

32/76

## FAMILY COURT OF AUSTRALIA at BRISBANE

**NICHOLSON v CRANS**

Demack J

17 March 1976

**FAMILY LAW – CHILD AS WITNESS – ASCERTAINING CHILD'S WISHES AS TO CUSTODY: FAMILY LAW ACT 1975, S64(1)(b); FAMILY LAW REGULATIONS, R116.**

Before the Court was an application by a mother for custody of her three children, aged 15, 11 and 8: the parents had been divorced for over four years and the custody dispute had been litigated previously, with custody being awarded to the father and the mother having defined access.

**HELD: G. (the 15 year old) expressed a clear preference to being with his mother. He was a small lad for his age and appeared to be extremely nervous. His answers appeared to have been carefully rehearsed and designed to bring forth all conceivable reasons to support the view that he was advancing. In view of the way in which Mrs Crans set about to manipulate the children so as to lay a basis for an application for custody, the Court was not satisfied that the wishes G. expressed were ones that ought to be acted on.**

**DEMACK J:** ... In relation to G (the 15 year old child) s64(1)(b) requires that I shall not make an order contrary to his wishes unless I am satisfied that by reason of special circumstances it is necessary to do so. In the course of the hearing, I indicated that in my view, the only way I could ascertain his wishes was to speak with him. Regulation 116 allows me to interview any child my chambers but also provides:

"(3) Evidence of anything said at the interview shall not admissible in any Court."

I indicated at the hearing that it seems to me this had be read subject to the express provision of s64(1)(b) so that where a child is over fourteen (14), the Judge is under an obligation to state what the wishes of the child are and if he intends to make an order contrary to those wishes, to state the special circumstance justifying this. It is, of course, provided under r116(5) that the Court may order a child under the age of eighteen (18) to be called as a witness. In view of the way in which the children were being used by the applicant, it did not appear to me to be desirable that any of them be called as witnesses in this case.

G. expressed a clear preference to being with his mother. He is a small lad for his age and appeared to be extremely nervous. His answers appeared to me to have been carefully rehearsed and designed to bring forth all conceivable reasons to support the view that he was advancing. In view of the opinion I have expressed about the way in which Mrs Crans set about to manipulate the children so as to lay a basis for an application for custody, I am not satisfied that the wishes G. expressed are ones that ought to be acted on.

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