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IN THE COURT OF APPEAL OF NEW ZEALAND CA. 116/85

BETWEEN ANN SEARLE

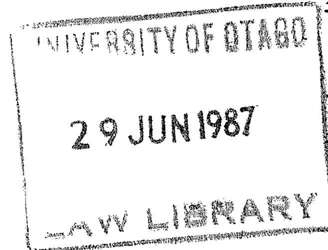
Appellant

A N D ANTHONY BRIDGE BEATSON

First Respondent

A N D ALAN JOHN DUNLOP

Second Respondent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29 JUN 1987
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Coram McMullin J (presiding)
Casey J
Bisson J

Hearing 13 May 1987

Counsel W.V. Gazley for appellant
J.H.C. Larsen for first respondent (abides decision of Court, given leave to withdraw)
J.W. Gendall for second respondent

Judgment 19 May 1987

JUDGMENT OF THE COURT DELIVERED BY McMULLIN J

This appeal involves a question as to the validity of an order as to access made by a District Court Judge on an oral application made on behalf of one parent without notice to the other.

D, the second respondent, is the father and S, the appellant, is the mother of U, a child born on 29 October 1977. On 25 February 1985 D made an application to the

Family Court for an order granting him custody of, alternatively access to, the child. That application was served on S on 13 May 1985. Prior to that date D had access to the child and an informal arrangement had been made with S for D to have access for the last four days of the school holidays of May 1987. After D's application was served on S on 13 May 1987, the arrangement was terminated by S. D then consulted his solicitor who on 22 May 1987 arranged by telephone with an officer of the Family Court to have D's application placed in the list of cases to be called in the Family Court on 23 May 1987. On 23 May D attended at the Family Court with his solicitor. His solicitor then applied to District Court Judge Beatson, who exercises jurisdiction in the Family Court, orally and without notice to S, for an order granting D access to the child from 23 May to 26 May 1987, this being the period for which he was to have access to the child under the informal arrangement he had made. The District Court Judge made an order granting D access to the child. (A note of the order, made in the Judge's handwriting on the back of D's application of 25 February 1987, refers to the period of access being from 22 May to 26 May 1987. The reference to 22 May and not 23 May is simply a mistake and nothing turns on the point). The District Court Judge also made an order referring the parties for counselling and appointing counsel to represent the child. At the same time as he made the order for access he also made an order on D's solicitor's oral application that a warrant under s.19 of the Guardianship Act 1968 issue to

enable D to enforce the access given to him. On 23 May 1987 D's solicitor gave an undertaking to the District Court Judge that a written application for access in terms of the order made that day and a supporting affidavit would be filed the same day, which they were. A formal Order of the Court as to access and a warrant under s.19 were then sealed but, as the circumstances turned out, it was not necessary to execute them.

Although the access period covered by the order made on 23 May had by then expired, on 12 June 1985 S applied to the High Court for an order quashing the order made on 23 May 1987 and the warrant issued pursuant to it. She did so upon the stated grounds that the order had been made, and the warrant issued thereon, without jurisdiction and that the indiscrimate and improper use of ex parte orders can be a vehicle of oppression and irreparable injustice. That application was heard by Eichelbaum J. He dismissed it in a reserved judgment delivered on 8 August 1987. S now appeals against that judgment.

In summary, Mr Gazley submitted that the order for access and the ensuing warrant to enforce it were both made under the Guardianship Act 1968; that that enactment is one of the Acts referred to in R.3 of the Family Proceedings Rules 1981 (SR 1981/261); that R.14(1) of the Rules requires every application for the making of an order under the Guardianship Act to be in the appropriate form in the

First Schedule to the Rules (see forms 15 and 20); that the Rules make no provision for the making of oral ex parte applications in the circumstances disclosed; and that the proceedings before the District Court Judge were a nullity or coram non judice.

In the judgment under appeal Eichelbaum J held that certain of the rules, notably RR. 5 and 6, construed in the manner envisaged by R.4, enabled the Court to act on an oral interlocutory application when appropriate and that, if circumstances require, the Judge is entitled to say that the absence of specific provision for an oral application means there is no adequate provision for a procedure to meet the particular case. Mr Gazley submitted that because no directions had been given by the District Court in terms of R.5(5) of the Family Proceedings Rules, the District Court Judge had no jurisdiction to act on an oral application. He also submitted that R.5(5) was limited to the giving of directions and did not extend to the making of orders for access or to the issue of warrants. Alternatively, Eichelbaum J held that R.6 could be applied so that non-compliance with R.14 did not render a proceeding void but allowed the Court to deal with the matter in such manner as it thought fit.

Mr Gendall said that in the High Court he had made two submissions: The first, which hinged on the circumstances of this case, was that at the time he made the order for

access on 23 May the District Court Judge already had before him an application in writing for custody or access with a supporting affidavit, and that on 23 May D's solicitor had done no more than ask for an interim order to be made in terms of a then existing application. The second, which was of more general application, was that the Rules allowed a District Court Judge to adopt such procedure as he thought fit, where none was prescribed by the Rules, to meet the circumstances of the case.

He reiterated these submissions in this Court. Mr Gazley's recollection was that the first submission had never been made to Eichelbaum J but when Mr Gendall said that this was not so Mr Gazley accepted Mr Gendall's statement that it was otherwise. Although Eichelbaum J in his judgment dealt with the case as one which primarily involved the construction of R.5, there is a passage in his judgment in which he dealt with the making of interim orders for custody under s.11 of the Guardianship Act. This suggests that the first point was raised in the High Court but not as directly as it was in this Court. However, there is nothing in the way the case was argued in the High Court as Mr Gazley had the opportunity of replying to both submissions in this Court.

It is necessary now to examine certain provisions of the Guardianship Act and of the Family Proceedings Rules. Section 11 of the Guardianship Act empowers the Family Court to make interim or permanent orders as to the custody of a

child and s.14 empowers it, on making any order with respect to custody, to make an order as to access. The procedure for the making of applications for custody and access is prescribed by the Family Proceedings Rules. These Rules provide for the use of prescribed forms for the making of an application for custody or access, and the giving of notice of that application to the other party to the proceedings (R.14 and R.15). They also provide for the making of ex parte applications where the delay caused by proceeding on notice would or might entail "undue hardship".

D complied with R.14 in the first place in that he filed an application for custody or access in the event that custody was not granted to him. And he swore an affidavit in support of the application. It was copies of these documents which were served on S on 13 May 1987. What D did on 23 May was to ask the District Court Judge to make an interim order for access which seems to me to be a type of order fairly encompassed by the words "as it thinks fit" in s.15 of the Guardianship Act. D's originating application of 25 February being already on the file, it was not incumbent on the District Court Judge to insist that D make a separate application in writing for the interim relief which he sought although, as a matter of normal practice, a written application should be made. Nor was it necessary for notice of the making of the application to be given to S. The words "undue hardship" are not words of art - Rukat v. Rukat [1975] 1 All ER 343 per Lawton LJ at 351. They

should be construed in a commonsense way. To cut off a child from a previously arranged stay with her father at the very time it was to occur or to deprive the father of access to his child at that stage might well cause "undue hardship" to either or both of them.

For these reasons we think that the procedure adopted by D on 23 May was within the Family Proceedings Rules and that the District Court Judge did not act without jurisdiction in making the orders sought.

The same result would follow from the adoption of the alternative approach encompassed in Mr Gendall's second submission. This approach is dealt with fully by Eichelbaum J in his judgment. The alternative does not require an originating application in writing to be in existence when the oral application for access is made. Mr Gendall mentioned the kind of circumstances it might cover, e.g. the making of an oral application for custody or access on a Sunday evening when legal offices were closed to prevent the immediate taking of a child out of the jurisdiction. Mr Gazley contended that the exigencies of any situation were of no moment; that the procedures laid down by the Rules had to be followed.

Mr Gendall's second submission fairly raises the question whether the filing of an application in writing is a prerequisite of the making of any order for custody or

access, however temporary the order may be. Mr Gazley contended that it was; that R.14 required the making of an application in writing and admitted of no exceptions. The matter is to be considered by reference to other of the Family Proceedings Rules as well as R.14. Rule 4, R.5(1), (2), (3), (5) and (6) and R.6 are relevant. Rule 4 directs that the Rules are to be so construed as to secure the "just, speedy, simple and inexpensive determination of any proceedings". Rule 5(1), (2), (3), (5) and (6) provides:

(1) No practice that is inconsistent with these rules shall prevail in any Court.

(2) Subject to subclauses (3) to (5) of this rule, if any case arises for which no form of procedure is prescribed by the Acts or these rules, the District Courts Rules shall apply, so far as they are applicable and with any necessary modifications, and the general practice of District Courts shall apply.

(3) Notwithstanding subclause (2) of this rule, a Court shall dispose of any case to which that subclause applies in such manner and subject to such modifications as the Court thinks best calculated to promote the ends of justice.

(5) Where a Court is satisfied, in the circumstances of any particular case, that -

(a) The provisions of the Acts, of these rules, or of the District Courts Rules, or the practice of the Court, do not make adequate provision for procedure or practice; or

(b) Difficulties arise or doubts exist as to the appropriate procedure or practice, -

the Court may give such directions with respect to the procedure and practice to be followed in the case as the Court considers necessary to promote the ends of justice.

(6) Every Judge may from time to time give such directions, not inconsistent with any enactment or these rules, as he thinks proper for regulating the business of the Court over which he presides.

Rule 6 is as follows:

> Non-compliance with any of these rules shall not render void the proceedings in which the non-compliance has occurred, but the proceedings may, of the Court's own motion or on application made with reference to the non-compliance, be set aside either wholly or in part or amended or otherwise dealt with in such manner or on such terms as the Court thinks fit.

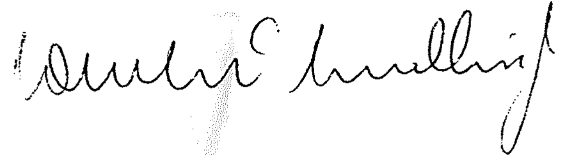
D found himself denied access to the child at the very time when his four day period of access was about to commence. What he required in that situation was an immediate order for access to give effect to the informal arrangement previously made. Although, as Mr Gazley contended, he might have made a handwritten application of an informal kind to the Family Court, or his solicitor might have made such an application for him, it is reasonable to assume that in this particular case such a course would have resulted in further delay, thereby limiting further his period of access, and that in some cases it might result in irreparable delay. Therefore, prompt application to the Court was necessary.

In such a situation, where no special form of proceeding was prescribed, it was open to the District Court Judge to have recourse to R.5(2) and (3) in order to promote the ends of justice and to (5) for the same purpose.

In our view the orders made were not nullities. They were within the jurisdiction of the Court. What is in issue here is not a question of jurisdiction. The Family Court

has the jurisdiction to make orders both as to custody and access. As an inferior Court it has the right to do what is necessary to enable it to exercise the functions, powers and duties conferred on it by statute - McMenamin v. Attorney General [1985] 2 NZLR 274, 276. What S is, in effect, submitting is that D did not adopt the usual machinery to obtain access to the child and no question of lack of jurisdiction arises.

For these reasons, which are largely those given by Eichelbaum J in his judgment the appeal is dismissed. The second respondent D, is allowed costs in the sum of $350-00.



Solicitors:

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Buddle Findlay, Wellington, for second respondent