

IN THE HIGH COURT OF NEW ZEALAND  
PALMERSTON NORTH REGISTRY

633

BETWEEN

K of

AppellantAND

K of

RespondentHearing: 30, 31 May 1984 at WellingtonCounsel: C.J. Walshaw for Appellant  
G.P. Davis for Respondent  
L.H. Atkins for ChildrenJudgment: - 1 JUN 1984

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JUDGMENT OF EICHELBAUM J

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This is an appeal against orders made in the Family Court on 22 March 1984 whereby guardianship of the three children of the parties was vested in the Director General of Social Welfare and custody in the respondent. I have heard the appeal in accordance with the principles in K v K 1979 2 NZLR 91. Pursuant to s 31 of the Guardianship Act 1968 the evidence has been reheard. With the agreement of the parties I have had recourse to five reports provided for the Family Court, these being from the Department of Social Welfare and from Mr D G Page now Chief Psychologist of the Department of Education, who was also called as a witness by counsel for the children.

I have not seen any of the evidence given in the Family Court nor have I read the reasons given by the learned Family Court Judge for his decision. No legal issues have arisen, but I have referred to A v A 1978 1 NZLR 278, B v B 1978 1 NZLR 285, G v G 1978 2 NZLR 444, and N v N 1980 2 NZLR 38.

Turning to the background, the wife was born in Scotland, a member of a large family most of whom emigrated to New Zealand. She left school at 15, shortly before coming to this country. The parties met when the respondent became a boarder in his future wife's household. They married after a short acquaintance. It will be convenient to continue to refer to them as the husband and the wife. They started with virtually nothing. The wife was 17; the husband 20. Both were working, and intended that that should continue while they became established, but this plan was frustrated when the wife became pregnant. Two other children followed. For about three years the couple lived in Palmerston North, where the wife's mother and other relatives also resided. The husband was in steady employment, and had a secondary job as well. However, the marriage did not prosper. In the wife's view, the husband drank to excess, and gambled as well. The husband denied these allegations. He admitted that the wife was correct in saying that he had hit her quite frequently. There were regular violent arguments to which both contributed. The wife spent a good deal of time with her mother. The presence of the wife's relations was a source of friction. There were others. The wife maintained that her husband did not give her any money; that she had to rely on her mother for meals, and her sister for cast-off clothing. I think that in these respects and others the wife's evidence was exaggerated. The husband's version, which to me was the more probable,

was that the wife was incapable of managing finances, and that he decided to control the family shopping himself. Nevertheless I am sure that the husband's shortcomings contributed substantially to the marriage's failings.

The parties separated for the first time only two years after their wedding. The wife and the two elder children (the second of whom was only a baby) spent five weeks in the Salvation Army Lodge. It was the first of many experiences that must have been disturbing to the children. There was a second separation. Then the couple decided to make a fresh start on the West Coast, where the husband's family resided. They moved in with the husband's mother and brother and lived in spartan conditions in a village near Hokitika. I can understand that in these primitive surroundings, in the company of strangers, the wife felt unable to cope. She consulted Social Welfare who after investigating the position obtained custody of the children for three months during which time they were with foster parents in Greymouth. Eventually the parties regained custody.

The third child was born while the parties were living on the West Coast. There was a further separation and reconciliation. Then the wife decided to leave. In March 1981 she moved to Greymouth, then to Christchurch. In the latter place she became quite settled, purchasing a flat with the assistance of capitalisation of the Family Benefit. But the usual reconciliation followed, the flat was sold and the profit spent in settling various debts incurred by the husband on the Coast. After a short while however the reconciliation followed the pattern, by now familiar, of degenerating into arguments and assaults. The wife left again, this time for good. After several moves

she finished in the house in Palmerston North which she has now occupied for the past 18 months. I have not detailed every shift of housing involved but some indication of the unsettled nature of the existence this family led during the course of their marriage, is that in three years the oldest child attended nine different schools.

I am concerned then with the future of E , aged 8, C , nearly 7, and A , about to turn five. The choice is between custody of their mother, with whom home would be in Palmerston North, and the father, who has now obtained a house in Blenheim. The houses themselves are comparable. Each is close to a school; being in the case of the Palmerston North house, the school which the two older children have been attending. The father has decided that if he is awarded custody, he will be a full time parent. Thus both households are dependent on a benefit, rather than ordinary earnings for support. In each case some support is available from an extended family. In Palmerston North, it is the wife's mother, and other members of the wife's family, with whom the children must be familiar. Members of the husband's family live in and near Blenheim. His sister, who gave evidence, has supported and assisted her brother considerably already and would I am sure help him during any settling in period. She impressed me as a sensible and conscientious person. It would not be fair to give too much weight to her presence as she is under no obligation to assist nor indeed to remain in Blenheim although there was no suggestion that she might move elsewhere.

In addressing the paramount consideration of the welfare of the children, in the end the decision comes to rest almost entirely on the question, which

parent is likely to cater best for their needs, spiritual and physical. At the hearing no one suggested they should be split up and my own view is that it would be in their best interests to remain as a unit. The one additional factor, apart from the abilities of the respective parents, is that a decision in favour of the husband would require the children yet again to be broken from their existing environment. One may argue that one more time would hardly matter, but the fact that they are well settled in Palmerston North, and that Blenheim is virtually a new environment for them, counts against a further move. It is however a matter of less weight than the abilities of the parent now to be assigned the responsibility of the upbringing of the children.

There are additional points in the mother's favour. She has done the majority of the parenting so far. I accept that the children have a good relationship with their father, but at the moment, because of the history, the tie with the mother must be closer. However, there are powerful factors against her. She will be offended by what I say next, but I think I have to express my views without varnish. She has not been successful in the parenting she has done. In saying that I make allowance for the difficult circumstances in which she has lived. I also note that there is no present criticism of the purely physical well being of the children, in the sense that they appear to be adequately fed and clothed. However, it is clear that they have considerable problems.

E. was described as being at the point where she had major areas of education to catch up, and indeed it was said that she was close to the point where her education was coming to a stop. C. was stated to be on the borderline of mild mental retardation; A. has grave behavioural problems his development being retarded by 12

to 18 months. Both the younger children have speech defects. Yet Mrs K stated in evidence that so far as she could see the children did not need any special attention. Obviously the problems are a reflection of the unsettled background and as I have endeavoured to make clear, Mrs K is not wholly responsible for that. She has however had sole custody of the children for two years now, and during the last 18 months they have been settled in one place. The most worrying aspect is the wife's failure to recognise the children's special needs. If they are to be helped out of these difficulties clearly it is essential that the person in whose primary charge they are, is able to perceive their existence.

On my own observation of Mrs K, I am not altogether surprised at her inability in this respect. She is not to blame for the disadvantages she has suffered but she has not emerged well from them. I wish to avoid detail that she would find hurtful, but I am afraid that from the point of view of maturity, perception, character, and intelligence she made an unfavourable impression on me.

A further important factor is that the wife now has a further child, born this January. She said she did not have any continuing relationship with the father. I have reservations about that. The main relevance of this aspect however is that the wife was having sufficient difficulty in coping with her three existing children. I do not believe she can cope adequately with them at a stage when the first claim on her attention must be the new baby. I have fears too about the situation of the wife in a further relationship, either with the father of the child or some other person, where the children comprising her first family would be taking second or third place.

I turn then to the husband. He was frank enough, or intelligent enough, to confess his past shortcomings freely in his evidence. I do not want it thought, from the remarks I have made, that I blame the wife for more than a share in the failure of the marriage, not that this is now relevant. I think that both went into marriage without sufficient maturity but that while the husband has made some improvement in himself, the wife has not been so successful. There are factors that must be put in the scales against the husband. I think he paid limited attention to the children during the course of the marriage. Then, after the separation, he really did nothing to maintain the relationship with them for about a year. I appreciate that there were difficulties, but with greater effort I think he could have achieved some degree of contact. His admitted violence to his wife must give one pause. There was no suggestion however that he had ever behaved similarly towards the children. Clearly, he has in the past mismanaged his finances. Finally, and this is probably the aspect of greatest importance, he has no track record as a solo parent. There is no guarantee that as a male of limited experience he will be successful in the demanding task of caring for and rearing two young daughters and an even younger, and more difficult, son.

The general tenor of the five reports submitted for purposes of the hearing in the Family Court was that it would be best not to disturb the children's existing Palmerston North residence. However, this is not as decisive as may at first appear. They were all written at a time when there was no viable alternative : the husband, at that stage, was unable to offer any suitable living accommodation. They were lukewarm about

the wife's ability to cope. All but one were prepared in ignorance of the fact that Mrs K. was expecting a further child. It was noticeable that in giving evidence Mr Page, taking the presently known facts into account, was concerned about the mother's ability to provide the children with the care they so obviously needed. Further, despite the risk involved in upsetting the children's progress through yet another change of household, he did not go so far as to say that the possibility of that move should be discarded.

So far as the wife is concerned, I believe that if the children stay with her, their future is fairly predictable. That future in my opinion would be bleak. They would be in a household of very modest standards and expectations, with little hope of improvement. They will no doubt receive such special outside assistance as the agencies concerned can provide but there will be no impetus from inside the home because regretfully the wife has shown that even when the children had her undivided attention, she was incapable of providing adequate stimulus for them. The support available from her family, although no doubt well intentioned, unfortunately is not of a high quality either; the independent evidence made that clear. The wife's ability to be of assistance to the children is inhibited by the narrowness of her own outlook.

Turning back to the husband, there are two principal risks in giving him custody. First, the detrimental effects of yet another move may outweigh any gains. Secondly, he may be unable to cope. The potential gains are considerable. He impressed me as a person of much greater perception and intelligence than the wife. Although his formal education was less than hers, he made



an effort to improve himself. He undoubtedly understands the problems facing the children, and has given a good deal of thought as to how to meet them. I think there is a distinct chance that he will be more successful than the wife has been. I believe that the only real hope the children have of a better lot for the balance of their childhood and to give them a reasonable start in adult life, rests with the husband. No one can give any guarantees, but on the best consideration I can give to the matter my conclusion is that on balance the risks associated with giving custody to the husband are worth taking.

Conscious as I am that in deciding as I have that custody should be given to the father, I am making the less conventional decision, I am comforted that the learned Family Court Judge should have reached the same conclusion, and that Mr Atkins, to whom I am obliged for the careful attention he has given the matter on behalf of the children, submitted that that was the course favoured by the evidence, if only marginally. Further, although Mr Page gave his evidence entirely impartially, I detected, I thought, that he was not unattracted by the course on which I have decided.

I am conscious of the disappointment that this result will cause to the wife. Within the limits available to her, she has done her best. She has had many unhappy experiences. I hope that she will understand that the decision is made solely in the children's best interests. I hope too that she will be able to make a contribution towards their upbringing through wise exercise of her access rights. For the sake of the children both parents must realise that they have to co-operate in regard to access, and make these occasions happy ones for the children, rather than look on them as an opportunity

to score petty points against the other partner.

Turning to the detailed orders made at first instance, the first, relating to the arrangements for handing over custody, has been overtaken by subsequent events. I vary it to provide as follows :

1. The father shall make such arrangements for the education of the children in Blenheim (including any special or extra educational arrangements) as the Director General of Social Welfare, in consultation with the Psychological Service of the Department of Education, shall approve.

In all other respects the orders made by the District Court Judge are confirmed, and the appeal dismissed.

*[Handwritten signature]*

Solicitors :

McKegg Walshaw & Co (Palmerston North) for Appellant  
Gascoigne Wicks & Co (Blenheim) for Respondent