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**FAMILY COURT OF AUSTRALIA at MELBOURNE**

# *In the Marriage of CILENTO and CILENTO*

**Evatt CJ, Ellis SJ and Cook J**

**13 June 1980 — (1980) 6 Fam LR 35; (1980) FLC 75,344 (¶90–070)**

**FAMILY LAW – INTERIM CUSTODY APPLICATIONS – GENERAL GUIDELINES: *FAMILY LAW ACT* 1975.**

The parties separated on 11 January 1979. The dispute concerned the custody of their 3 year old girl. In February 1979 application was made to Box Hill Court. Proceedings were transferred to the Family Court. On 26th March interim custody was awarded to the wife. On 13th July the husband filed application to discharge this order and on 19th September he was awarded interim custody. On 15th October 1979 a further application by the wife on the question of interim custody was refused.

**1. On the hearing of an application for interim custody of a child it must be borne in mind that it is not then the task of the Court to determine whether the interests of the child would be better served by being in the custody of one particular party. That is a task which will face the Court when the contested custody application comes on for hearing and all the evidence is placed before the Court.**

**2. The interests of children will best be met by ensuring a degree of stability in their lives until the matter can be fully investigated by the Court and a full hearing of the issues within a reasonable time. Unnecessary disruption to the life of the child should therefore be avoided. If the child has remained in the matrimonial home after separation with one party this stability will usually be ensured by continuing that arrangement unless convincing proof is provided that the child's physical or mental health or moral welfare will be really endangered by the child remaining in that home with that party until the contested application is heard.**

**EVATT CJ, ELLIS SJ and COOK J:** ... We would draw attention to the fact that three contested applications have been dealt with by the Court relating to interim custody of B over the last 18 months since the filing of the original application and that the contested custody application has not come on for hearing. Smithers J's comment on 26 March 1979 that the final hearing should be regarded as appropriate to be given a speedy trial has been ignored in that no application for such a hearing has as yet been made and it would appear that it could be up to a year before the application is heard.

Such a situation is unacceptable. It is quite contrary to the intention of Parliament and the philosophy of the *Family Law Act* and totally inimical to the interests of children that the issue of custody should have to wait some 18 months to two years or longer to be heard. That there should be such a long period of enforced uncertainty runs counter to the need to provide for a child whose parents have separated some degree of stability for the future. Congestion in the Court's lists is one factor resulting in delays and that is regrettable.

Another factor may be the readiness of parties to bring repeated unnecessary interim and interlocutory applications which clog the lists. Interim applications for custody are not to be encouraged. Not only do they place unnecessary emotional and financial strains on the parties and in many cases unnecessary emotional strains on the children but they also tend to prevent the parties, if necessary assisted by court counsellors, attempting to resolve their differences affecting the welfare of children. Where it is not possible for the parties to resolve those differences, such applications delay the final hearing of the contested custody application.

On the hearing of an application for interim custody of a child it must be borne in mind that it is not then the task of the Court to determine whether the interests of the child would be better served by being in the custody of one particular party. That is a task which will face the Court when the contested custody application comes on for hearing and all the evidence is placed before the Court.

While the Court must always have regard to the welfare of the child as the paramount consideration that welfare will not be promoted by a decision based on inadequate and hastily prepared material presented at a circumscribed hearing. In many cases a period of settling down is necessary to enable a proper decision to be made. It was submitted in argument that the appropriate principles to apply are those enunciated in *Edwards v Edwards* (1966) 8 FLR 460 or in *Ingram v Crouch* (1979) FLC ¶90–664; 5 Fam LR 326.

No two cases are the same and it would be unwise to lay down any hard and fast rule. Nevertheless we consider that the interests of children will best be met by ensuring a degree of stability in their lives until the matter can be fully investigated by the Court and a full hearing of the issues within a reasonable time. Unnecessary disruption to the life of the child should therefore be avoided. If the child has remained in the matrimonial home after separation with one party this stability will usually be ensured by continuing that arrangement unless convincing proof is provided that the child's physical or mental health or moral welfare will be really endangered by the child remaining in that home with that party until the contested application is heard.

Circumstances will arise however where a party leaves the matrimonial home taking a child and becomes established in a new environment before the matter first comes before the Court. In such cases the child's life would be disrupted and his stability endangered by removing the child from the new surroundings and returning him to the spouse remaining in the matrimonial home unless convincing proof is provided that the child's physical or mental health or moral welfare will be really endangered by the child remaining where he is until the contested application is heard. This general approach does not necessarily apply where the Court has to deal with an application regarding the occupation of the home, when other factors may point to the need for a change in occupation and custody on an interim basis.

If the above approach is adopted the Court can ensure that the evidence adduced is confined to relevant issues. Such evidence would in the majority of cases be short. Once an order for interim custody is made, a change in circumstances of either of the parties would be irrelevant unless such a change placed the child in jeopardy if he remained where he was. If the application were contested, the Court should hear relevant oral evidence and allow cross-examination.

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