

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON DISTRICT
PALMERSTON NORTH REGISTRY

D.98/70

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BETWEEN : GEOFFREY HILTON SMITH of
Dannevirke, Carpenter
Petitioner

AND : MARJORIE ETHEL SMITH of
Levin, Married Woman
Respondent

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AND : IAN MCGOWAN of Levin,
Driver
Co-Respondent

Hearing : April 1, 1971

Counsel : Comber for respondent (applicant)
Poole for petitioner (to oppose)

Judgment : ~~April 1~~ 1971
May 3 1971

RESERVED JUDGMENT OF WHITE J.

This is an application by the respondent for ancillary relief; for custody of the children of the marriage, and for an order vesting the joint family home in the petitioner and respondent as tenants in common in equal shares, and that the property be sold and the proceeds divided equally. I propose to refer to the petitioner and the respondent as "the husband" and "the wife".

A decree nisi on the grounds of the wife's adultery was made on 11th September 1970 without any order as to custody. The decree was made absolute on 5th February 1971, the Court being informed that custody would be the subject of an application at the present sessions of the Court. Quilliam J. requested the Child Welfare Department to obtain reports. That was done and I have had the advantage of reading the report submitted to the Court.

There are three children of the marriage, Stephen James, born on 29th December 1963, Trevor Bruce, born on 20th August 1965, and Fiona Margaret, born on 7th July 1967. (Their present ages are Stephen 7 years 5 months, Trevor 5 years and 7

months and Fiona 3 years and 8 months). When the wife left the matrimonial home at Dannevirke on 4th May 1970 she took the two younger children with her. The present position is that Stephen is in the care of the husband and the husband's mother and the younger boy and girl are with the wife who is living with the co-respondent at Levin. I was informed that the co-respondent's wife has petitioned for divorce on the ground of adultery with the respondent in the present proceedings. The petition is expected to be heard in May, and to complete that picture the custody of the two year old son of the co-respondent in those proceedings is sought by his wife. Both the husband and the wife seek custody of all three children. The husband asked for custody in his petition for divorce and the wife has now applied for custody of all the children in her application for ancillary relief.

I must now consider the rival claims of the husband and wife bearing in mind that the first and paramount consideration is the welfare of the children, and taking into account other factors, especially the importance of a mother's care in the case of young children. In carrying out this duty, which is always a difficult and distressing one, I must make comparisons in applying the principles. Where possible the Court will take a "long range" view which was summed up by North J. in Palmer v Palmer (1961) N.Z.L.R. 702 at 720 when he said, "Even in the case of a child of tender years the welfare of the child requires to be considered broadly and with due regard to the future as well as to the present". I must also bear in mind what was said by North P. regarding "the mother principle" in De Vax R (not yet reported, in which judgment was delivered on 9th September 1970). He referred to the principle as "a very vital one" but went on to say that it had not been recognised "as having the status of a rule of law" and is "a factor of importance which varies from case to case".

The evidence is in the main contained in the affidavits but the parties and the husband's mother gave evidence. Mr Poole made no application to cross-examine and did not cross-examine the wife but Mr Comber applied at the hearing to cross-examine the husband. As a result I have had some opportunity of forming an opinion of the husband and wife and in addition the husband's mother whose health and vigour referred to in the report of the Child Welfare Officer seem to me to be confirmed. As required by s.23(2) of the Guardianship Act 1968 I saw the eldest child Stephen.

The conduct of the parties is a factor only so far as it affects the suitability of either of the parties as a parent related to the welfare of the children. Having read the affidavits and noted the conflict of evidence between husband and wife and having heard husband and wife give their evidence I should record the view that I prefer the evidence of the husband. While realising that the wife was married at seventeen and may have been affected by a somewhat humdrum domestic scene, she seems to me to have given an exaggerated picture of being neglected and of alleged failings of the husband as a father. On the other hand there is evidence to satisfy me that in the period immediately before she left the family home she carried on affairs with other men, one of which led to her being divorced. While I have no reason to think that the wife would shirk her responsibilities to her children, in considering the character and nature of the parties as parents, responsible for bringing up children and providing for the security and wellbeing of the children, the wife's position in the short term is not satisfactory. She has a full time occupation and the two young children are looked after during each day (after school in the case of Trevor and after creche in the case of Fiona) by relatives of the

co-respondent who are paid for this service by the wife out of the maintenance payments she receives from her husband. This is a temporary arrangement until she marries the co-respondent but the position cannot improve for several months.

Then looking at the matter at "long range", to the extent that one can, and considering anxiously the special need young children have for their mother, it seems to me that I must have regard to the practical situation. The wife and the co-respondent have decided to start what is another life. She and the co-respondent are both young and considerably younger than the husband. It is likely, as the wife naturally admitted, that when she and the co-respondent marry they may have their own family. While this is no doubt commonsense I am not confident that the prospects for the three children in the mother's new household would compare favourably with being brought up in their family home. On the other hand there are risks that the husband's mother, now aged 62, might well find it difficult to care for all three children. As I have indicated above however she appears to be in good health and to be a sensible person. Further, these children are her only grandchildren and she has known them all from babyhood. If custody is granted to the husband the intention is that the father and children and their grandmother will move to the former matrimonial home where there is ample accommodation and that assistance in the home will be arranged if necessary.

Applying Miller v Low (1952) N.Z.L.R. 575, I am prepared to assume in this case that on re-marriage the wife's new menage will be "conducted with normal propriety" but in considering the importance of a mother's care in the case of young children, I must bear in mind the lack of certainty and the completely new life to which I have referred including the Court's lack of real knowledge concerning the co-respondent as father substitute.

Like many other cases it is not possible at this stage to see clearly where the best interests of the children lie, and there may be developments ahead which will change the circumstances. Weighing the advantages and disadvantages however, as they exist and are likely to develop, and taking into account the factors to which I have referred I have reached the conclusion that the interests of the children will be best served by ordering that custody of all three children be given to the husband with rights of reasonable access to the wife. There will be an order accordingly. If rights of access cannot be agreed on a further application can be made.

In considering the matter I have also considered the possibility of dividing the children. Both husband and wife seem to agree that they should be together and I agree of course that is desirable. As I have said I have seen Stephen, as I am required to do, but not the younger children who could not be expected to express wishes which I could take into account. I may say that while I have talked to Stephen I do not think his wishes, which favour the status quo as far as he is concerned, should be given any real weight in deciding the matter. I should add however that even if I had come to the conclusion that the younger children should remain with their mother I consider that Stephen should remain with his father and grandmother where he seems to be well settled and looked after.

As far as the joint family home is concerned Mr Comber said that if the husband were given custody he agreed that the house should be the home of the father and the children and that the wife would then rely on her right to claim an interest in the matrimonial property. Submissions were made on this matter but I do not intend to deal with the question at present. I propose to adjourn consideration of that aspect of the case because the decision in a case heard recently by the Court of Appeal might

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affect the decision in this case and, it may be necessary to hear further argument.

The question of costs is reserved.

SOLICITORS FOR THE PETITIONER :

Messrs Corrington & Poole,
Solicitors,
DANNEVIRKE.

SOLICITORS FOR THE RESPONDENT :

Messrs Todd, Whitehouse, Comber & MacKay,
Solicitors,
LEVIN.