23/7

(472)

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

M 482/80
M 492/80

Special Consideration

BETWEEN [redacted] STEVENS of Upper Hutt, Engineer

Applicant

AND [redacted] STEVENS of Upper Hutt, Married Woman

Respondent

Hearing : 13, 14 April 1981

Counsel : P.D. Green for applicant
G.L. Turkington for respondent
J.W. Gendall for children

Judgment: 17 July 1981

RESERVED JUDGMENT OF WHITE J

This is an application for the custody of the children of the marriage.

The delay in giving my decision should be explained at the outset. My intention was to deliver judgment promptly as is desirable always, and often essential, in such cases. In the present case, however, the parties had arranged what amounted to interim joint custody and soon after the hearing I was asked to postpone my decision as there were prospects of reaching a settlement. Unfortunately I did not appreciate that the negotiations had failed due to a misunderstanding when I later discussed the matter with the Registrar. As a result I have had to reconsider the whole of the evidence and my notes of the addresses

of counsel. It was fortunate that the welfare of the children was protected by the satisfactory interim arrangements as to custody and access. The course taken in an endeavour to enable the parties to discuss joint custody has certainly given the parties time to consider whether they could agree on joint custody which, it appeared, was a possible happy solution for a very sad case.

The history of the marriage is of importance in this case. I summarise it by reference to the chronology which was helpfully provided. The parties were married in Hastings in January 1970. They moved to Lower Hutt in May 1970 and was born there in 1971. The same month the respondent was operated on for a bowel perforation. She had another operation in 1972 and later that year was born. The marriage was close to breakdown in the next few years. In that period the respondent had a short-lived affair with another man during 1974. She left the matrimonial home in October but returned next month. She was again in hospital for surgery in 1975 and continued to suffer ill health in 1976 and 1977. In March 1978 the second matrimonial home was purchased at which is a few minutes away from the school the children attend. Again that year the respondent was in hospital for an operation and was under treatment in 1979. That year she moved into a separate bedroom from her husband. There was another affair with another man of short duration. In 1980 marriage guidance began after the respondent sought

legal advice. Within a short time, however, the respondent left for Hastings in September 1980 taking the children with her. An interim custody order in favour of the applicant was made by O'Regan J on 2 October 1980. Later that month the applicant sought counselling at the Anglican Social Services Family Centre. There was trouble over access in November 1980 but later that month the respondent joined the applicant for counselling at the Anglican Social Services Family Centre. These counselling services led to considerable progress in the relations between the parties so far as the children were concerned. As a result the present satisfactory arrangements for access were made.

In his submissions Mr Turkington said the real issue was "the management of the two boys" in a case where there would be a continuing influence of both parents. He submitted that the respondent with a very satisfactory part time job was well placed to continue her proved capacity to care for and bring up the children of 10 and 9 years of age. Mr Turkington pointed to the respondent's close involvement through babyhood, kindergarten and early school days as described in the affidavits and viva voce evidence. This situation it was submitted had continued since the separation and that on the evidence the criticisms made by the applicant as to a lack of sensitivity and insight stood alone. Having regard to the evidence as a whole Mr Turkington submitted that in the comparative peace and quiet after separation the respondent, whose capability

was not disputed, had proved that she should undertake the role of solo parent. It was claimed that the applicant on the other hand, despite his efforts to meet the situation was clearly at a disadvantage which could not but be compared unfavourably with the position of the respondent in being able to give the necessary care and attention to boys of this age. In that context it was submitted she should be in the matrimonial home and keep the children in their present environment. A close relationship with the applicant would also be practicable and should be provided by liberal access arrangements which, it was clear, were happily a matter of agreement in the present case. This was a case where the parental bond remained strong which could best be secured by taking advantage of the individual capacities of the parents to continue with their influence on the children while remaining in their respective jobs. Naturally Mr Turkington drew attention to Dr Bridge's report. Mr Turkington also pointed to the advantage of the extended support of the respondent's strong family unity. As to neighbours it was submitted that the effect of the evidence was that both parties had won respect for their capacity as parents.

Mr Turkington referred to the general principle regarding conduct and submitted that there was nothing in the present or the future which should weigh against the respondent. It was argued that any suggestion of an irresponsible attitude on her part evidenced by the associations she had had must be considered having regard to the applicant's insensitivity in the earlier

part of the marriage. At the present stage the parties would have to be judged living apart in the role of solo parents.

This is a case where the children are young. It is a case where they are boys. It was submitted that as the statute now states, there are not, and never have been presumptions based on either of these situations. Indeed, in the present case Mr Turkington submitted they were factors which did not loom large because of the close continuing interest and contact of both parents through access arrangements.

Mr Green submitted that the question for the Court went beyond the issue of "management" suggested by Mr Turkington. He submitted that in every family one parent inevitably has a greater influence on the children than the other and that the issue in a particular case will be to decide which parent will have the greater influence on the psychological and emotional development of the children in the years ahead. This submission was made, like Mr Turkington's on the basis that in the present case that arrangements as to access would be likely to retain the influence of both parents.

I pause in my review of the submissions of counsel to make the comment that I think it is impossible to generalise bearing in mind the infinite variations there are in the relationships between parents and children in any family and during the various stages of their development. Of course the Court must do its best to

consider the competence of parents having regard to their past actions, so far as they are revealed, and try to assess them in the role of solo parents. In doing that it is necessary to try and look ahead into the forseeable future of the children concerned to the extent that seems possible.

Mr Green submitted, correctly, that stability and security were important factors and that the continuity of the status quo must be taken into account. He submitted that the evidence had not shown any long term or short term reasons for changing the existing situation. On the other hand it was submitted there was "a cloud of uncertainty" as to the situation under the respondent's control. Mr Green referred to the respondent's action in leaving and taking the children to Hastings as a sign of selfish and irresponsible conduct and that there were other examples of an irresponsible life style, already referred to. These matters it was submitted were factors which weighed against her as a suitable solo parent. Mr Green referred to the evidence of the applicant's active part in the care of his children and his success in their upbringing in all their activities. He submitted that a real and marked sensitivity on his part to the needs of the children had been established. And it was the applicant, Mr Green submitted, who after the complete breakdown in the marriage had "set about putting life together" by counselling at the Family Centre.

Regarding criticism of the appearance of the children Mr Green submitted the reports of the school principal should be noted. It was submitted that that report and the evidence of the family counsellor raised doubts as to the accuracy of the allegations made by the respondent. Then regarding material considerations Mr Green submitted that despite what the respondent had said they were probably evenly situated. He submitted that "once the basic needs are met the degree of lavishness is slight". It was contended that high standards of neatness set by the respondent and criticisms founded on them should not be given great weight.

Turning to Dr Bridge's evidence Mr Green submitted that it must be considered with the other evidence and that the doctor's view that the father was not in a position to exercise the "constant supervision" that the respondent had been able to give was overstated. It was submitted that the applicant was in a position to maintain fully adequate standards of daily upbringing and that the present arrangements confirmed this. Any small matters which had arisen could be improved through the counselling both parents had accepted. The present situation it was submitted was reflected in the evidence of Mrs Parker. Mr Green submitted that the applicant's ability to bring up his sons was confirmed by his success during the period he has had custody and he contended that bearing in mind the respondent's medical history, and the need of a father in a case where both children were boys, the applicant should be granted

custody.

Before reviewing the evidence in greater depth so far as it is relevant to this case it is useful, I think, to refer to general principles which it is the duty of this Court to apply. I refer to the following passage from the joint judgment of Richmond P and Richardson J in G v G (1978) 2 NZLR 444 :

> "Custody cases are difficult cases and we have given careful consideration to the evidence, to the judgment and to the submissions made to us in terms of s 23 (1) of the Guardianship Act 1968. The wellbeing of the children is the first and paramount consideration. An overall view must be taken. Undue emphasis must not be given to material, moral or religious considerations, or for that matter any other factor. All aspects of welfare must be taken into account and that will include consideration of the child's physical and mental and emotional wellbeing and the development in the child of standards and expectations of behaviour within our society. ... In most cases and largely because of the respective roles of the two parents in the family, it is the mother who has the closer and stronger tie with the children. It is the mother who, in most families, spends the greater time in companionship and shared activities with the children. And so she is usually the person with whom the strongest bond is formed. She is usually the central figure in the child's life and development. For those reasons it is often said that it is generally in the interests of young children to remain in the care of the mother. What has been referred to as the 'mother principle' reflects that

> common pattern of family life. But as the Courts have said over and over again, it is not a principle or rule of law. It is not of universal application."

Mr Gendall in dealing with the facts submitted that this was one of the rare cases where avenues of criticism were limited and that both parties should be regarded as "worthy parents". It should be noted that Mr Gendall had spent a total of 21 hours with the parents in the course of interviews and visits. Having regard to the submission he was about to make he suggested that the parents should realise that the children "belonged to themselves and not to the parents". He submitted that a formula was required which would lead to the boys receiving the best of both parents so that they would still have the advantages of belonging to a family. He was encouraged to put the case in that way because of the attitude of the parties to sharing responsibility, as the evidence demonstrated. As I understood him Mr Gendall was seeking a formula for the present case to continue the successful division of responsibility which was very different from custody to one and "crumbs of access" to the other.

Regarding criticisms of the respondent based on past conduct Mr Gendall submitted that there should be no criticism of either party of a kind relevant in the terms of the statute; that both were capable as parents despite the real bitterness between them. In his submission both had shown their capacity in the

interim period and he went so far as to say that the boys would not have "survived the trauma" of the separation if the respondent had not been close by co-operating as she had done.

Regarding divergent views expressed by the children on occasions he submitted that they should not be treated as determinative; that in fact the attitude of the children was not to hurt either parent. Having seen the children during the period of the interim arrangements it is sufficient for me to say that I agree with that view. I would only add that the boys seemed to me to be facing the present situation well and indeed appeared to appreciate that their welfare was the object of all concerned.

Against this background of fact Mr Gendall submitted with "hesitation" that an order of joint custody should be considered. He submitted that a solution which recognised that separation does not deny or negate the obligations of parenthood should be carefully considered. He repeated that the arrangements arrived at following the interim order of this Court illustrated how joint custody could operate practically as joint care and control.

Mr Gendall made it clear that he made the submission on the basis that hostility between the parties was ended, that there was proper communication and a desire to maintain a "family" atmosphere for the children and that there was a method of counselling

available when necessary. He envisaged a case where the welfare of the children and their development was accepted by parents of intelligence, understanding and responsibility and was strong enough to achieve a working arrangement providing for both "management" and "influence" as the only possible basis of a joint custody order. It was submitted that the stating of what could be the result showed the great advantages which were possible as compared with an order for custody to one parent which inevitably meant that the other parent could not serve the interests of his or her children as well despite liberal rights of access.

The place of counselling referred to by Mr Gendall is referred to in a recent article in the Victoria University Law Review 1981 Vol 2 p 95, 122 - "Parents at Law" by V. Ullrich. The article deals with the development of the legal relationships between parents and children and concludes with the following passage which is apt in considering the practical problems in the present case :

> "At the same time it is recognised that there are no purely legal answers to family problems and that counselling and conciliation services must be seen as providing a useful resource not only at the point of marriage breakdown but at any stage in the parenting life whether before marriage, during marriage, after divorce or during a subsequent marriage. As a society we must realise that there is more than one model for "the family" and that parenting roles must be sustained across the boundaries of reformed adult relationships."

Mr Gendall submitted that an order for joint custody would require conditions fixed by the Court. By way of example it was submitted that conditions could be made part of the order covering the periods when the children would be with each parent along lines similar to the interim arrangements with variations to be arrive at by agreement and covering counselling and arrangement for sharing the children during holidays.

At the end of the hearing in this case I made notes of my tentative view that there appeared to be a case for joint custody, adding that there was clear evidence that the boys related well to both their parent and that, as claimed, the parties were "worthy parents". I also noted that an order in some detail would be required. The course of the trial following a period when interim arrangements had worked very well clearly led to Mr Gendall feeling optimistic enough to make his submissions as to joint custody. These in turn led to the notes I made. Then within a short time I was asked to postpone further consideration of the case, as I have already mentioned. That request suggested that agreement on joint custody was likely. Regretfully that was not to be. As a result I have had to consider whether I should conclude that the feelings of optimisim have been shattered because one or other of the parties, or both, have not responded. The prospects of successful joint custody in such circumstances may not appear favourable but on the other hand the decision is for the Court, and I have the following evidence before me from the parents themselves in answer to Mr Gendall.

First, the evidence of the applicant :

"Do you agree they are both anxious about the idea that either their mother or their father might win them as a result of this hearing? Yes I believe there is some anxiety there. I think they both don't want anything to change again. Is not the situation that like almost all children [redacted] don't want to have to chose between you and their mother?Yes, very much so.

As I see what has been happening since November, you and your wife have been substantially sharing their care?Yes, I believe that has been for the benefit of the children. The only effective difference in terms of time of direct care, being morning before school and evenings before bed on four week nights?Yes. Do you feel the concept that of sharing, so that the boys still have the best of both worlds with two parents should continue in some form or other if at all possible?Yes, very definitely. I believe the sharing that has taken place has enabled the children to survive the splitting up of the home. Given this has happened because of the love and genuine concern of both you and your wife, can you see the future being advanced for the boys by this type of concept continuing but without calling one parent a winner and one a loser? If that can be achieved, yes. It would be good for the children and for either parent. You agree with me this is not, or ought not be, a contest for the children in sense of your or your wife's possessions?Yes, very much so. Both parent has a great deal of love for the children. We can both keep it at the back of our minds that what we are doing is for the best interests of the children, you don't tend to get that WIN or LOSE situation.

> Dealing in legal concepts talking about custody and access - if we talk about care and upbringing do you see that the boys would greatly benefit from a continuation of a sharing of care and upbringing - from a situation of joint custody? Both parents quite obviously have got something to contribute to each child and by a sharing taking place now both parents would continue to contribute to each in his or her own way. Do you accept if that is to work it can only happen where there is a very high degree of co-operation, communication and good will between the parents?Yes. It will depend very much on those particular aspects."

The evidence of the respondent was to the same effect :

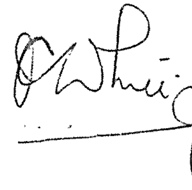
> "Do you think they would be happier returning to their familiar home rather than the smallish flat you have? Most definitely so. The opportunity of relaxed open space activity is more available there?Yes.
>
> TO COURT: How long have you been out of matrimonial home? About 6½ months. Do you think there might be any difficulty if this were the position - of your going back there with the boys and your husband in those circumstances going out? I don't see any difficulties at all Sir.
>
> To Mr Gendall : You heard me ask your husband questions relating to sharing of care and responsibility for the boys? Yes. Even though there has been tension and ill feeling somehow you have both advanced the situation substantially? Yes. The tension and acrimony that exists is it largely because you and your husband are engaged in a contest and you are both anxious

about the outcome? Yes. That is inevitable but it has been the impending competition that has injected a less than charitable approach by each of you to the other?Yes. Do you think it would be possible in the future to put aside the hurt that a case and breakdown occasions so that your two boys can have the very best of both parents, given the fact you are going to live apart? I believe we can, yes. Will you work towards that?I most definitely will. With counselling if necessary, do you see it as possible that there could be very substantial sharing of care and sharing of decisions of importance affecting the boys between yourself and your husband? I believe so.
You heard your husband express this similar belief and sentiments - so that there ought not to be any insurmountable barrier to prevent you working as parents for the good of your two boys? That's right."

With this evidence I have again considered the valuable report prepared by Dr Bridge.

The conclusion I have reached is that this is a case where a joint custody order should be ordered, but it is also a case where there are some danger signals to which I have referred. That being so the order I am about to make will not at this stage be in detail and it will be subject to the right of either party or counsel for the children to apply to the Court. Should that occur it might well be necessary for further evidence to be given and the question of custody reviewed in light of that evidence.

There will be an order for joint custody, the terms of the order to be agreed on and approved by me or fixed by me after hearing all counsel at a time to be fixed by the Registrar.



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Solicitors for the children	:	Buddle Anderson Kent & CO (Wellington)