

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M 209/84

780

BETWEEN

K

Appellant.

AND

K

Respondent.

Hearing: 10-11 July 1984

Counsel: Appellant in person
Mr Gubb for respondent
Mr Adams for children

Judgment: 11 July 1984

ORAL JUDGMENT OF HILLYER J.

This is an appeal by way of rehearing against a decision of District Court Judge Mahony delivered in the District Court at Auckland on 31 January 1984. It is an application for the custody of four daughters of the marriage of the appellant, Mr K and the respondent, Mrs K. The four daughters are A aged 12, E aged 10, G 8 and S 5.

The parties were married in 1971 and the marriage came to an end in October 1983 when the wife left the home without warning, taking with her the three youngest children.

The history of the marriage, and the evidence that was then presented to Judge Mahony, are set out in his decision, and I do not propose to set that out again.

Over the last two days I have listened to Mr K, who has presented his case in person, which as is often the case in such circumstances, has created certain problems.

but which has enabled me to observe him and listen to him in a way I would not have been able to had he been represented by counsel. He told me that he came here alone, not of his free choice, but obviously had he chosen he could have had counsel to represent him. In the result I do not consider he has suffered at all from not having counsel to represent him, because I have given him a degree of latitude in the presentation of submissions and evidence, to me, which counsel would not have had.

Since the District Court Judge gave his decision, some other factors have entered into the matter, notably of course the children have been with their mother now for a period of something more than six months. They have settled down at school and are doing well there. Mrs K has been taking counselling both from a Mr Guild of the Psychological Services Section of the Department of Education and from a Dr Calvert who is a psychologist stationed in Tauranga, who was appointed by the court to assist the family.

The children have been made wards of court and access arranged within that framework, whereby Mr K has been able to see the children. He lives in , Mrs K lives in . Obviously there are problems in relation to access, but not such as cannot be overcome.

A further important factor that has emerged is that the appellant has formed an association with a Mrs F . Mrs F is a lady of Hungarian origin, as is the appellant. She has three daughters living with her aged 14, 16 and 18. The 18 year old is a , the 14 and 16 year olds are still at school, the 16 year old sitting school certificate this year.

Mr K has asked Mrs F to marry him when he is free to do so, and Mrs F has agreed that she will. She and her three children have moved down to and

are now living with the appellant in the appellant's home there. Clearly the home would be inadequate for all seven children to live there permanently, but Mr K tells me he would be able to provide suitable accommodation for all seven children, plus himself and Mrs F if he were to obtain custody.

This however, is a factor which is of major importance. It is a new and disturbing influence in the lives of children who have had sufficient disturbing influences in their lives to the present time.

I have come to the conclusion, with very great agony of deliberation, that it would be best if the children were to stay with Mrs K and Mr K should have access to them. I have taken the unusual step at the suggestion of the psychologist, Dr Calvert, of seeing the children again in my chambers, just before I came back into court to deliver this decision.

I had still not made up my mind what the right thing, and the best thing for the children to do might be after I had heard the evidence and the submissions this afternoon. I deliberately refrained from making a decision until again I had seen the children in my chambers, because the psychologist advised it would be to the children's advantage if they were to hear the decision from the Tribunal making it, rather than from the appellant, the respondent or either of the counsel. I therefore had them into my chambers again and I discussed the new factors that have entered into the matter that I have recited.

They were reluctant, and indeed opposed to the decision that I told them I was going to make. They endeavoured to persuade me to the contrary. I made that decision only after I had considered the new factors with them, and their attitude to those. Nevertheless, in spite of the

opposition of the children, I came to the conclusion that I should maintain the decision which I told them about; that is to say, they should stay with Mrs K with access to Mr K .

I have had put before me by Mr K letters written to him by his eldest daughter, A. . These letters, while they may not have been the product of a deliberate attempt on his part to influence her and the other children, undoubtedly demonstrate in my view a very powerful influence exerted on the children in favour of the appellant and against the respondent. I think that this is an unhealthy thing to have happened, for a child to be listening in to telephone conversations which her mother has with a psychologist, and then writing to her father reporting what was said. Whether prompted by the father or not it is unhealthy.

Listening to the father as he gave his evidence and made his submissions before me, I formed the opinion he must modify his attitude of intense opposition and rigidity if there is to be any hope for these four children, whom undoubtedly he loves, and loves very sincerely, to hold on to a stable life. The pulling of children apart by conflict between mother and father is one of the saddest manifestations of the break up of family life in our present community. It does untold harm to the children, and in my view it is up to both parents to submerge their private feelings to prevent the children feeling that they must make a choice between parents, that it is possible for them, the children, to have a meaningful and loving association with both their parents, which is what they need.

I have had further put before me by Mr K extracts that have been made from diaries which he has taken which belong to Mrs K . This evidence was not before the District Court Judge and Mr K appeared to consider

that it would influence me in his favour. I say that that type of attitude did little to encourage me to believe that Mr K would give his children the attitudes that I think they should have in their future life. The suggestion that he made that he might show parts of those diaries or extracts from them, to the children, can in my view only be hurtful to them, harmful to them, and add to the destruction of their self-esteem, which is being so sadly shaken by these events.

I formed the view also that Mrs K is over-defensive, that she undoubtedly needs the counselling that she is very properly taking. I am glad that she is doing so. I think she would be well served, not only to go on with that counselling, but to endeavour to acquire skills for dealing with the children. Perhaps this could be in association again with the Psychological Services Section of the Department of Education in Tauranga, not necessarily Mr Hutton with whom she has had some association, but with whom she did not apparently form any rapport. That Section will be able to observe the behaviour of the children in the schools, and will be able to give Mrs K assistance in dealing with them and bringing them to the love and affection for her which undoubtedly is there, but which at the moment is overlaid by unnecessary emphasis on matters such as are set out in the letters that were written by the children to Mr Kovarczy, and have been produced by him.

I order that the wardship order that was made by Casey J in June of this year should continue until further order of the court.

I order that access be granted to Mr K. It was suggested that that access should be restricted to one day per month. I appreciate that I am going contrary to that suggestion in the order I am about to make, but I am influenced in doing so by the very real wish that the

children have to see as much as they can of their father. I order therefore that every second weekend, from Saturday afternoon until Sunday evening, the appellant may exercise access to the children, by making such arrangements through Mr Adams, whose appointment as counsel for the children is hereby extended until further notice. Arrangements can be made either through him or through Dr Calvert whose appointment is also extended, as to the detail of the way in which that access is to be exercised.

I reserve leave to any party to apply further on questions of access. I have in mind that if genuine efforts are made to avoid influencing the children against the orders that have been made and against their mother, that the periods of access might be extended. Equally, if the court is led to believe that those periods of access are being used to turn the children against their mother, or to make them resent the orders that have been made, then the access periods will be reduced.



P.G. Hillyer J

Solicitors:

Gubb McNiece & Vlatkovich for Respondent
J.G. Adams for Children