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IN THE MATTER of the Guardianship Act 1968

BETWEEN SOLOMONS of Auckland,

APPLICANT

114

A N D SOLOMONS of Auckland, married woman

RESPONDENT

Hearing : 8 March 1978

Counsel : Brown Q.C. and Giles for Applicant
Edwards for Respondent

Judgment: 20 MAR 1978

JUDGMENT OF McMULLIN, J.

This is an application by applicant as the father for orders that the custody and control of his son, the child of his marriage to respondent, be given to him and that he be given leave to remove him from the jurisdiction of the New Zealand courts. Respondent has filed a cross application for custody.

The parties were married on June 1974 after they had lived, since 1972, in a de facto relationship. The child, a boy, was born on 1974. The parties lived together until late in 1976 when they separated after what I would think was a growing pattern of dissension and general incompatability. A short time later, on 20th November 1976, they entered into a written agreement for separation. It was a term of this agreement that respondent was to have the custody of It was also a term of the agreement that the child should not be removed out of the jurisdiction of the New Zealand courts without the consent of the other parent. The father was to have access to between the hours of 10 a.m. and 4 p.m. on Sundays in each week.

In January 1977, respondent applied for the issue of a passport. The passport which she obtained also related to who, being under the age of 16 years, could not hold a passport himself. Applicant says that he agreedto being included in respondent's passport because he anticipated that would be visiting him along with his mother in Australia where he proposed to go and live.

Early in April 1977, the father was expecting to have access to on the Sunday but received advice from his wife that would not be free that day. On 4th April 1977, he received a letter from his wife advising that she had left New Zealand with and was going to take up residence in the United States of America. It is plain that when in fact the father was denied access on the Sunday, the child was already on his way with respondent to the United States of America and that the reason advanced for his inability to see his father on the Sunday was ficti

In September 1977, respondent encountered difficulties with the immigration authorities in the United States of America. She had been admitted to that country on a visa which had expired or was expiring. The authorities there required her to leave the United States. On 23rd September 1977, she did return to New Zealand after she had asked applicant to pay the fares of both and herself back to this country. This he did at a cost of $1,579.00.

On 30th September 1977, applicant took to Australia for a period of ten days for a visit to his family. He undertook to return him on 9th October 1977 and this he did. Since his return to New Zealand on 9th October 1977, applicant has lived here. So have respondent and

On 4th November 1977, applicant filed an application to prevent being removed from the jurisdiction of the New Zealand courts and on 7th November 1977, an order was made on that application by Mahon J. The same judge on the 16th December 1977 made an order that respondent deposit her passport in the Supreme Court at Auckland. On 7th November 1977, applicant filed a substantiv application for the custody of

Applicant objects to respondent having custody of and to being allowed to return to the United States to live with her there. He himself seeks the custody of the child. It is his wish to go to Australia to live ther taking with him.

Applicant has lived for the greater part of his life in He left that country for Australia in 1968. He now holds an Australian passport. He says, however, that he is not of blood but possibly of extraction although his forebears came from . His family now live in Kings Grove, Sydney, New South Wales. They include his father, his step-mother and his brothers. I is apparent from the affidavits that they are a closeknit family. Applicant's parents and his brothers and sisters are both able and willing to help him in looking after One brother lives nextdoor to his parents. He is married with a child aged 5½. Another brother lives opposite his parents in the same street. He has two children aged 6 and 4 years. Yet another brother lives in Sydney. He has one child and another is expected. His step-sister and his step-brother (his father remarried after the death of applicant's mother) reside with applicant's father. Applicant proposes that should, on attaining school age, attend the same school as his cousins.

Respondent wishes to return to the United States. The purpose behind her visit to America in April 1977 is that it is the country of residence of a Mr with whom respondent had in the six months she lived in America in 1977 resumed a liason formed some years before. Respondent met Mr before her marriage to applicant. He apparently wished to marry her then even though she was pregnant to applicant. Mr has filed an affidavit setting out briefly his position. He says that he has always wished to marry respondent. He is 27 years of age (responden is 30). He was in the United States Navy visiting Australia when he met respondent. He is now employed by Consolidated Railways. His affidavit discloses little about his living conditions though it is implicit that he is willing to care for

Both parties were required to be present for cross-examination. Applicant's viva voce evidence was directed to his lifestyle, mode of dress and general interest Itwas suggested that he was a homosexual, that he wore exaggerated clothing, that he used makeup and that he was generally effeminate. Applicant denied any suggestion that hewas a homosexual. He freely admitted to wearing makeup but said that the type that he used was used by men in as a cooling agent. He admitted to wearing clothing which might be considered by many as unorthodox but I was left with the impression that while his mannerisms, his mode of dress and his lifestyle were unusual, they did not in any way disqualify him in his application for custody nor reflect adversely on his suitability to have the custody of or access to his son I rather think that in his occupation as a he is expected towear clothing which is unusual and even flamboyant and that he obtains a certain amount of pleasure in acceding to the wishes of his female clientele.

Respondent was also cross-examined as to her lifestyle, particularly in regard to her relationship with Mr Starr.

It was a happy feature of the case that historical material was correctly treated as having a limited value in the resolution of the dispute before me and that recriminations were not widely indulged in.

On behalf of applicant, Mr Brown accepted that subject to certain points made in his client's evidence, respondent was a loving and competent mother. He submitted that, accepting all things which could be accepted in favour of respondent, the stability of applicant's home in Australia the recourse that could be had to the closeknit family unit a the emphasis which would be placed on schooling and recreation was to be preferred to residing with his mother in the United States of America. He contended that th affidavits filed by respondent disclosed very little about the character of Mr He also referred to the fact that the affidavits were silent as to the type of schooling which respondent had in mind for and that there was no reference to recreation or to the child's future development. He referred to the fact that respondent's marriage to applicant was the second broken marriage into which she had entered and he questioned the durability of respondent's association with Mr

Mr Edwards, on behalf of respondent, not unnaturally placed some store on the fact that had bee in thecare of respondent since his birth and submitted that the Court should interfere with that custody only if it had grave reasons for doing so. He prayed in aid the affidavits

of Dr Phillips and Dr Culpan both of whom had expressed the view that custody of should remain with respondent. On this point I pause to say that I accept that Dr Culpan as a psychiatrist is entitled to express an opinion on respondent's general stability and state of health and that Dr Phillips as a paediatrician is entitled to express a viewpoint upon s state of health and the standard of care which he has received or may be expected to receive in the future while in his mother's custody. But I think that the evidence of the two doctors can be taken that far and tha far only. It is not within the province of either of them to usurp the function of this court in deciding, on all the evidence before it, what is in the best interests of

What is in the best interests of is, of course, the primary question to be decided in determining the present application. Applicant wishes to have so that he can travel to Australia with his father to make a new life there surrounded by his grandparents, uncles, aunt and cousins. If I refuse this application and respondent returns to live with Mr in the United States of America Damian will, for all intents and purposes, be deprived of any really close communication with his mother. I think it would be unrealistic to suppose that if she lived in the United States she would be able to travel to Australia to see other than once every several years. On the other hand, if I grant respondent's cross application and give her the custody of and permit her to remove him out of the jurisdiction she is likely to travel to the United States and, if she is given a permit to remain in that country, live there on a permanent basis. In that event, by the same token, applicant would be deprived of access to However, I entertain some doubts over respondent's position. She was required by the immigration authorities to leave the United States becaus

her entry visa permitted her to remain in that country for only a limited period of time. I rather think that if she marries Mr she is likely to have no difficulty in entering the States. But, at present, her continued residence there cannot be guaranteed. Whether her chances would be increased by the pronouncement of a decree in divorce between applicant and respondent leaving respondent free to marry Mr I do not know. But I am at present not prepared to speculate on her future in America.

In view of the fact that respondent has been living in New Zealand since her return to this country in September 1977, I propose to deal with the matter on the basis which the parties framed for themselves when they separated in November 1976. The correspondence between the solicitors at that stage recognised that applicant was to be given reasonable, if not generous, access to The separation agreement recorded that the child was not to be taken out of the jurisdiction of the New Zealand courts without the consent of the other party. The agreement also recorded that respondent was to have the custody of the child and she has, in fact, had the child in her custody since his birth. I think it would be a very grave step to remove from the custody of respondent and thereby to disturb the status quo. I am not therefore prepared to accede to the father's application to have the custody of the child given to him. But I am also not prepared to take a step which would lead to him being deprived permanently of access to his child. He seems to have manifested an interest in the child during the period of the separation and to have taken the opportunity of seeing each week. I accept that he is concerned over the welfare of the child and is anxious to see that the child has a stable home and environment. It is because he does not believe that respondent, living in America with

Mr will be able to provide that stable environment that he has brought the present application. As I have said, if respondent is allowed to return to the United States of America with applicant will be deprived of any say in the upbringing of the child.

I therefore make an order that the custody and control of Damian be given to respondent. Her cross application succeeds to that extent. I am not, however, prepared to make an order that she is free to remove the child out of the jurisdiction of the New Zealand courts. I therefore dismiss the father's application, but I order that he be given reasonable access to I do not define the access in exact terms because I am not sure what steps he will now wish to make and as to whether he proposes to live in New Zealand or Australia. In view of the fact that respondent removed the child out of the jurisdiction, without first obtaining applicant's consent in April 1977, I indicate that I will be prepared to consider an application for the retention of her passport by the courts until further order. There may, however, be some other means by which s continued residence here can be meanwhile secured.

Messrs Russell McVeagh McKenzie Bartleet & Co., Auckland, Solicitors for Applicant

Messrs Dickson & Co., Auckland, Solicitors for Respondent.