41/76

FAMILY COURT OF AUSTRALIA at TOWNSVILLE

In the Marriage of JURSS

Demack J

23 April 1976 — (1976) 1 Fam LR 11,203; [1976] FLC ¶90-041

FAMILY LAW – CUSTODY – WELFARE OF CHILD PARAMOUNT – CHILDREN HAD ESTABLISHED RELATIONSHIPS WITH THE FATHER – WHETHER FATHER SHOULD HAVE CUSTODY OF THE CHILDREN OF THE MARRIAGE.

Husband and Wife were separated. W. lived with another man in N.S.W. and H. lived with a woman in Queensland. The two children of the marriage lived with the father. W. sought custody of the children. Both parties offered suitable accommodation for the children in areas with adequate resources for educational and health needs.

HELD: Father granted custody of the children and mother to have access at times agreed between the parties.
1. The welfare of a child in any particular case must be determined on the facts of the particular case. Certainly rules of experience and prudence may indicate the limits of the inquiry in any particular case, and certainly experience may indicate certain factors which are more significant than other factors. But to look for disqualifying factors against the mother is to put the cart before the horse. The inquiry is essentially a positive one designed to promote the interests of the child, not to demote the claims of either parent.

2. This does not mean that the status quo must always be preserved. It merely shows that in every custody application the Court must very carefully consider the evidence placed before it and determine how best to promote the interests and welfare of the children.

3. In this case the children were with their father with whom they have lived all their lives. They were in a household where they had established relationships with two other children in their age group. They were well cared for by a young but competent and loving woman. To move them from this environment was to choose uncertainty and to require them to make a variety of emotional adjustments which was not necessary for their well being.

DEMACK J: ... Mr Webb who appeared for Mrs Jurss submitted that I should follow the practice which has existed for many years granting the custody of children of tender years to their mother. He referred to *Lovell v Lovell* [1950] HCA 52; (1950) 81 CLR 513, and *Re Bone Infants* (1957) St R Qd 196. He submitted that the mere fact that Mr Jurss has had the custody of the children over the past three years is not enough to determine the issue. Nothing adverse has been shown against his client so that the ordinary rule that young children need their mother's attention should prevail.

Mr Lindsay, who appeared for Mr Jurss, submitted that I should not disturb the status quo. A new family unit has been created in which Michael and Toni have enjoyed proper care and attention and it is in their best interests that they remain where they are.

Mr Jurss admitted that his wife looked after the children well, that she had affection for the children, and was a good mother. Mrs Jurss admitted that her husband had not tried to embitter the children against her, that he is a good father and that he has endeavoured adequately to provide for the children.

It appears to me that one very significant factor in cases such as this is the relationship which will develop between the children and their prospective step parents. So far as Mr Hunter is concerned, he was cross-examined before me and he appeared as a pleasant man who probably will discharge the duties of a father adequately. However, he is presently a complete stranger to the children.

Mrs Tichborne is only nineteen. She does, however, appear mature enough to discharge the

duties of a mother. She told me that she and Mr Jurss have discussed the question of family size and have agreed that four is enough, so that they did not plan to have any further children. This demonstrates a willingness to face up to the responsibilities of parenthood. It sounded strange to hear a woman of nineteen years saying that she does not intend to have any more children, but Mrs Tichborne seemed to me to give this answer deliberately and earnestly. There is nothing to suggest that the four children in the Jurss-Tichborne household do not form a happy, harmonious family unit.

There is one other factor which has influenced me considerably. Throughout Michael's life Mr Jurss has been constantly present to care for him and to provide for him. On both separations Michael remained with his father. Also with Toni she has been continuously with her father. After coming to Townsville Mr Jurss did obtain help from his mother for some time in the care of the children. However, he also said, in effect, that he left the Army for a period to care for the baby. This was not explored beyond that one remark. However, it does demonstrate an unusual degree of affection and ability on Mr Jurss' part which does ensure that the children will be well cared for if left in Mr Jurss' custody.

I think it is appropriate to comment briefly upon the submissions of law made by Mr Webb, because he seemed to be saying that unless there are some disqualifying factors demonstrated against the mother, the custody of children of tender years should always be given to the mother. It is possible to take statements from cases such as *In Re Thain* (1926) Ch 676 and to turn them into propositions like that propounded by Mr Webb. But to do this is to commit a serious error.

The welfare of a child in any particular case must be determined on the facts of the particular case. Certainly rules of experience and prudence may indicate the limits of the inquiry in any particular case, and certainly experience may indicate certain factors which are more significant than other factors. But to look for disqualifying factors against the mother is to put the cart before the horse. The inquiry is essentially a positive one designed to promote the interests of the child, not to demote the claims of either parent.

In recent years there has been an increasing awareness of the damage done to the emotional development of children if they are suddenly removed from a known, secure, supporting set of relationships, and thrust among strangers, even if there be some blood relationship with one or more of the strangers. In some cases this may be explored by the calling of expert testimony.

In others the ordinary experience of the Courts is relied upon. One quotation is enough to point to this factor of importance in custody cases. It is from the judgment of Lord MacDermott in *JVC* (1970) AC 668, at p715 -

> 'Some of the authorities convey the impression that the upset caused to a child by a change of custody is transient and a matter of small importance. For all I know that may have been true in the cases containing *dicta* to that effect. But I think a growing experience has shown that it is not always so and that serious harm even to young children may, on occasion, be caused by such a change. I do not suggest that the difficulties of this subject can be resolved by purely theoretical considerations, or that they need to be left entirely to expert opinion. But a child's future happiness and sense of security are always important factors and the effects of a change of custody will often be worthy of the close and anxious attention which they undoubtedly receive in this case.'

Reference can also be made to *Barnett v Barnett* (1973) 2 NSWLR 403.

This does not mean that the status quo must always be preserved. It merely shows that in every custody application the Court must very carefully consider the evidence placed before it and determine how best to promote the interests and welfare of the children.

In this case the children are with their father with whom they have lived all their lives. They are in a household where they have established relationships with two other children in their age group. They are well cared for by a young but competent and loving woman. To move them from this environment is to choose uncertainty and to require them to make a variety of emotional adjustments which are not necessary for their well being. Indeed the only reason for any change is to gratify the natural and honest maternal concerns of Mrs Jurss. But I am required to regard the welfare of the children as the paramount consideration, and there is nothing shown to indicate that

their welfare will be enhanced if they are given to their mother. They are well and properly cared for now, and their welfare is very well advanced and ensured by leaving them with their father.

Mrs Jurss raises the question of the religious instruction of the children. Both Mr & Mrs Jurss agree that they previously decided to have the children instructed in the tenets of the Salvation Army. However, neither of them belongs to the Salvation Army so that this instruction has not occurred. Indeed the only one of the four adults who could be significant figures in the growth of the children's religious perceptions who regularly attends worship is Mrs Tichborne. She is a Seventh Day Adventist and the children attend worship with her and receive instruction at the Sabbath School. While the Seventh Day Adventist faith may be regarded by some as heretical, it does not appear to act as a decisive influence within families. As both parents apparently place little value in the regular observance of religious practices, it seems to me that I should not make any requirement about educating the children in any particular faith.

Access presents a serious problem because the parties have only modest incomes and they live about two thousand kilometres apart. It seems to me to be difficult to order precise times for access at present because Mrs Jurss has had great difficulty in the past in coming to Townsville and Mr Jurss has little surplus money available. Mr Jurss obviously recognises that it is desirable that the children grow up knowing their mother.

However on the other hand if the parties know that access is to be taken at particular periods each year they can budget for the financial commitment involved. If the Order is left in general times of up to one half of all school holidays, then if there is any improvement in the financial position of the parties adequate access can be taken. If the Order also provides a minimum of one month per year then this allows for all the access to occur during the December-January school holiday period, thus reducing travelling expenses. The cost of travel should be borne equally by Mr & Mrs Jurss.

The Orders will be:—

(1) That the applicant, Bruce Robert Jurss, have custody of the children of the marriage, Michael Anthony Jurss and Toni Marie Jurss.

(2) That the respondent, Susan Jane Jurss, have access to the said children at times agreed between the parties for up to one half of the periods of school holidays occurring in the State in which the applicant is from time to time residing, provided that if she does not have access to the children during the shorter periods of school holidays in any one calendar year, she shall be entitled to have access to them for a period of four weeks during the school holidays commencing in the month of December in that year;

(3) That the travelling expenses of the children incurred in travelling from the applicant's residence to the respondent's residence for the purpose of access and in returning to the applicant's residence be borne equally by the applicant and the respondent.