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IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 38/81

No Special Consideration

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BETWEEN MIDDLETON of Lower Hutt, married woman

Appellant

AND MIDDLETON of Wellington, hotel worker

Reported - Family Reports

Respondent

Coram: Cooke J. (presiding)
McMullin J.
Ongley J.

Hearing: 3 August 1982

Counsel: J.A.L. Gibson for Appellant
W. Olphert for Respondent
J.W. Gendall for Child

Judgment: 6 August 1982

JUDGMENT OF THE COURT DELIVERED BY COOKE J.

This is an appeal by the mother of a child from an access order made by the Chief Justice in favour of the father. The parents, whose marriage collapsed soon after the boy's birth, are now aged respectively 29 (the mother) and 26 (the father). The boy is five and in the custody of the mother. She lives in a flat in Lower Hutt, has full-time employment and leaves the boy at school and a day-care centre while she is at work. The father, whose occupation has varied, is living, also in the Hutt Valley, with another woman and her young children.

After earlier difficulties Quilliam J. had made an order on 6 September 1979 whereby the father had access each Saturday from 10 a.m. to 5 p.m. After 25 October 1980 the

mother denied the father further access, alleging that on returning the boy on that day he had assaulted her. There is evidence supporting her allegation, but we have not been invited to examine the incident in depth. On 17 December 1980 Quilliam J. made interim orders including provisions that the father have access for some hours on Christmas Day and that (by consent) as from 10 January 1981 Saturday access resume as before. The Judge warned the parties against continuing their personal vendetta to the disadvantage of the child.

Nevertheless, on 10 January 1981 the father very foolishly kidnapped the boy, keeping him for some ten days without the mother knowing his whereabouts. White J. granted a warrant for the return of the boy and after that period he was returned. The father had taken that irresponsible action notwithstanding that a fixture for a further hearing of the access question had been made for a date in March.

The father has not seen the boy since returning him 18 months ago. The order under appeal was made by the Chief Justice on 19 March 1981. It was intended as a trial arrangement and was as follows:

> 1. The father will have access to on every second Saturday between the hours of 2 p.m. and 5 p.m.
> 2. Such access shall only be exercised in the presence of a third person agreed upon by the parties and approved by the Court or, failing agreement on such person, by a third person nominated by one or other of the parties and approved by the Court. Leave is reserved to either party to apply to the Court further regarding the appointment of a third party to supervise access if such becomes necessary.

3. Both parties, mother and father, shall take such counselling and advice from the officers of the Lower Hutt Family Centre as they direct.

4. At the end of six months from this date either party shall be at liberty to apply to the Court concerning any variation of the access order. But leave is reserved to either party to come back to the Court in respect of any other matter relating to access during the six month period.

5. If and when any party brings the matter back before the Court, Mr Davidson shall be requested to make a further report on the child and the access arrangements for the Court's consideration. Authority to obtain such report is granted.

6. Access shall commence on the first Saturday next after the approval by the Court of the third party to supervise access.

Since that decision there have been a lapse of time and some developments; and further evidence has become available. This means that we need not be quite as slow as we would otherwise have been in making changes to the Chief Justice's discretionary decision. As it is, however, we think that his approach to the case was essentially right, for reasons that will appear.

The main subsequent development is that the parties have failed to agree on a third person to supervise access. Further they have in effect become agreed, albeit for quite different reasons, that very limited and supervised access is unsatisfactory. By her appeal the mother seeks cancellation, for the time being at least, of all access whatever by the father. In evidence in this Court she said

that it should not be resumed until the boy is able to take care of himself, as by telephoning. As well as seeing her in the witness box, we have had the advantage of evidence from the father and the latter's sister,

There are also valuable psychiatric reports from Mr G.P. Davidson, dated 25 January 1982, and Dr G.W.K. Bridge, dated 28 July 1982.

We were not impressed with the attitude of the father as revealed by his answers to questions. It savoured of an attempt to bargain with the Court, with a suggestion that if not granted access which he saw as reasonable he might again take the law into his own hands. Thoroughly unattractive though that attitude is, we have to keep firmly in mind that the welfare of the child is the first and paramount consideration. Normally it is a drastic step to deprive a child of the lasting benefits resulting from a direct link with a parent. This case is no exception. We are satisfied that it would be of benefit to the boy to retain an association with his father and his father's extensive family of relations. The evidence of was of material help to us in that regard. On this fundamental matter our approach is the same as that of the Chief Justice.

The real difficulties relate to practicability. Supervised access for a few hours a fortnight does not truly commend itself to either party and would be difficult to arrange in practice. Moreoever it would introduce an

artificial element into the access occasions, militating against their whole purpose and justification. On the other hand the father's conduct and attitude have been such that, if unsupervised access were allowed without special safeguards, the Court could hardly have full confidence that he would not again descend to some kind of kidnapping, even although the ultimate outcome would be the virtually certain loss of all access to his son.

We think that the initial goal should be to establish, as soon as reasonably possible but after a preliminary stage of reintroduction between father and son, access for a full day once a fortnight; the arrangement to be reviewed after six months. But we are mindful of the mother's concern. If access is allowed on this basis, it must be accompanied by all compatible safeguards. In the circumstances the Court requires not only the father himself but also some other person to be answerable to it for carrying out the terms of its order.

One safeguard is to make the boy a ward of Court, without disturbing the mother's custody, and to appoint a special agent of the Court to ensure that the access order is complied with and not abused. , whom we accept as a responsible person, authorised Mr Olphert to inform the Court that she is willing to accept this responsibility. We treat the submissions of counsel for the father as a sufficient application for the appropriate orders under s.9 of the Guardianship Act 1968.

As well, monetary bonds from both the agent and the father should be called for. The order now to be made is in accordance with the information given to us at the hearing regarding their financial and assets positions.

In the judgment under appeal and the professional reports and the submissions of counsel it is common ground that the parties should receive qualified counselling; so this Court's order will provide for that also.

To achieve what we have in mind the details of the order under appeal have to be varied, but we regard the new terms as the most appropriate way of now carrying out the Chief Justice's intention.

Accordingly the order in the High Court will be replaced by the following:

1. The child is placed under the guardianship of the Court. His mother is to retain custody of the child. of Wellington, employment consultant, is appointed the agent of the Court for the particular purpose of ensuring that the terms on which the father is to have access are duly complied with and not exceeded.

2. The father is to have access to the child on every second Saturday. Initially such access is is to be for three hours, between 2 and 5 p.m. or such other times as may be mutually agreed. After three such occasions the hours

are to extend from 10 a.m. to 5 p.m. or as may be mutually agreed. On all occasions of access the boy is to be collected from his mother's home and returned thereto by On the initial three occasions the father is to have access at s home only.

3. The father and are each to enter into bonds or other securities in favour of the Registrar of the High Court in Wellington as security for the due compliance by the father with the terms and limitations of the rights to access hereby granted to him and any subsequent variation thereof. is to give security in the sum of $2000 and is to give security in the sum of $10,000. The nature and form of each security is to be to the satisfaction of both the Registrar and counsel for the child, leave being reserved to that counsel (Mr Gendall) to apply by memorandum to the Court of Appeal for further directions should any difficulty arise.

4. The parties are to attend for counselling at the Child and Family Health Clinic, Lower Hutt, in accordance with arrangements to be made by counsel for the child, who is requested to take the necessary steps.

5. This order is to come into effect on completion of the required securities, and this order and the securities are to remain in force unless and until respectively discharged or varied by the High Court.

6. Leave is reserved to the parties and to counsel for the child and to to apply to the High Court at any time for variation or discharge of this order or of the securities. Without limiting that leave, it is declared that the Court's intention is that in the normal course the working of the access arrangements is not to be reviewed until this order has been in force for at least six months.

Subject to the above substitution the appeal is dismissed. Both parties being legally aided, no order is made as to their costs. The fees and expenses (including proper medical fees) of counsel for the child in this Court and the High Court are to be paid as provided in s.30 of the Guardianship Act 1968.

R B Cooke J.

Solicitors:

McCulloch & Sygrove, Wellington for Appellant

Olphert & Bornholdt, Wellington, for Respondent

J.W. Gendall, Buddle, Anderson, Kent & Company, Wellington for Child