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FAMILY COURT OF AUSTRALIA

In the Marriage of CARTLEDGE (JH & SE)

McCall J

20 July 1977

(1977) 29 FLR 244; 3 Fam LR 11,339; [1977] FLC 76,368 (¶90-254)

FAMILY LAW – CUSTODY – EVIDENCE – WISHES OF THE CHILD – CHILD'S WISHES ASCERTAINED BY CONSULTANT PSYCHIATRIST – WHETHER PSYCHIATRIST'S EVIDENCE ADMISSIBLE – PSYCHIATRIST'S REPORT COMPARED WITH WELFARE OFFICER'S REPORT.

Evidence of the wishes of a child in a custody case may be ascertained by a judge interviewing the children in chambers, by separate representation of the children pursuant to s65 of the *Family Law Act* 1975-76, or by obtaining a report from a welfare officer pursuant to s62 of the *Family Law Act* 1975-76. Evidence from a consultant psychiatrist as to the wishes of the children is hearsay and inadmissible unless such evidence is necessarily ancillary to a report from such a psychiatrist as to the physical, psychological or psychiatric condition of such child.

***Reynolds v Reynolds* (1973) 47 ALJR 499;**
***In the Marriage of Ryan* (1976) 27 FLR 327; and**
***In the Marriage of N.* (1977) 28 FLR (Pt.1) CN 11, referred to.**

APPLICATION:
On the hearing of a custody application by H. an issue arose as to the admissibility of the evidence of the consultant psychiatrist as to the wishes of the children.
N. Tolcon, for the applicant; P. Nisbet for the respondent.

McCALL J: In the course of these contested custody proceedings a question arose as to the admissibility of the evidence of a consultant psychiatrist either orally or in the form of a report. I heard argument from counsel and informed them I would give a decision, after considering the authorities cited to me, the following morning. This was necessary as the decision on admissibility could well affect the way in which the respondent's case was then conducted. These are my reasons.

The proceedings involve the custody of the two children of the parties, a boy who will be fourteen years of age in approximately three months' time, and a girl who has just turned ten years of ago. They are presently in the custody of their mother and the father enjoys liberal access. This is pursuant to an order made in the Supreme Court of Western Australia in December 1975. In August 1976 the husband applied in this Court for an order that the custody of the two children be changed and that they be placed in his custody with reasonable access to the wife. One of the grounds upon which he sought a change in the existing custody of the children was that both the children, he claimed, desired to live with him. In support of his claim he filed an affidavit to which was annexed the report of a consultant child psychiatrist. This report, after setting out that the children had been interviewed by the psychiatrist went on in some detail to describe the wishes of the children as told to the psychiatrist with respect to their future custody and to analyze reasons for their views. The psychiatrist was called to give evidence. At that stage objection was taken, both to the admissibility of his report and to any oral evidence that he might give which would indicate the wishes of the children as expressed to him.

In short, the objection was that such evidence was hearsay; that it did not fall within any recognized exception to the hearsay rule and accordingly ought not to be admitted in evidence. In addition, it was argued that a report from a welfare officer attached to the court had been ordered and had been obtained. Incorporated in this report was a communication to the court of the wishes of the children. In these circumstances it was submitted that no other evidence should be admitted.

On the other hand, in favour of the admissibility of the report, it was argued that the report of the psychiatrist ought in some way to be treated in the same way as the report of the welfare officer – that as the welfare officer's report was admissible, so ought the report of the psychiatrist. Further, it was argued that there were special circumstances in this case, namely that it was the wife who had first consulted the psychiatrist with one child and that, as she had refused to divulge the contents of the report given to her, the husband then consulted the same psychiatrist with both children and obtained his report. In these circumstances it was argued that as both parents had taken the children to the psychiatrist, information elicited by the psychiatrist as to their wishes ought to be admitted in evidence.

As was pointed out by Mason J in *Reynolds v Reynolds* (1973) 47 ALJR 499 the admissibility in custody proceedings of statements of this kind made by children is a difficult subject. He continued:

> 'The relationship which exists between a child and its parent is plainly a relevant consideration and the wish of a child (of reasonable age) to live with one parent rather than the other is a matter to be taken into account by the court, although the weight to be given to it will depend upon the circumstances of the case. But it is quite another thing to say as the appellant would have it, that there is a rule rigid and inflexible, according to which all statements made by a child outside the court must be received. It is notorious that children are responsive to the situation in which they find themselves. The probative value of statements which they make to others of their affection or lack of it depends on a comprehensive evaluation of the circumstances in which, and the motives with which, the statements are made. In general their probative value is slight when it is compared with other available means of establishing the wishes and attitudes of a child. To my mind the suggested rule, if adopted, would impose an intolerable burden on the court in receiving the statements and in testing the circumstances under which they came to be made.
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> 'The wishes and attitudes of children can be made apparent to the court by their evidence as witnesses and by means of interview in private chambers in circumstances where the judge is at liberty not to disclose to the parties the communications which have been made to him.
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> I do not say that the court can never receive evidence of a statement made by a child as to its attitude to, or its affection for, a parent. There may be some cases in which it is desirable, or indeed necessary, for a court to receive evidence in that form in order to determine the relationship which exists between parent and child. But I would reject the notion that the court is always bound to receive such evidence.'

In the past the wishes of a child have always been a relevant factor in determining the custody of a child provided the child is of reasonable age. (See for example *Hodge v Hodge* (2) per Gibbs J). Now pursuant to s64(1)(b) of the *Family Law Act* 1975-76 the wishes of a child of the age of fourteen years or more are given such prominence that the court is bound to give effect to such wishes unless there are special circumstances for it not doing so. In this case the boy will reach fourteen years of age in a matter of three months. Although his wishes do not fall within s64(1)(b) nevertheless he is so near the age of fourteen that I could not overlook any wishes that he expresses as to his future custody. On the other hand, the girl has just turned ten. Her wishes are by no means determinative as to her future. Nevertheless any positive wish that she might express is a wish that the court should take into account. (See *In the Marriage of Mazur* (3)). In this case accordingly, in my view, the wishes of the children would constitute evidence of some significance.

The next question then is how these wishes are to be communicated to the court. Since the passing of the *Family Law Act* (and before) there have been a number of cases, in particular *In the Marriage of Ryan* (1976) 27 FLR 327 in which the earlier decisions are canvassed in which earlier question has been discussed. From these cases it appears that the following methods have been accepted by the courts for the communication of such wishes to the trial judge: (1) By taking their evidence as witnesses or by means of a private interview by the judge in chambers. (See *Reynolds v Reynolds* (1973) 47 ALJR 499. On the question of the private interview in chambers, see also the comments of the Full Court of the Family Court of Australia *In the Marriage of Ryan* (*supra*). (2) By separate representation of the children. Communicating the wishes of children via *Ryan's case* and was recognized as being a new means of seeking information about children's wishes. (3) A report by a court counsellor or welfare officer. (Again see *Ryan's case* and also *In the Marriage of N.* (1977) 28 FLR (Pt 1) CN 11 In the latter case Evatt CJ went on to say: 'The only other matter

I would like to mention is that I was rather surprised that various passages should have been excluded from the welfare report, particularly those passages in which the wishes of the children were set out – the wishes as conveyed by them to the welfare officer. This has been recognized ways of obtaining information about the children's wishes and that process would, of course, be frustrated if that information were excluded from the welfare report on the ground that it was hearsay. In my opinion it is not strictly hearsay at all.' From this passage it is clear that whether the communication of the wishes via a welfare officer's report is regarded as a statutory exception to the hearsay rule or not infringing the hearsay rule at all, nevertheless it is an accepted method of communicating the wishes of the children to the court.

In none of these cases which have canvassed the question of communicating the wishes of the children to the court has there been a suggestion to the court that the communication by other persons is an exception to the hearsay rule. In my view, for a witness falling outside the categories of those referred to above to give evidence that he has interviewed the children and has ascertained their wishes and then to proceed to outline what those wishes are, clearly constitutes hearsay evidence. Neither counsel was able to produce to me any authority which would justify my treating such evidence as an exception to the rule; therefore, in my view, such evidence is inadmissible. It seems to me, therefore, that any evidence by the consultant psychiatrist as to the wishes of the children should be excluded.
