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SUPREME COURT OF NEW SOUTH WALES

LAND & ANOR v HORNE & ANOR

Helsham CJ in Eq

29 February 1980

FAMILY LAW – CUSTODY CARE AND CONTROL OF TWO CHILDREN OF MARRIAGE GRANTED TO MOTHER ON DIVORCE SUBSEQUENT TO DEATH OF MOTHER - APPLICATION BY FATHER TO FAMILY COURT FOR CUSTODY OF HIS TWO CHILDREN – APPLICATION BY MATERNAL GRANDPARENTS TO SUPREME COURT FOR CARE AND CONTROL OF ALL FOUR CHILDREN (AS WARDS OF THE COURT) – INTERPRETATION – WHETHER ORDER FOR CARE AND CONTROL MADE ON DISSOLUTION OF MARRIAGE IS A "CUSTODY" ORDER: *FAMILY LAW ACT* 1975 (CTH) S61(4).

There were two children of the marriage between the wife and the respondent husband. The parties then separated, the wife commencing a defacto relationship with another man and taking the two children with her. Two further children were born of this relationship and all four children were brought up together. In 1977 the respondent husband obtained a divorce and at that time the Family Court made an order giving the wife care and control of the two children of the marriage. No order for custody was sought or made. The wife separated from defacto husband and subsequently died, the four children having stayed with her until just prior to her death. The respondent applied to Family Court of Australia for custody of his 2 children under s61(4) of *Family Law Act*, and the children's maternal grandparents made application to Supreme Court of New South Wales for orders that all 4 children be made wards of the court and that they be placed in care and control of grandparents. The respondent argued that the Family Court had exclusive jurisdiction.

HELD: (*inter alia*)
(1) Order for care and control not a "custody order" within the meaning of s61(4) of the *Family Law Act* 1975;

(2) The prior existence of a custody order is a prerequisite for jurisdiction of any court to which application is made relying on provisions of s61(4).

HELSHAM CJ in Eq: ..."It is basic to the jurisdiction of any Court to which an application is made relying upon the provision of s61(4) that there must have been a custody order made in favour of the deceased spouse (here the mother) with respect to the relevant child ... The matter turns upon what is meant by the words "custody order" where those words are used in s61(4). In my view they mean precisely what they say, that is "an order for custody". ... A distinction between order for custody and order for care and control in proceedings concerning children has long been recognised and given effect to in this country and in England." (See *Wakeham v Wakeham* [1954] 1 All ER 434; (1954) 1 WLR 366 per Denning LJ @ p369).

... It is quite clear the learned judge of the Family Court of Australia who made the order for access for Mr Horne in his divorce upon his application, did not intend to make and did not make a custody order. ... It follows that no valid application was or could have been made under S61(4) of the *Family Law Act*.

[Ed note: His Honour ruled that the Supreme Court of New South Wales had jurisdiction to entertain an application for the children to be made wards of the court. For the arguments forming the basis of this decision as to the matters of "exclusive jurisdiction" *vis-à-vis* the Supreme Court of New South Wales and Family Court see the Report at (1980) FLR 28 @ pp30-33.]
