

**No Special
Consideration**

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BETWEEN : GRAHAM GLYN FOX

Applicant

A N D : SYLVIA LILY FOX

Respondent

Hearing : 16th, 17th, 18th June 1980

Counsel : R.H. Jerram for Applicant
C.J. Harding for Respondent
W.J. Scotter for Child

Judgment : 18th June 1980

(ORAL) JUDGMENT OF BISSON, J.

This is an application by the father for the custody of his younger daughter, Paula. There were two children of the marriage, Nicola born in January 1964 and who is accordingly now 16 years of age and Paula, born in January 1967 making her now 13 years of age. The parents lived in Hamilton for a number of years where the father was employed as a fireman and had at times undertaken secondary employment. The mother from about 1970 had a full time job of her own. Unfortunately due to what appeared to me to be incompatibility they separated in February 1978 entering into formal agreement covering the usual matters in May 1978. This agreement provided for the mother to have the custody of both children reserving reasonable access to the father.

The mother and the children remained in the matrimonial home until the mother decided to pursue her work career in Australia and also she desired to remove herself from what she described as a hassle by her husband. She went to Australia with the two children in January 1979. The matrimonial home was sold

and since that time both parents have acquired homes of their own the father in Hamilton and the mother in Camden about 40 miles south of Sydney in New South Wales. No question has been raised as to the suitability of either home as a home in the building sense for Paula. Paula came to visit her father at his expense on the 4th January 1980 and she has not returned to live with her mother in Australia. Nicola also came to New Zealand in the January school holidays but at her mother's expense and she did not stay with her father. She has returned to live with her mother in Australia.

When Mr. Fox first applied for the custody of Paula he was living in a de facto relationship but because a jealousy arose over his affection for his daughter the de facto relationship was terminated in March and there appears no prospect of that or any such relationship in the immediate future. Arrangements which Mr. Fox has made for the care of his daughter involve her in spending two nights out of eight with her grandparents the parents of her father who live a short distance away. Mr. Fox's work involves him in day shifts for two days then night shifts for two days and then four days off. The pattern of life which has emerged is that he and his daughter share the domestic chores, he sees to her leaving for school and returning from school, if not to his home then to his parents' home. When she stays overnight with his parents they have suitable accommodation for her and she is happy with them.

Mrs. Fox has a home of her own now in Australia, Paula has not lived in that home because it was completed after her departure for New Zealand but she has seen photographs of it and it is in all respects an attractive home. Mrs. Fox works but is able to give adequate attention to the care of her children when living with her so that both parents are loving parents and devoted to the well-being and development of their children. It is unfortunate that the parents are so hopelessly incompatible. They have different lifestyles, Mr. Fox is quiet by nature and domesticated while Mrs. Fox requires to be

stimulated and has sought that stimulation, which her husband could not give her and which she does not find in household chores, outside the home in her employment and with other people. It is unfortunate that in pursuing this stimulation she should have elected to leave New Zealand because it substantially deprived the father of his children and the children of their father.

Mr. Fox's parents both impressed me as having a genuine affection for their daughter-in-law and the two grandchildren but Mrs. Fox the mother of Paula has found it hard to relate to Mrs. Fox Snr., again she is incompatible, and felt that she was being adopted by them as a daughter instead of being a wife to their son. Nicola has also grown away from her father and his parents and it would seem shares with her mother the same attitude towards them. This is unfortunate because Mr and Mrs Fox Senior are people of obvious charm and integrity and experienced in the rearing of children not only having had three children of their own but at one time for four years looking after two children of Mrs Fox's brother when his wife died. This speaks highly of their character and unselfishness. Paula relates to them and that being the case I feel that there is much to be gained by her because of this relationship with Mr and Mrs Fox Snr, their standards and their qualities.

There^o was a social workers report prepared but that has been criticised by counsel because of the short time available for its preparation and the danger that it was superficial. Also the social worker did not have the opportunity to interview Mrs Fox or Nicola so I put that to one side. However there was another report which was prepared by Dianne Cameron who is in practice as a Clinical Psychologist and who prepared this report as a result of a number of interviews of Mr Fox and his daughter Paula and of Mr and Mrs Fox Senior. Here again unfortunately she did not have the benefit of interviewing Mrs Fox and Nicola.

However, Dianne Cameron did give evidence so I had the benefit of making my own assessment of the weight to give to her report and I was particularly impressed with her second conclusion namely "supervision of Paula has been well planned to ensure that she is with family members when her father is working shifts. His work pattern is a predictable one and one that has been easily accommodated by Paula. There are in fact advantages to this arrangement in that Paula has regular access to three caring adults instead of one." Two important aspects of that conclusion are that the applicant has a predictable work pattern so that he can give the regular time required for proper care and attention for the upbringing of his daughter and also that he is well supported in that regard by his own parents thereby giving Paula the benefit of three caring adults instead of one.

I was also impressed with the evidence of a Miss Gray who is a teacher at Paula's high school in Hamilton and a Guidance Counsellor there for some four years. Knowing of the custody dispute she alerted Paula's teachers to the need to keep an eye on her behaviour at school. She was assured that all was going well at that stage and that has continued to be the case until the present time, her last interview with Paula being on Monday of this week. In her own discussions with Paula, Miss Gray has drawn a conclusion that although Paula has obvious affection for her mother she is happy here and prefers the New Zealand environment. She seems to fit in more easily here in the New Zealand lifestyle. As Miss Gray put it she is more comfortable and happier in New Zealand.

Mr. Jerram and Mr. Harding as counsel for the parties in dispute presented their evidence with great care and I listened with, I hope, patience to many parts of the evidence which really did not directly assist me in reaching the decision which I have to make on this application but which did give me the opportunity to carefully study the applicant and the respondent in particular and also Mr. and Mrs. Fox Senior. From that opportunity to draw

my own conclusions I have made the observations which I have already expressed and I am not going into any further assessment of either parent because that may even widen the gulf between them and findings of that nature in any event are not relevant to the welfare of Paula, both parents being as I have said loving and dedicated to their children but having somewhat different lifestyles.

I come now to the submissions made by counsel. Mr. Jerram referred to the present arrangements for Paula having proved satisfactory and that her desire to remain with her father in New Zealand as being a constant one which has not waned and that the good school report which was tendered in evidence indicates that there is no sign of any domestic problem adversely affecting her school work. I should say at this stage that the same could be said for the twelve months that she lived with her mother in Australia because two school reports indicate that she was doing well at school there which reflects credit of course on her mother and the care she received in Australia. Mr. Jerram also pointed out that Paula is not really missing her sister Nicola and he made a point which may have some merit namely that Nicola according to the evidence is an exceptional child both academically and in art and music whereas Paula who is also gifted is not quite so brilliant but would be above the average and it may be that she has felt overshadowed by her older sister and will do better in her progress by being on her own in New Zealand. Mr. Jerram also referred to Paula's preference for the New Zealand environment and the closely knit family relationship which she has here where grandparents cousins and old friends are living compared with Australia where the only relations would be her mother and sister and other friends would be new friends.

Mr. Harding for the mother referred to there being three factors to weigh up first the mother principle, secondly the cohesive principle and thirdly the wishes of Paula. It is true that a teenage girl may well need the guidance and counselling of a mother on the more intimate matters and sexual relationships

as she goes through her teenage years but it appears from the report of Dianne Cameron that a good relationship in that direction exists with her father and that Mrs. Fox Senior is also available. In any event, Paula is corresponding with her mother and her mother with her and while she remains in New Zealand it is to be hoped that correspondence will be a satisfactory means of communication between them. So far as the cohesive principle is concerned and her relationship with her mother and her sister, I feel her closest relationship is with her father and it is more important that this should be fostered than a cohesion with her mother and sister where I do not find on the evidence there to be quite the same close affinity. I am reminded by Mr. Harding to look at the overall situation bearing in mind that it was the mother who cared for Paula almost exclusively for many years when Mr. Fox was engaged in two employments but giving due regard to that I am faced now with a present situation since the marriage has broken up and to make a decision in the light of the present circumstances and the immediate future as to what is best for Paula and in that regard her wishes must be taken into account. Mr. Harding has submitted that her wishes may have been unduly influenced by her father by a Christmas gift of a cassette player, by the excitement of being allowed to have her ears pierced and by receiving \$2.05 a week for pocket money from her father when her mother was not in a position to give her such a regular amount. These are certainly factors to be taken into account but as the cassette player and the pierced ears took place soon after her arrival in January there has been ample time for any excitement from those gifts to have worn off and then so far as the pocket money is concerned for her to have settled down and to make a reassessment of life with her father in New Zealand compared with life with her mother in Australia and from the evidence it is clear that her wishes remain the same that she stay in New Zealand.

I interviewed Paula myself in Chambers and found her to be a mature girl for her 13½ years. She was assessed by Dianne Cameron as having average maturity for her years while a Miss Steven who is a school teacher and has known Paula all her life gave evidence assessing her as being somewhat above average maturity for her age and I am inclined to agree with her from my own observations of children of this age. I am directed to have regard to her wishes to such extent as I think fit having regard to her age and her maturity. From my impressions of Paula I take the view that she is mature enough for her wishes to count for a great deal in the Court's consideration of this matter. In fact I feel it is important in having her welfare as the first and paramount consideration to take into account that her wishes are to remain with her father in New Zealand and that they are not transient feelings. In fact, she told me she did not wish to go to Australia in the first place and there has now been a period of five months back in New Zealand for her to reconsider her feelings about the matter. She has seen her mother again in New Zealand prior to and during the hearing of this case, she has seen the coloured photographs of the attractive home which her mother has in Australia but she remains steadfast in her choice to stay with her father in New Zealand.

I am faced in this case with more than the usual problem in resolving custody of a child between mother and father. There is also the choice between two countries, Australia and New Zealand. In this case it seems clear that Paula prefers the New Zealand way of life to that in Australia and that is a factor which I also take into account. She is certainly no infant, her school reports show that she is highly intelligent and she has had ample time to reach a valued assessment free of influence and pressures from either parent to state a view of her own and I regard her views as of particular importance in this case so that I take them into account together with the matters I have already mentioned such as the close relationship which she enjoys with her father which has been expressed in their correspondence over the past year while

she was in Australia and the very good influence that Mr. and Mrs. Fox Senior can have on her and that she is showing good progress at school in New Zealand, is not missing her sister and there is every indication that she will be a happy and contented girl with her father without implying by that anything derogatory of her mother. In the unhappy situation of a broken marriage; it is inevitable that one parent will suffer the disappointment of not having custody of a child or children. However, one must do the best one can in the interests of the child and I am satisfied that it is in Paula's best interests that she remain with her father in New Zealand and accordingly my order is that custody of Paula be given to her father and that is the order of this court.

I would like to also mention that the Court has been greatly assisted by the careful consideration and research that was done by Mr. Scotter who was appointed to assist the Court and to represent Paula. I did not refer prior to giving my decision to the fact that in his submissions to me Mr. Scotter said that from his own observation and investigation he felt justified in supporting Paula's wishes to remain with her father in New Zealand as being in her own best interests. He did not in any way of course presume to usurp the function of the Court in saying that but it is of assistance to have a frank opinion from counsel who has obviously carried out his task with great care but the decision which I have made is one in which I rely on my own judgment having seen and heard several witnesses and having studied the various reports and in particular having interviewed Paula herself.

Reasonable access will be reserved to the respondent.

H. Brown J.