

25/79

SUPREME COURT OF THE NORTHERN TERRITORY

SALIH v SALIH

Gallop J

19 December 1978

FAMILY LAW – APPLICATIONS BY MOTHER AND FATHER FOR CUSTODY OF THE CHILD – MATTERS TO BE CONSIDERED WHEN MAKING AN ORDER.**HELD:**

1. Comparing the relative proposals of the two parents for the welfare of the child, and when the present living circumstances of the child and the length of time in which they have subsisted are examined, the best interests of the child would be served by leaving the child in the custody of the mother. The child is being well cared for in a loving relationship. The mother does not work, she devotes all her time and energy to the child and to promoting her relationship with Mr Kaladonis.

2. Ordinarily a child of only two and a half years would not be contemplated as having to travel across Australia so that the father can have access to the child. In that sense the very tender years of the child are a serious impediment to the father's desire to take some part in the upbringing of the child. Nevertheless, it will be made possible for the child to spend time with his father in Sydney. This is because the father is a very special sort of father who can cope with the child's needs. Whilst the wife's apprehension is borne in mind, weight is given to the evidence of the father that the child is a resilient child used to being in the company of strangers and adaptable to strange situations.

GALLOP J: These are cross-applications by mother and father for custody of the child, Barish Salih, who is now a little over 2½ years old, having been born on 29 May 1976. The mother does not oppose the father having reasonable access. However she does say that the access should only take place in Darwin and not in Sydney for a number of reasons, and, without intending to cover all those reasons, she relies upon the very tender years of the child, the fact that there is considerable air travel involved in the child coming from Darwin to Sydney, and that that would have to be subject to one of the parents bringing the child in the company of an unidentified and unfamiliar adult and she also says that because the child has not seen his father for so long, there will be a certain strangeness between them which is not easy for the child and will not be easy for the father, and, in the best interests of the child, that situation should be avoided; it can be avoided if the access takes place in Darwin.

On the other hand, the father says that if he is forced to have access to the child in Darwin and, only in Darwin, that is not a very relaxing form of access because he has no family or friends in Darwin, he would be accommodated at some hotel or other accommodation available for the general public and that that, in the absence of a motor car or any friends, and in unfamiliar surroundings, would not be either satisfying or relaxing so far as the child is concerned.

I should have added also that another of the reasons the mother opposed access in Sydney is that she has a fear as it was put, that the father may remove the child from Australia without her permission. I fear with that last matter first for the sake of getting it out of the way. I think that that is a wholly unreasonable apprehension on the mother's part at the present stage. The child is not endorsed on anybody's passport. The husband has offered to make his passport available and that it be lodged in the care of some responsible person during the period of the access. He has indicated that he has no intention of leaving Australia. The objective signs were that he is in regular employment and doing well in that employment a position which he has held ever since his arrival in Australia, or shortly thereafter, and in all respects, whilst one can understand a person of the mother's personality being anxious and apprehensive, it is not a risk in my judgment, in this case. I therefore, think that that ground on the part of the mother is quite unsubstantiated.

The parties were married on 6 April 1974 in England, the mother then being only 16

years of age and the father being only 23 years of age. As I have indicated, the child, who is the only child of the marriage, was born on 29 May 1976 in Australia, the parties having come here just a couple of months before that birth. Cohabitation ceased on or about 20 January 1978 and the mother then took the child from the matrimonial home, which was in a suburb of Sydney, to Darwin, thereby depriving the father of any ready access. She, on the other hand, said that she really had no other choice. That is where her mother was living and, needing the support of family in the stressful conditions she found herself in, she had to choose Darwin.

The fact is, however, that by choosing Darwin the father has been denied access on any ready basis to the child. It is necessary to express some views about the respective qualities and fitness of the parties as parent. My impression of the wife is that in the few years of marriage she was a person who was very much in need of family support because she herself was very immature and not fully equipped for marriage. She impressed me as a sensitive and anxious person, and I think that she would have manifested those traits of character during the marriage. He was of a more mature disposition but, it appears to me, as I say, in a broad way, that he was unable to cope with her moods and, in that sense, he, too, was not quite prepared for marriage.

It is very much an indication of what sort of young man the father is that notwithstanding his reluctance he agreed to come to Australia indeed, has made what anybody must regard as a very substantial success of his life here. So much so that he now holds a union position, he is in regular and steady industrious employment which he has held ever since his arrival in Australia. He is well regarded and seems to be making for himself a very substantial foundation for a good life here.

The mother impressed me as a good mother, and it is not really contended on the part of the father that she is not a good mother. She is now in what appears to be a fairly solid relationship with a young man called George Kaladonis whom she met soon after cohabitation ceased, and with whom she has been living in a de facto relationship since a very short time after they met. I was impressed with George Kaladonis. He struck me as being very much in the same mould as the father, a solid sort of citizen and, apparently devoted to the mother. I think that this relationship will probably endure that they will probably marry and will probably establish themselves very well in Darwin where Mr Kaladonis has a substantial business and is earning a substantial income.

The father in this case is on all the evidence, and on the evidence of a social worker, Tracey Julianne Hood Hammond, genuinely and deeply concerned about the upbringing of the child. When I compare the relative proposals of the two parents for the welfare of this child, and when I examine the present living circumstances of the child and the length of time in which they have subsisted, I think that the best interests of this child would be served by leaving the child in the custody of the mother. I am satisfied that the child is being well cared for in a loving relationship. The mother does not work, she devotes all her time and energy to the child and to promoting the relationship with Mr Kaladonis.

This is not to say anything against the father; it is simply one of the facts of life that unless the father assumes a housekeeper role he has to go to work and the proposals that the father put forward, including the proposal that the child would be left from 6.30 in the morning till 3.30 in the afternoon, five days a week, while he went to work – those proposals do not compare favourably with the mother's proposals.

I come to the question of access. This too is a difficult issue in the case. Ordinarily a child of only two and a half years would not be contemplated as having to travel across Australia so that the father can have access to the child. In that sense the very tender years of the child are a serious impediment to the father's desire to take some part in the upbringing of the child. Nevertheless, I propose to make it possible for the child to spend time with his father in Sydney. I do that because I think the father is a very special sort of father. I trust his confidence when he says that he can cope with the child's needs. I bear in mind the wife's apprehension but I give weight to the evidence of the father that the child is a resilient child used to being in the company of strangers and adaptable to strange situations. Nevertheless, I think I should build some safeguards to make that less risky than it otherwise would be in that situation. I think the father should travel to Darwin for the purposes of making contact with the child and for the purposes of facilitating the child coming to Sydney for a period of two weeks. I think the father

will accept these conditions. He has not disqualified himself in any way as a father. In my view he has been responsible so far as money is concerned and I think the wife should acknowledge the payments that he has sent through the wife's mother. He has complied with the order for maintenance made by this court in October and in all respects he seems to me to bear an acute sense of responsibility so far as his child is concerned.

I propose to order that the mother has custody of the child, that the father has reasonable access. So far as the immediate future is concerned, I define that access to mean access in Darwin between 27 and 29 December 1978 and access in Sydney between 30 December 1978 and 13 January 1979. What I contemplate is that he should pay the expenses associated with his travelling to Darwin and bringing the child back to Sydney. So far as the return fare is concerned, because the wife took the child away and because the wife is now probably in a better financial position than the father I think it is reasonable that the travelling expenses of the child should be born equally. So what I have in mind is to order the access on these conditions:

- (1) That the father travel to Darwin for the purpose of availing himself of access from 27 to 29 December and in Sydney from 30 December to 13 January 1979 inclusive and that the father pay all travelling expenses associated therewith;
 - (2) that the child reside with him at Flat 3/77 Union Street, Dulwich Hill, during the period of Sydney access;
 - (3) that the child be returned to Darwin at the expiration of that period and in the company of a responsible adult, not necessarily the father, and the mother pay the expenses of the return journey. I interpolate here that the mother can come down to get the child if she wants to. If she is so apprehensive about the child being returned, she might elect to do it that way or, alternatively it can be done through the services of the airlines;
 - (4) that the husband's passport be surrendered on or before 27 December 1978 to the wife's Sydney solicitors, Messrs Norton, Smith and Company, to be returned to him at the expiration of the period of the access;
 - (5) that the maintenance of \$15.00 per week which was ordered to be paid by this court on an interim basis be suspended for a period of two weeks and by consent I order that the order for maintenance be an order until further order;
 - (6) that as a final condition the father keep the mother informed on the child's well-being as she so desires and allows the child to speak to the mother by telephone during the period of access if she so desires.
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