14/76

FAMILY COURT OF AUSTRALIA at SYDNEY

In the Marriage of TODD [No 1]

Watson J

17 February 1976 — (1976) 25 FLR 253; 8 ALR 602; [1976] FLC 75,054 (¶90-001)

FAMILY LAW – CUSTODY APPLICATION – MATTERS TO BE CONSIDERED.

On consolidated applications in this matter, Watson J made considerable comments as to custody applications and matters which should be borne in mind by judicial officers when hearing them.

WATSON J: The crucial matter in this case is the custody and the future of these two girl children. Because of the nature of the case and because I proposed to bring into it at the last minute a further legal representative for the children, I propose to make a few comments about how I see such a case should be conducted.

I propose first to quote from something I said in *Lythow and Lythow*, a decision which I handed down in Melbourne on 10th February 1976.

> 'Section 42 of the *Family Law Act* provides that the Court shall exercise its jurisdiction in accordance with the Act. When compared with section 25(2) of the repealed Act it will be seen that there is a clear indication by Parliament that the present Act should provide its own code of law in matrimonial causes; proceedings with respect to the custody, guardianship, maintenance or access of or to a child of a marriage are a "matrimonial cause" Section 4(1).
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> Section 43 requires that the Court in exercising jurisdiction under the Act shall, *inter alia*, have regard to:
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> (a) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children; and
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> (b) the need to protect the rights of children and to promote their welfare.
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> Section 61(1) provides that subject to any order of a court for the time being in force, the mother and father of a child of a marriage have the joint custody of the child. This provision dramatically breaks away from the common law which reposed custody in the father.
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> Section 64(1) provides that in proceedings with respect to the custody or guardianship of, or access to a child of the marriage the Court shall regard the welfare of the child as the paramount consideration. This is a well known criterion and is well examined in the reported cases — see Toose Watson and Benjafield, *Australian Divorce Law and Practice*, paras, (729) *et seq*. I pause to note that the reported cases explore the constant shifts in community mores and opinions and reflect the increased psychological understanding by the courts of the dynamics of inter-relationships within the family. To that extent they should be read more as examples of how the courts seek to deal with varied sets of facts and relationships rather than as hard and fast precedents binding upon later decision-makers. For example who today would dare to rely upon the strictures that poured forth from the Bench in *Re Besant* (1879) 11 Ch D 508 at 521?
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> Consistent with a general code which no longer seeks to assign fault in marriage breakdown, s101 empowers the Court to reject offensive, scandalous, insulting or humiliating questions. An interesting examination of the philosophic approach properly to be adopted by the Court where the code is based in irretrievable breakdown rather than fault is to be found in *Wachtel v Wachtel* (1973) 2 WLR 355; (1973) 1 All ER 829.
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> The *Family Law Act* (and particularly Part VII thereof) does not exist in a vacuum – it must be seen as implementative, particularly in regard to children, of general community standards and norms. One such generally accepted norm is that a young child, particularly a female, needs the constant warmth and companionship of her natural or psychological mother. It follows from this that the natural mother should not be replaced in this all important role by another woman unless she is

> shown to be unfit for that maternal role. Unfitness is not always clearly measurable and there are times when the Court must seek to strike a delicate balance between partial unfitness and the need for a natural mother's caring and warmth.'

I pause here to point out that in that case I was dealing with a 12 month old girl baby. Different considerations could apply when I am dealing with girls aged 14 and 11. Resuming the quotation from *Lythow*;

> 'Section 97 of the Act provides that the Court shall proceed without undue formality and shall endeavour to ensure that the proceedings are not protracted. Part VIII of the Act and in particular ss62 and 65 furnish the Court with a wide range of interlocutory options to enable it to bring about a solution where there is a dispute concerning a nuptial child's future.
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> Regulation 36(4) provides that where an application relates to the welfare or custody of, or access to a child, the application shall be accompanied by an affidavit setting out shortly the arrangements proposed for the child, and the facts to be relied upon in support of the application.
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> Regulations 5 and 81 furnish the Court with a wide battery of pre-trial procedures, and in particular r81(2)(1) invites the Court to make orders with respect to any matter relating to procedure that will enable costs or delay to be reduced and will help to achieve a prompt hearing of matters at issue between the parties.
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> The spirit of the Act and Regulations is clear. Adversary procedures are to be cut to a minimum. Only that conduct of the mother and father which touches upon their fitness to maintain their roles as natural parents is relevant. The Court and legal representatives of the parents, and the legal representatives (if any) of the child, are under an obligation to protect the rights of the child and to promote the child's welfare. Narrow adherence to the adversary system is not only non-productive but contrary to the duties imposed by the Act. This view is not novel — see *Clarkson v Clarkson* (1972) 19 FLR 112. The Court has the delicate but clear duty to see that as far as possible parents of a child who are to have a continuing relationship with the child, leave the Court with their self-respect unviolated by forensic aggression or curial denunciation.'

When one turns to the Act for further guidance in a matter of this nature, the clearest indication where a child has turned against one of her parents and where that child has reached an age where the Act accepts that she can make some decisions for herself, is to look at s64(1)(b) and s65 of the Act.

Section 64(1)(b) provides that:

> "In proceedings with respect to the custody or guardianship of, or access to, a child of a marriage —-
> (b) where the child has attained the age of 14 years, the court shall not make an order under this Part contrary to the wishes of the child unless the court is satisfied that, by reason of special circumstances, it is necessary to do so."

I pause here to say that one way of ascertaining the wishes of Jodie, who is now 14, would be for me to see her in chambers. However, as she has already been involved as a potential witness in this case, I do not propose to do so. I believe it is more in her interests that she has her own spokesman in court rather than to have to rely upon a discussion with a Judge which must remain completely privileged.

Section 65 provides:

> "Where, in proceedings with respect to the custody, guardianship or maintenance of, or access to, a child of a marriage, it appears to the court that the child ought to be separately represented, the court may, of its own motion, or on the application of the child or of an organization concerned with the welfare of children or of any other person, order that the child be separately represented, and the court may make such other orders as it thinks necessary for the purpose of securing such separate representation."

Regulation 112 provides that it is not necessary to appoint a guardian *ad litem* before granting an application under Section 65, and further provides that where the court orders that a child be separately represented in accordance with s65, it may request that the representation be arranged by the Australian Legal Aid Office.

Before I leave the Act and the Regulations in this regard, I should, I think, make reference to r116 which provides not only that a Judge or Magistrate may interview a child, but also provides

that a child who is under the age of 18 years shall not be called as a witness or remain in a court exercising jurisdiction under this Act unless the court otherwise orders.

I pause here to say that I personally would need a considerable amount of persuasion before I allowed any child to be called as a witness or to be used in any way as a witness in a court in which there is a dispute between that child's parents. I could think of nothing more counter-productive to the relationship between parent and child for the future than allowing such a course to take place.

I propose in this case therefore to order that Jodie and Lisa be separately represented and I propose to ask the Australian Legal Aid Office to take the necessary steps for such representation.

This is not the first order I have made for separate representation. I have made one in Melbourne, I have made one in Canberra and one in Hobart. However, I have not as yet offered any assistance of any substance to those who have been called upon to provide separate representation, and the query has been made from time to time, 'What is the role of such a person?'

In my view, the proper analogue is the role carried out in wardship cases by the Official Solicitor in the Chancery division of the High Court in England. Whilst the two systems cannot be completely matched, there is some valuable learning in respect of the Official Solicitors's role which, I believe, can be properly adapted to be used in the structures under the *Family Law Act*. The best description of what the Official Solicitor ought to do is, I think, to be found in short form in *Cretney's Principles of Family Law* (1974) at pages 283 and 284. Cretney points out that:

> 'The object is to ensure that the ward's interests and point of view may be represented by an objective outsider, and to insulate the child so far as possible from the effects of any conflict between the parents and to ensure that decisions are taken in the child's interest.'

In that reference Cretney accurately quotes from the report on the age of majority handed down by the Latey Commission in 1967. Cretney went on to say:

> 'The Official Solicitor plays a dual role; he is an officer of the court and the ward's guardian, and he is a solicitor whose client is the ward – not his parents.'

I pause there to say, of course, that by providing that there shall be separate representation, the guardianship does not arise, but the reference to being an officer of the court, as a solicitor of the court, and the requirement of investigation is still the same.

Cretney goes on to point out that:

> 'In all cases he makes a full investigation and reports to the court. He will see not only the people directly concerned, but others including specialists where useful; indeed, if it is desired to introduce psychiatric evidence the Official Solicitor will decide (subject to the views of the court) whether an examination is desirable, and he will instruct the psychiatrist so as to ensure that he has unbiased instructions, all relevant material, can see all parties, and not be subject to the temptation to take the side of the party instructing him.'

Mr Justice Cross (as he then was) in *Re S* (1967) 1 All ER 202 at p209, indicated the methods whereby that duty can be approached and also incidentally, used some rather helpful phrases as to how psychiatrists could conduct themselves, I think, in somewhat more gentle terms than has fallen from some of the Judges in Australia, but pungent nevertheless.

Cretney went further to refer to a different type of wardship proceeding where there is an attempt by the parents to break up an undesirable association between their daughter and a man. He pointed out how the Official Solicitor's Department by discharging its duties with humanity and expertise and by carrying out a full and sympathetic investigation of an emotional problem, this in itself can achieve a therapeutic effect.

The Official Solicitor is not bound in making his report to the Court to accept the views of the ward or any expert instructed by him, nor is the Court bound to accept his recommendations but his report will ensure or should ensure that all the relevant facts are considered. The only other point that I would make while I have the book in front of me is the next section on page 285.

Normally rules of evidence and procedure applicable to ordinary litigation hardly apply when you are dealing with the future life of the children. I don't think it is necessary to refer to any other reports from the English Courts consequent upon that statement from Cretney.

It seems to me having glanced at the other cases that Cretney is a reasonable summary of the way the person representing the children can go about his duties. I would refer however, to two comments that appear in the case of *Re L* which was a case in which the Official Solicitor opposed serological testing of a child. (*Re L.* (1968) Probate 119 at p136). Mr Justice Ormrod as he then was said the Official Solicitor's primary duty is to see that the children's interests are fully safe-guarded and to help the Court to arrive at the best and wisest decision so far as the child is concerned. And a little later on when the matter went on appeal Lord Denning in his judgement pointed out that all the Official Solicitor does is to represent the child in the conduct of the suit. He must on occasions seek the approval of the Court, etc. It was suggested that the Official Solicitor had the right to decide whether the child had to submit to serological testing.

In my opinion considerable assistance can be obtained when one examines the spirit of the Act and the Regulations. I invite those who will be representing these children to have regard to these remarks. This case will be adjourned until Thursday. If the counsel then appearing who represents the children, finds it impossible to attempt to present a case on that day, I must consider and will consider any reasonable application for a short adjournment. I therefore indicate to all three counsel, the two presently involved and the one to be involved, that if they wish to present a consent application for an adjournment on Thursday for a few days that will be favourably considered.
