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FAMILY COURT OF AUSTRALIA at MELBOURNE

In the Marriage of BESWICK: KEATINGS (Interveners)

Asche SJ

12 September 1983

FAMILY LAW – CUSTODY OF CHILD WITH GRANDPARENTS INTERSTATE – *EX PARTE* APPLICATION BY MOTHER FOR CUSTODY – DESIRABILITY OF DIFFERENT COURTS MAKING *EX PARTE* ORDERS DISCUSSED: *FAMILY LAW ACT*, s64(7).

K.'s who live in Melbourne are the parents of Mrs B. who lives in Queensland. When the B.'s separated, their child S. went to live with the K.'s in Melbourne. Some 10 months later, Mrs B. obtained an *ex parte* order from a Magistrates' Court in Queensland that she have interim custody of S. and that service of the application on the K.'s be dispensed with. When Mrs B. and the Police arrived in Melbourne to take S. into her custody, the K.'s applied *ex parte* for an order granting them custody of S. until further order.

HELD: Application granted.
1. There needs to be the most exceptional circumstances for a Court acting *ex parte*, to set aside an earlier order made *ex parte* by another Court.

2. Where an order for custody is made *ex parte*, it should be directed that the order, together with the affidavit in support, be served upon those persons having the *de facto* custody.

3. Whilst it is undesirable for different Courts to make *ex parte* orders, the exceptional circumstances of this case demand otherwise.

ASCHE SJ: *[After setting out the facts referred to in the affidavit supporting the application, His Honour continued]:* ... **[5]** It is, plainly, very unusual that an order for custody, made *ex parte*, has not directed that service of the order be effected upon persons having the *de facto* custody of the child, and has not directed that an affidavit, setting out the basis upon which the application for custody was made, be served upon those persons having the *de facto* custody of the child. As a result it appears that Mr and Mrs Keating, who have had the *de facto* custody of this child since 12 November 1982 and with the consent or their daughter, were suddenly confronted with a situation in which they were told by Police that an order had been made that the child be delivered to the wife; yet were given no material which indicated to them any reason why their *de facto* control of the child should have been disturbed so suddenly.

I do not, of course, make any criticism of the Police because they were merely doing what the order presumably asked them to do. Nor do I feel it would be proper, without having knowledge of the material that was placed before the Magistrate, **[6]** to make any criticism of the Magistrate who made the order.

But it does seem a very extraordinary situation that an order such as this was made in circumstances that precluded Mr and Mrs Keating from making any reply before having the child taken from them. The matter is obviously urgent on the affidavit material of Mr and Mrs Keating; because, if the child returns to the wife, he might either come again into contact with Barry Swanson whom the wife has alleged has beaten the child; or he might come under the control or partial control of John Maguire who might apparently wish to take the child to New Zealand. In any event he will come under the control of a woman who, if Mr and Mrs Keating are to be believed, has shown an inability to care for the child properly and has admitted that fact to them and has asked them to look after the child.

It needs to be the most exceptional circumstances for a court acting *ex parte* to set aside an earlier order made *ex parte* by another Court. The problems created by such conflict of jurisdictions are obvious. But, s64, sub-s (7) of the *Family Law Act* does allow the Court to discharge or vary an order made under that section. The material before me elicits the fact that Mr and Mrs Keating

have had this child, apparently on the mother's request, since 12 November 1982, and no reason has been given to them by affidavit of the wife as to why she **[7]** should now have the child without any hearing of their side of the story. More particularly, on the material before me, the welfare of the child would appear to demand that he remain in the custody of Mr and Mrs Keating, at least until all parties have the opportunity to be heard. These factors do create, in my view special circumstances why the order of the Magistrate should be discharged. It seems to me that the proper course is to restore the *status quo* and allow the application then to proceed to a situation where all parties can be heard and various allegations sifted out. It seems to me that the welfare of the child demands this.

I might have been of a different view if an affidavit had been served upon Mr and Mrs Keating which showed reasons why the wife should have interim custody of the child. At that stage I would have been faced with a situation where both parties had at least indicated to the Court why the child should be with them. It might then have been appropriate, unless one side showed a very strong case, to have allowed the matter to proceed in this Court or in the Court in Queensland; but in the circumstances which I have set out, it seems to me that for the welfare of the child I must take the action, which I stress is an unusual one, of discharging the order of the Magistrate and making an order for custody to Mr and Mrs Keating.

[8] I should of course add that I will make appropriate orders that this order and the affidavit of Mr and Mrs Keating and the affidavit of the husband be served on the wife, and appropriate orders that the matter be heard here, and that the wife be given an opportunity to bring the matter on as soon as possible if that is what she wishes. It seems to me that, whatever the ultimate findings are, I should also endeavour to see that *ex parte* applications on either side now cease: and I can only do that effectively by restraining the wife from bringing any applications in any Court other then the Melbourne Registry of the Family Court. Of course, if the wife has reasonable grounds to have the venue changed, she may file appropriate affidavits and be heard on that issue: but it seems to me that matters will get out of hand if I do not make it plain that one Court must deal with these applications.

[His Honour then turned to consider unfair procedural matters and continued]: ... **[9]** It is not unlikely that, if the wife was proceeding against her parents for custody, she might have sought an order in the State jurisdiction; and, if that is so, and unless the husband now files the appropriate application, it would seem that this Court would have no jurisdiction in the matter. I repeat that this case has concerned me because of the extreme undesirability of having different Courts making *ex parte* orders, but I consider for the reasons I have set out that this is an exceptional case and that I should act in the way I have set out.

[After considering the appropriate orders to be made, His Honour ordered that interim custody be granted to the interveners.]
