33/76

FAMILY COURT OF AUSTRALIA at MELBOURNE

In the Marriage of HORMAN

Fogarty J

24 February 1976 — (1976) 5 Fam LR 796

FAMILY LAW – CUSTODY – ACCESS – CONDUCT OF PARENTS – MATTERS TO BE CONSIDERED WHEN DETERMINING AN APPLICATION FOR CUSTODY: *FAMILY LAW ACT* 1975, S64(1)(a).

Before the Court was a custody dispute between husband and wife in relation to their young child. The Court made an order that the wife should have custody of the child, conditional upon her giving undertakings to the Court that she would not, so long as she had the custody of the child, partake of drugs, that she would not move without giving her husband written notice of her new address: and that she would report to a Court Marriage Guidance Counsellor as directed. The Court ordered that the husband have access, as defined, upon condition that he undertake to the Court not to partake of or be affected by drugs during any period of access and that he surrender forthwith his passport.

HELD:

1. This application was to be determined upon the basis of the welfare of the child as the paramount consideration (see s64(1)(a)). The test of the welfare of the child has to be determined having regard to contemporary social standards, that is, it cannot be a totally subjective test based upon the views or standards of the individual parent, but objective at least in the sense of falling within the wide range of existing social standards.

2. It is unnecessary to base the Court's refusal to grant to the husband the custody of his daughter upon any unacceptability of his general philosophic views. In any event his proposals that he ought to live in remote circumstances in the hut described with his daughter without any real basis of financial support for either of them and without any intention to work and where it is likely that he will continue to indulge freely in drugs and in a free sexual life such a mode of existence may endanger the welfare of the child and is not a situation into which the Court could be prepared to place the child.

3. It would be a rare and compelling case which would require the Court to refuse all access by a parent to his or her child.

4. Although one frequently sees it referred to as the 'right' of a parent to access of the child, a parent has no such right as such. Nevertheless common experience shows that in the vast majority of cases the child is very much benefited by as close an association with both parents as is possible. Parents themselves may divorce each other and go their separate ways but then cannot divorce themselves as parents.

5. Provided reasonable safeguards are provided, A's welfare would be advanced by her continuing to have regular and frequent association with her father. That he greatly loved her and was very much attached to her was beyond argument. Nor was it suggested that, subject to the restrictions which were obvious from his mode of living that he failed to adequately and properly look after the child's needs during the several lengthy periods when he was the child's sole custodian. To cut him off now from future association with the child would be to do him a grave wrong and would not advance the welfare of the child.

FOGARTY J:

Custody

There could be no doubt nor was it seriously challenged that the husband has a strong love and affection for his daughter and would be anxious to do what he regarded, within the confines of his own particular beliefs, as best for her welfare.

However this matter has to be determined upon the basis of the welfare of the child as the paramount consideration (see s64(1)(a)). The test of the welfare of the child has to be determined having regard to contemporary social standards, that is, it cannot be a totally subjective test

based upon the views or standards of the individual parent, but objective at least in the sense of falling within the wide range of existing social standards. In saying that I am not suggesting that applicants for custody must fit themselves within some accepted social norm or groove. Our community enjoys the benefits of the widely differing social styles and attitudes and it would be unacceptable if a parent's custodial position was endangered simply because that person's style of living or attitude to life differed even radically from what might be regarded as the community norm. In adopting the above view the Court is not passing any judgment upon the correctness or otherwise of the social or moral views held by the parent. As Hutley JA said in *Barnett v Barnett* (1973) 2 ALR 19 at p25,

> "Objections to the conduct of parents because they infringe the conventional moral code also have no weight except in so far as they reflect upon the parent's fitness to take charge of the child."

See also *Chisholm v Chisholm* (1966) NSWR 125 at p126, and *Thompson v Thompson* (1962) 2 NSWR 534 at p538.

Further there are obvious difficulties about determining what such a norm is. Of necessity the Judge is limited by his own upbringing and social contracts. Attempts by Judges in this jurisdiction to lay down standards of acceptable morality usually end up being of antiquarian interest only. For example, in *Re Besant* (1879) 11 Ch p509 at page 521 the Court of Appeal said: 'The Court cannot allow its ward to run the risk of being brought up, or growing up, in opposition to the views of mankind generally as to what is moral, what is decent, what is womanly and proper, merely because her mother differs from those views and hopes that by the efforts of herself and her fellow propagandists, the world will be someday converted'. Mrs Anney Besant being a then advocate of contraception and atheism. However, where the Court is convinced that the proposed mode of behaviour of a parent seriously offends even the most elastic views of conventional morality and where it considers that the mode of living would or may seriously jeopardise the future welfare of the child, the Court has a duty to act upon that view; see *Evers v Evers* (1972) 17 FLR 296 and in particular the discussion there of the cases relating to custody or access claims by members of the Exclusive Brethren, but contrast *Campbell v Campbell* (1974) 9 SASR 25 where the Court concluded that in the particular circumstances of the case the mode of living of the mother did not place the welfare of the child in jeopardy.

Here I find it unnecessary to base my refusal to grant to the husband the custody of his daughter upon any unacceptability of his general philosophic views. In any event his proposals that he ought to live in remote circumstances in the hut described with his daughter without any real basis of financial support for either of them and without any intention to work and where it is likely that he will continue to indulge freely in drugs and in a free sexual life it appears to me that such a mode of existence may endanger the welfare of the child and is not a situation into which I could be prepared to place the child.

It therefore makes it unnecessary for me to finally conclude whether the particular philosophy or beliefs held by the husband may themselves be really injurious to his daughter's future welfare. However, there is no doubt that by any contemporary standard they are eccentric beliefs, although held by him with considerable fervour. In saying this I am not challenging the husband's right to hold these beliefs but whether the upbringing of the child in such beliefs would be for her welfare. An aspect of this matter which did however concern me was that it appeared from the husband's evidence that he may not send his child to school but would prefer to look to her education himself upon the lines of his beliefs.

An additional matter ought to be mentioned. Mr Jolson in his submissions urged that the so called 'rule' as illustrated in such cases as *Kades v Kades* (1962) 35 ALJR 251 at p254 that a young child, and particularly a girl, should normally be placed in the custody of a mother was no more than a 'rule of thumb'. Whatever application this so called rule might be thought to have in the ordinary run of cases it appeared to me to have very little application, if any, in this case and it was not a consideration upon which I relied.

Access

Miss Opas on behalf of the wife, submitted that in the event that her client obtained an order for custody no access should be granted to the husband at least for the present. In submitting this

Miss Opas went somewhat further than her client did in evidence. The wife indicated when asked a specific question as to this that she feared that if her husband obtained the child he would take her overseas. I felt that this was a genuinely held fear but aside from that fear the wife did not otherwise really suggest that her husband ought not to have access to the child.

It would in my opinion be a rare and compelling case which would require the Court to refuse all access by a parent to his or her child: In *Roberts v Roberts* [1971] VicRp 18; (1971) VR 160 at p164 the Supreme Court of Victoria said:

> 'Normally it is for the benefit of the child that it should maintain contact with both parents, the degree of contact between the child and the non-custodial parent varying in accordance with the circumstances of the case. The current view of access is that generally it is highly desirable that a child should have as much contact as possible with both parents, so that there may be created in the child feelings of security often missing in the case of a child with one parent. Moreover, it is now recognized that boys require contact with their mothers and girls with their fathers, as well as with the parent of their own sex. These considerations apply to the normal situation. If continued association with the non-custodial parent would cause harm to the child physically, mentally or morally, then the Court must weigh the advantages of the association against the disadvantages, and in a proper case should not hesitate to refuse access.'

Similarly in *Innes v Innes* (1970) ALR 566 at p572 Jenkyn J said:

> 'It is in the child's interests that he should come to know, love and respect his father unless the father has completely forfeited his rights to such close and intimate relationship with him, or unless the enforcement of the father's right to access would be likely to endanger the child's physical, mental or moral health or otherwise be clearly contrary to the child's well being.'

see also *Mclean v Mclean* (1964) ALR 264; *M v M* (1973) 2 All ER 81; *S v S* (1962) 2 All ER 1 at p4; *Lister v Lister* (1967) 11 FLR 93. The test in respect of access is, as is the case with custody, the welfare of the child as the paramount consideration (see s64).

Although one frequently sees it referred to as the 'right' of a parent to access of the child, a parent has no such right as such (see *M v M supra* at p85). Nevertheless common experience shows that in the vast majority of cases the child is very much benefited by as close an association with both parents as is possible. Parents themselves may divorce each other and go their separate ways but then cannot divorce themselves as parents. A child will normally gain considerable value from continued association with both parents in those cases where unfortunately the parents are separated and the child cannot enjoy their companionship, love and affection in the one household. Further, considerations which may cause a Court to refuse to grant to a particular parent the custody of the child may not necessarily lead the Court to refuse or unduly restrict periods of access to the child by that parent.

In my view provided reasonable safeguards are provided I do not consider that A's welfare would not be advanced by her continuing to have regular and frequent association with her father. That he greatly loves her and is very much attached to her is beyond argument. Nor was it suggested that, subject to the restrictions which were obvious from his mode of living that he failed to adequately and properly look after the child's needs during the several lengthy periods when he was the child's sole custodian. To cut him off now from future association with the child would I believe be to do him a grave wrong and would not advance the welfare of the child.
