered on 24th November 1977 where, in considering the problems attached to communicating the wishes of a child to the Court, their Honours said in respect of a ruling of McCall J in *Cartledge and Cartledge* (1977) FLC ¶90-254:

> "Without commenting on that particular ruling, as the point has not been fully argued before us, it may be too narrow to confine the persons who may give evidence of the child's wishes to a court counsellor or welfare officer. It may be important for the Court to have evidence of information about the child's wishes and for that evidence to be tested by cross-examination bearing in mind of course, the observations of Mason J in *Reynolds v Reynolds* as to the probative value of such evidence. The options available to the Court for obtaining information about the child's wishes are few. It is often considered undesirable for the child to be a witness and there are disadvantages attached to a private judicial interview though that course is not precluded (reg.116). The child's legal representative may have to find a means of placing evidence before the Court in order to ensure that s64(1)(b) is complied with. The options should not be closed off in too sweeping a fashion."

Their Honours further had this to say:

> "There are, of course, situations such as those described by Mr Justice Wood, where an independent investigation is required. Examples might include allegations of child maltreatment or unfitness of a parent. These investigations are better done by the court counsellor or by a person whose evidence can be given to the Court and tested by cross-examination. The child's representative may have a role in ensuring that investigations are pursued and in presenting the evidence to the Court."

In *N. and N.* (1977) FLC ¶90-208 Evatt CJ took the matter of the reception of evidence of statements made by children of their wishes further in expressing her view of the same as follows:

> "The only other matter I would like to mention is that I was rather surprised that various passages should have been excluded from the Welfare Report, particularly those passages in which the wishes of the children were set out – the wishes as conveyed by them to the welfare officer. This has been one of the recognised ways of obtaining information about the children's wishes and that process would, of course, be frustrated if that information were excluded from the Welfare Report on the ground that it was hearsay. In my opinion it is not strictly hearsay at all."

I respectfully agree with her Honour's view. In this jurisdiction I fail to see how something a child has to say about its own welfare can 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, I think, 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, I feel, 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.

Neither would there appear to me to be any distinction to be drawn in this regard between

statements made by children concerning their wishes and those affecting any other aspect of their welfare. The reception of evidence of the latter kind must surely also be in the discretion of the Court. Any attempt to place general limits on the extent to which that discretion is to be exercised would, in my view, be extremely undesirable. The way in which the Court should exercise its discretion must always depend on the facts of the particular case, in my opinion, and one does not have to practise for long in this jurisdiction to know that one is constantly confronted with sets of circumstances of an infinite variety.

There is perhaps the temptation in the interests of convenience to lay down hard and fast rules that will have the effect of narrowing the field of enquiry but, where this may have been found desirable in other jurisdictions, it would seem to me that, where the Court has the heavy onus, as it does here, of deciding upon a child's future, it should not be fettered by rules of convenience or expedience that are quite inappropriate to cases with which this jurisdiction has to deal.

The legislature has clearly recognised this to be the case for, far from placing restrictions upon the ways which the Court may inform itself in these matters, the Act, by its Regulations, goes so far as to actually extend the means of enquiry open to the Court and, what is more gives to the Court a wide discretion as to the use it might make of the information (reg.116 and 117). These regulations even give to the Court a discretion not to divulge information to which it is privy but by which, presumably, it may nevertheless be influenced.

I do not wish to suggest that, in exercising their discretion over the matter of statements made by children judges can do so arbitrarily. Far from it. There is always a duty upon them to be watchful for any abuse that might be occasioned by the attempted admission of evidence of this sort; and of course, once received, the evidence should be given only so much weight as is warranted by the circumstances of the case. Very great caution must of necessity be exercised in many instances but that is not to say that the Court should shrink from receiving the evidence if it tends to have relevance to the welfare of the child; it is then simply a matter of placing upon the evidence the weight it deserves.

Whilst therefore in this very difficult area of the exercise of the Court's discretion it may be useful to issue exhortations for caution and the like, I am of the opinion that the formulation of principles of general application as to the reception of this form of evidence should be undertaken as sparingly as possible so as not to inhibit any more than is necessary the exercise by the Court of its discretion in particular cases.
