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FAMILY COURT OF AUSTRALIA at MELBOURNE

In the Marriage of DYASON

Emery J

18 March 1976 — [1976] FLC 75,117 (¶90-026)

FAMILY LAW – JOINT CUSTODY ORDERS – MATTERS TO TAKE INTO CONSIDERATION WHEN DETERMINING CUSTODY APPLICATIONS: *FAMILY LAW ACT* 1975, S61(1).

The question for the Court was whether the wife should have the sole custody of the children that she was seeking, with access to the husband, or whether, as the husband sought, there should be no order as to custody at all or there should be joint custody with care and control to the wife.

HELD:

1. The argument that s61(1) of the *Family Law Act* introduced a new concept of joint custody into the law is rejected. Section 61(1) does no more than state what has been statutory law in Victoria since 1928, namely that both parents have an equal right to the custody and to the care and control of a child until such time as the court otherwise orders. Although orders as to joint custody may be made, they should be made only in the most exceptional circumstances.

Barber J in *Travnicek v Travnicek* [1966] VicRp 47; (1966) VR 353 at 356, followed.

2. To order joint custody to continue can in some circumstances reduce tensions, for, on the face of it, it means that neither party has lost his or her claim for custody. This type of order must however be used with great care and always remembering that the Court must treat the welfare of the children as the paramount consideration. Such an order can create more problems than it solves for where the parties have separated, particularly because of serious incompatibility, then it will be difficult for them, as a committee of 2 to reach a majority decision.

3. Sole custody of the children of the marriage was awarded to the wife. The Court is required by the *Family Law Act* to treat the welfare of the children as the paramount consideration and this requires that the party who has the day to day care of the children must with that duty accept the obligation of making and the ultimate responsibility for, the more important decisions from time to time required.

EMERY J: Mr Radford put in argument that the concept of joint custody and the provision in s61(1) of the Act that the parties have joint custody was a statutory enactment of the common law. With the greatest respect to his argument I must disagree with this proposition entirely. In *R v Prior* (1898) 19 LR (NSW) 329 Owen J stated that the father and in case of his death the mother of an infant under the age of 21 years is according to the common law of England entitled to the custody of the infant. Again in *Ewing v Ewing* (1881) 1 QLJ 15 Lilley CJ stated the law makes the father the absolute lord of both wife and children subject to certain exceptions with respect to nurture, and that he can take the children from the wife so long as he does not commit a breach of the peace. See also *Halsbury* 3rd Ed. Vol. 21 p191 paragraph 425 as to the rights of the father to the custody of a legitimate child.

The common law was varied in each of the Australian States by the *Marriage Act* provisions as to custody and later by the *Matrimonial Causes Act* 1959 (Cth). The *Marriage Acts* I refer to hereunder are the Victorian Acts.

The *Marriage Act* 1890 provided in s31 that a mother may be granted access or custody. There was no provision and no necessity for a provision that the father could be granted custody. Section 40 of the same Act provided that on the death of the father without having appointed a legal guardian the mother shall be deemed to be the lawful guardian of an infant. Section 40 was repealed by the *Custody of Infants Act* 1912.

The *Marriage Act* 1915 re-enacting the 1912 Act went a step further and provided that where after

the 31st Day of December 1912, the father was dead then the mother shall be the guardian of an infant either alone if no other guardian was appointed by the father or jointly with any guardian appointed by the father.

By s69 of the 1915 *Marriage Act* the Court could make an order for custody or control of the infant and the right of access thereto of either parent 'having regard to the welfare of the infant'. Originally the law had been concerned with the rights of the parents and at this stage the infant was to be considered.

In the *Marriage Act* 1928 (following similar legislation in England in 1925) it was first enacted (s136) that in proceedings as to the custody upbringing or property of an infant the Court in deciding the question 'shall regard the welfare of the infant as the first and paramount consideration' and shall not take into consideration whether the claim of the father or any right at Common Law possessed by the father is superior to that of the mother or the claim of the mother is superior to that of the father.

These same provisions were effectively restated in the *Matrimonial Causes Act* 1959 s85. In modern times – *post* 1928 – representation of persons of restricted capacity is guided by principles developed for the protection of those persons. In early law guardianship was frequently a right and not a duty (see Paton *Jurisprudence* 1946 Ed. p234). The guardian was he who would succeed if the ward died intestate the maxim being *ubi benficium successionis ibi onus tutalae* – where a person benefits on succession there in that person is the onus of tutelage. The wardship of feudal times protected the interests of the lord and the ward might not only find that the utmost had been ruthlessly contracted from his estate during his minority but that he was in addition forced to pay a fine for the privilege of succeeding.

In Roman law by the time of the Republic the then comparatively new concept of tutorship as a duty imposed in the interests of the ward was accepted but in England was not until the law of trusts was well developed that there was any real protection for an infant.

Section 61(1) then does not in my opinion state the common law but merely restates the statutory law developed in Victoria since 1928 and I believe in other States from about the same time. This section states in effect that until there is an order of a Court to the contrary each parent is a guardian and they have joint custody. This restates in a more positive form s136 of the Victorian *Marriage Act* 1928 which set out as above stated that the Court in deciding questions as to infants shall not consider the rights of the father as superior to those of the mother or of the mother as superior to those of the father i.e. their rights are equal.

I was referred by Mr Randall who appeared for the wife to s64(11) of the Act which provides that where more than one person has custody of a child a warrant shall not be issued for the removal of the child from the possession of one of those persons and the delivery of the child to another of them. Mr Randall contended and I believe rightly so, that this section in certain circumstances could well create difficulties for a person who had care and control of an infant coupled with an order for joint custody.

Again in my opinion s61 introduces no new concept of joint custody into the law. It does no more than state what has been the law since 1928 in Victoria namely that both parents have an equal right to the custody and to the care and control of a child until such time as a Court otherwise orders.

The wife gave evidence that it is true that the parties have been able to agree on all matters with regard to the children but that in many cases that agreement was reached only by her unwilling giving way to the husband whom she considered to be the head of the house. To instance this she pointed out (*inter alia*) that the children had not had the usual inoculation although she believed strongly that they should have them, and that if she is given sole custody she will see to it that they have them.

The husband through his Counsel (and I unreservedly accept his statement) stated that he was prepared to discuss this matter again with the wife.

This is a case where the parties have clearly been able to reach a consensus on all matters of importance up to the present time but it was obvious from the evidence of the wife and her demeanour in the witness box that she is anxious to have a free hand in the making of decisions with respect to the upbringing of the children. She assured me, and I accept her assurance as genuine, that she would be not only willing but also anxious to discuss the children's problems with the husband. It is clear of course that she cannot have an entirely free hand for even if she does have sole custody the father will have liberal access and at all times this court is available to him if he considers that the wife's actions with respect to the welfare of the children are not in the best interests of those children. She is always subject therefore to the overriding control of this Court.

I have looked carefully at the authorities to which I was referred by Mr Radford as to joint custody and as to custody in one (or both) of the parties and care and control in the other. I am, after a study of these cases, convinced that the views expressed by the late Sir John Barry and by Barber J constitute the correct approach to these questions namely that although such orders may be made they should be made only in the most exceptional circumstances.

Barber J after a comprehensive review of the Australian decisions in particular in *Travnicek v Travnicek* [1966] VicRp 47; (1966) VR 353 at p356 (7 FLR 440 at 443) said:

> 'With the greatest possible respect to those who take the opposite view, it seems to me preferable to follow the views expressed by Barry J in Victoria, and Wallace and Begg JJ, New South Wales, and that the long established practice in those two States should not be disturbed. In particular I find the principle stated by Wallace J, a compelling consideration. It may sometimes be useful and convenient to make an order in the *Wakeham model* where, as in that case, itself, the parties are living in different countries, and it is desired to preserve some legal standing for the party living within the court's jurisdiction, and where no practical problems can arise, by reason of the distance separating the parties, although it should be noted that the distance factor was present in *Harnett's case, supra*, where Barry J refused to make such an order. However, where both parties reside in Australia, and of course even more in the usual case where they are in the same city or district, it seems to me that such an order is undesirable.
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> Practical experience in the matrimonial jurisdiction leads to the conclusion, that any separation of the responsibility for the child's upbringing and the authority to control it would in most cases end unsatisfactorily and in some cases disastrously.
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> The ultimate test to be applied must always be the welfare of the child, and the custody of a child is not to be committed or refused to one party or the other merely as reward for virtue or penalty for matrimonial guilt. It is also necessary to resist the temptation to console the successful Petitioner by an order for legal custody where the circumstances are such as to require the actual case and control to remain with the respondent. On this aspect the observations of Barry J in *P v P* [1964] VicRp 55; (1964) VR 430; (1965) ALR 228 are relevant. An important factor affecting welfare is the need to eliminate, as far as possible, the inevitable friction between the parties where they have divergent views on the child's upbringing. Generally speaking, it seems to me essential that the party with the actual responsibility for the child's care should also have the legal right and duty to control and direct its mode of life, education and general upbringing, subject to a reasonable consultation with the other spouse, and ultimately, if necessary, to the control of the court.'

It is my opinion then that s61(1) of the Act does not introduce any new concept but the fact that the mode of expression has changed and the words are positive must have some implications and this new method of expression must be given some meaning. One of the policies of the Act is to provide for a reduction in the tensions between husbands and wives where they have separated and, one method of so doing is to postulate that until the Court otherwise orders they shall have joint custody. This concept then allows for the Court to place the children in the care and control of one party while giving to both parties equal rights with regard to important decision making.

To order joint custody to continue can in some circumstances reduce tensions, for, on the face of it, it means that neither party has lost his or her claim for custody. This type of order must however be used with great care and always remembering that the Court must treat the welfare of the children as the paramount consideration. Such an order can create more problems than it solves for where the parties have separated, particularly because of serious incompatibility, then it will be difficult for them, as a committee of 2 to reach a majority decision.

The change in the wording of the Act does not in my opinion invalidate or supersede the reasoning of Barber J as set out above and on the facts of this case it is my judgment that those considerations, coupled with considerations as to the welfare of the children render it inadvisable to make an order for joint custody.

For these reasons I propose to award sole custody of the children of the marriage to the wife. It has been necessary in this case to resist the temptation to reward the husband for the unusually active interest he has taken in the children by leaving custody with him and thereby giving to him equal authority with the wife. However, I am required by the Act to treat the welfare of the children as the paramount consideration and in my opinion this requires that the party who has the day to day care of the children must with that duty accept the obligation of making and the ultimate responsibility for, the more important decisions from time to time required.
