45/76

FAMILY COURT OF AUSTRALIA at MELBOURNE

In the Marriage of CRAVEN

Evatt CJ, Demack and Watson JJ

20, 21 May 1976

(1976) 26 FLR 131; 10 ALR 148; [1976] FLC 75,203 (¶90-049); noted 7 Mon LR

FAMILY LAW – ACCESS ORDERS – WELFARE OF CHILDREN – CHILDREN TAKEN BY WIFE TO QUEENSLAND – HUSBAND LIVED IN MELBOURNE – QUESTION OF ACCESS – WHETHER WIFE SHOULD PAY EXTRA PART OF THE COST OF TRAVEL FOR THE CHILDREN TO VISIT THE HUSBAND: *FAMILY LAW ACT* 1975, S43.

Original order granting custody of children to W with H to have access each Sunday and during certain periods of the school holidays. Without H's consent, W took children from Victoria to reside in Queensland, rendering H's weekly access impossible. On appeal against variation of access order—

HELD: Appeal granted. Husband to have access to the children and Wife to pay an amount equal to half the cost of three visits per annum by the children to Melbourne.

1. The Court cannot approve of the mother's conduct in taking the children away as she did and in failing to keep the father informed of her address. As a result of her action the children did not receive their Christmas presents in time, and did not see their father for nearly 5 months.

2. The Family Court will always condemn a parent who seeks to destroy the relationship between the child and the other parent unless there are special reasons requiring such a breach in the child's interest. The Court is always mindful of the need to protect children and to maintain their relationship with both parents. The Court's orders should be such as to encourage both parents to maintain relationships with the children; in this context the concepts of punishment and enforcement are not appropriate.

3. The welfare of the children should be uppermost in the Court's mind when it is called upon to consider whether to use its powers to restrain the parent with custody of children from removing the children away from the city or town where the other parent resides, thus affecting the opportunities for access to the children by that other parent.

4. In all the circumstances if the mother chooses to remove the children from the area where the parties lived together and where the father still resides, she must bear part of the burden of the cost of maintaining the father's access. A reasonable contribution for her to make in the circumstances of this case would be an amount equal to half the cost of three visits per annum by the children to Melbourne or by the father to Southport. The father should not be restricted to three visits. His access should remain liberal so far as arrangements can be made. On this basis, the alternative form of access protects the interests of the children and is fair as between the parents.

THE COURT: It seems to us that it is necessary in determining the issue to consider whether it is reasonable, and above all whether it is in the best interests of the children, that the mother be free to change her residence in such a way as to alter the access by the other parent to the children. Her freedom of movement and her right to choose freely where to live may itself be a factor in the welfare of the children. As the person responsible for the custody of the children her ability to function effectively is important to their welfare. In this case the mother has had the care of the children for 5 years and the father has no present means of caring for them and cannot make an application for their custody.

We cannot approve of the mother's conduct in taking the children away as she did and in failing to keep the father informed of her address. As a result of her action the children did not receive their Christmas presents in time, and did not see their father for nearly 5 months. This Court will always condemn a parent who seeks to destroy the relationship between the child and the other parent unless there are special reasons requiring such a breach in the child's interest. This is not

such a case. This Court is always mindful of the need to protect children and to maintain their relationship with both parents. (s43). The Court's orders should be such as to encourage both parents to maintain relationships with the children; in this context the concepts of punishment and enforcement are not appropriate.

The welfare of the children should be uppermost in the Court's mind when it is called upon to consider whether to use its powers to restrain the parent with custody of children from removing the children away from the city or town where the other parent resides, thus affecting the opportunities for access to the children by that other parent. We note incidentally that this is not a case involving removal of the children from Australia and we are not dealing with the issues which could arise where they may be taken outside the jurisdiction of the Court. We note further that an order restraining a parent from removing children from a particular State or Territory is not necessary to retain jurisdiction under the Act and that it does not help a parent resident, say in Melbourne, to have regular weekly access to a child which may be removed to Wodonga but not to Albury. Such an order seems inappropriate.

His Honour considered that the well-being of the children required that the father have reasonable access to them. He noted -

> 'that the Courts were of the opinion that it was highly desirable that these children should have full opportunity of knowing their father and having the benefit of his help and assistance.'

He found that -

> 'the welfare of the children does require that they should be brought back to Victoria where they may have the benefit of the help and assistance which their father is undoubtedly able to give them.'

The principles applied by this Court in custody appeals have been set out in *Watts v Watts* a decision of the Full Court of the Family Court of Australia delivered on 14 May 1976 ((1976) 26 FLR 136; 9 ALR 428; (1976) FLC 75,193 (¶90-046), which adopts the principles applied in *In re O* (1971) 1 Ch 748 and in *In re F (A Minor)* 1976) 2 WLR 189. The Appeal Court must consider whether the Court of first instance exercised its discretion properly and whether the decision appealed from is in the best interests of the children.

From a reading of His Honour's decision it appears that he was influenced to some extent by the mother's conduct. We disapprove of that conduct and we do not consider that undue weight was given to that aspect of the case by His Honour.

Our concern in this case is that His Honour did not give adequate consideration to alternative forms of access which could have been arranged. In our view an order restricting the freedom of movement of the custodial parent should be made only if the welfare of the children clearly indicates that the other parent should have regular weekly access rather than less frequent but longer periods of access. In our view as children grow older there can be advantages in the latter form of access. In this case the children have been in regular contact with their father and we agree that it is desirable in the interests of the children that they maintain their relationship with their father. However, when alternatives are considered, there is no preponderance in favour of weekly access provided that it is practical and reasonable to arrange for less frequent but longer periods of access; e.g. 3 or 4 visits each year of one or two weeks duration.

The father has 4 weeks leave each year and his nett income after week (after tax, etc., and after payment of $40 maintenance) is about $100. The mother's income (including maintenance and benefits) is about $94.00 per week. The full rate return fare for 2 children between Brisbane and Melbourne is about $180. In considering whether an alternative form of access is practicable and reasonable her freedom of movement has to be balanced against the need to maintain access for the children's benefit. The fact that she changed a status quo of 5 years must be put into the balance and account should be taken of the extra expense which would necessarily be incurred to insure the father's access.

In all the circumstances our view is that if the mother chooses to remove the children from the area where the parties lived together and where the father still resides, she must bear part of the burden of the cost of maintaining the father's access. A reasonable contribution for her to make

in the circumstances of this case would be an amount equal to half the cost of three visits per annum by the children to Melbourne or by the father to Southport. We do not consider that the father should be restricted to three visits. His access should remain liberal so far as arrangements can be made. On this basis, we consider that the alternative form of access protects the interests of the children and is fair as between the parents.

The relevant portions of the formal order of the Court:

> "that paragraph 2 of the decree nisi be varied to provide that the father have access to the children at Easter, for one week in the May school holidays, one week of the August/September school holidays and for two weeks of the Christmas school holidays and at any other times on notice to the mother and by agreement between the parties. The mother to contribute to the cost of access by paying for either the children's single fares from Coolangatta to Melbourne or the father's single fare from Melbourne to Coolangatta on three occasions each year. The terms of this order relating to contribution and access may be varied by consent in writing."
