14/6

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

NZLR 635

M. No. 522/83

BETWEEN W McEWING
of Whitianga, Fisherman

Appellant

AND SI McEWING
of Whitianga, Married Woman

Respondent

Hearing: 30th May, 1984

Counsel: I. B. Thomas for Appellant
O. K. Wilson for Respondent
D. M. Stuart for Children

ORAL JUDGMENT OF SINCLAIR, J.

This case is by way of appeal from a decision in respect of the custody of one of the children of the marriage of these parties, a boy A .

Shortly after the separation of the parties in April 1983, or really at the time of the separation, the mother moved out with the daughter who is now aged and left A with his father. There he remained until December of last year when as the result of a contested hearing the District Court awarded custody of A to his mother.

As is required in cases of this nature I have heard all the evidence again although I do not know whether it has been presented in the same way as was done in the District Court, and I have probably heard from one witness today who was not heard in the District Court. Therefore in approaching

my decision in this case I have had the benefit of seeing both the mother and the father: I have had the benefit of seeing the person with whom the mother intends to live and I have also, as is required by law, seen the two children.

Many custody cases are not difficult to decide because there usually is some factor somewhere which will quite easily swing the pendulum in favour of one parent or the other. This is not one of those cases. This would be one of the more difficult cases to decide because everything is fairly evenly balanced as between both parties.

I set to one side the District Court judgment because, being required to hear this afresh, I think it is unwise in these circumstances to start off with the premise that there is the District Court decision, has anything been established as to why it should be altered? I therefore approach this case as though that decision had not been made and the use that it provides is the fact that for a period prior to that decision the father had custody of A and for a period the mother has had custody of A so that now the Court has the ability to assess what has occurred in both those sets of circumstances.

The law in this country requires that the paramount interest is that of the child and it is not that of the parents. The English Statute is somewhat similar and there is a decision of the House of Lords in 1969 which I think conveniently sums up the difficulties with which a Court is faced in a situation such as this. It is the case of J v. C (1969)1 All E.R. at page 788 and I quote from the

passage of Lord MacDermott at page 820. In dealing with the Statute which is the same as in this country, he had this to say:

> "The second question of construction is as to the scope and meaning of the words '....shall regard the welfare of the infant as the first and paramount consideration.' Reading these words in their ordinary significance, and relating them to the various classes of proceedings which the section has already mentioned, it seems to me that they must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when allthe relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules on or determines the course to be followed."

There is no necessity to go back into the cause of the separation and it is somewhat gratifying to have a case of this nature dealt with in this Court without there being attempts to blacken the character of one spouse or the other by reason of what happened before the separation. Suffice it to say that it seems to me to be really common ground and accepted as such that for a number of reasons the marriage just came to an end. It had a precipitating factor and there is no necessity to dwell upon that, but it did result in the wife leaving with T and with A remaining with his father.

Mrs McEwing remained in Whitianga while Mr McEwing went to Tauranga. During that period there were certain difficulties with regard to access and I am satisfied both in relation to A and in regard to T . I think

at that time, having listened to both Mr and Mrs McEwing, they were somewhat doubtful about the other's trustworthiness. Mr McEwing was open enough to concede that when in Tauranga he did not make access so far as his wife is concerned easy because he felt that by doing so he was putting A at risk in that his wife might depart with him and that he might lose control of the boy. In all the circumstances which prevailed at that time that was probably an attitude which could not be criticised: he was being wary and careful. By the same token,I think probably wittingly rather than unwittingly, Mrs McEwing probably retaliated in relation to T , not making it as easy as it otherwise might have been.

However, on the return to Whitianga Mr McEwing had a woman who was obviously very capable living in the house and looking after A , Mr McEwing when he was there and her own family. She ceased living there shortly after the District Court decision so that the situation with which this Court is now faced is not that which the District Court had before it. Indeed, at the present time Mr McEwing is living alone; there is some possibility of his having another lady and her family living in the house, but once again with commendable frankness Mr McEwing stated that he was not sure whether he could have that person living in the house if it was merely to provide a roof over the heads of herself and her children. If his own son was to be there to be looked after, to Mr McEwing's mind that presented a situation which was entirely different and I can accept that attitude. I think it is realistic. The simple answer is really: I need nobody to look after me, but I need somebody to look after my son and myself if my son is going to be living there.

Therefore I find nothing peculiar in that attitude and, on the contrary, I find it quite a natural attitude to take.

At the time when the District Court heard this matter there was no suggestion by Mrs McEwing that she was about to enter into a new relationship of the type which she is about to commence. She has met up with a man who lives in Whitianga, who has the appearance of being stable and is in an established way of life. He has a five year old son. Mrs McEwing and Mr Sarney intend to take up a de facto relationship but that cannot, in my view, intoday's climate be regarded as a disqualifying aspect so far as the custody is concerned. It will give whoever goes with Mrs McEwing a roof over their heads and a degree of security which probably they do not have at the moment as she is in rented property and there are but two bedrooms, with each of the children having one bedroom while she herself has to sleep in the lounge. While that is acceptable, probably in all the circumstances it could be improved upon. That is precisely what will happen when she goes to live with Mr Sarney.

Mr McEwing expressed some doubts about Mr Sarney having regard to village rumours which were running around Whitianga. Village rumours have a habit of being notoriously wrong, but at any rate Mr Sarney faced up to that by giving evidence. All I can say is that from what I have heard today there appears to be no ground whatever for the rumours and the Court itself will take no notice of rumours unless there is some evidence from which a proper inference can be drawn that the conduct alleged against the man has in fact occurred. I am pleased to be informed by counsel that Mr McEwing and

Mr Sarney appear to have settled their differences during the period of a recent adjournment.

Therefore, having put aside all of those matters, this Court is left with the position where each parent has a considerable amount to offer this boy. Each, I am satisfied, could look after him adequately. Each can look after his physical needs. Each loves him. That is the situation where this Court then must make a decision as to what in all the circumstances in the interim is the best for this boy. The scales are pretty evenly balanced. There were suggestions by Mrs McEwing as to Mr McEwing's possible addiction to alcohol. The medical evidence which is available and everything else that is there indicates that alcohol may have played a part in their marriage troubles, but I am of the view that there has not been established anything against Mr McEwing in thatdirection which could in any way influence the Court in coming to a decision on this custody matter.

I have seen both children as required and I must remind myself of what the statute says: S.23(2) of the statute provides that the Court shall ascertain the wishes of the child if that child is able to express them and shall take them into account to such extent as the Court thinks fit having regard to the age and maturity of the child. Now that gives the Court a fairly wide discretion and it is also dependent to a very large degree as to the assessment the Court makes of the child's ability to express a preference.

In this particular case, unlike so many others, there has been regular contact since the last Court hearing in December between father and son. It has been to the point

of almost every weekend from Friday to Sunday, sometimes even Monday morning, and a goodly part of the school holidays, so that there has been a very close bond kept both with father and mother.

I am not concerned in this case with the custody of T but I did see her and she impresses as a child of some maturity for her age who is obviously well cared for and who is quite articulate when talking to her. She expressed quite clearly a preference to remain with her mother, but she acknowledged that she gets on well with her father and that she felt able to ring him and be able to invite herself around for a meal, although I gather that she had some diffidence in doing that and would prefer if possible for her father every now and again to make the approach by telephone to her and ask her around from time to time. She has no criticism of her father at all and it was interesting to hear her one comment with regard to A That was this: that when the whole family was living together she found him, to use her own words, as something of a little pill, but during the last six months she says they seem to have become closer and she can now enjoy his company to the point where from time to time they go off together and, particularly during the summer months, they spent quite a bit of time together on the beach and enjoying other avenues of sport. If she is to be believed, and I have no reason to doubt her, it seems to me that for some reason or other, and it may well be the separation, there has been a throwing together of brother and sister.

So far as A is concerned he also presented himself as a neat, clean, well looked after little boy. He is reticent

and it was difficult to really get very much from him, but I acknowledge that when asked bluntly where his preference lay he stated in favour of his father, which coincides with what he told Mr Stuart today and what he told the Welfare Officer some ten days ago, but it is contrary to what he told Mr Stuart about a week ago. When asked for his reasons he really could not give any excent to say that his father took him fishing, not out in the boat but with a rod from the beach. That was all I could gain from him. Therefore I must evaluate that preference of his, remembering the words of the section which states that the Court shall give regard to the preference stated to such extent as it thinks fit, having regard to the age and maturity of the child.

While A is years of age, in my view he is not an old years of age: he is young for his years. Therefore I feel that I cannot give his preference the same weight as I would with an older child who could give some valid reason for that preference and which could be balanced against the rest of the evidence.

Counsel have referred to the fact thatA probably has been subject to pressure of recent date with this hearing coming on today. I think that probably is true, but in saying that I do not want to be understood as saying that I find that either parent has pressurised this boy wrongly, deliberately or wilfully. I think all that has happened is that as two concerned parents various comments have been passed, various things have been done which unwittingly have resulted in A being the subject of some pressure, and that he has expressed himself now as a result, but in a way which in all the circumstances I should treat with a considerable amount of reserve.

Therefore, looking at the situation, I am now faced with on the one hand the mother being able to give all her time and attention, subject to what is required of her from a very small amount of work, to the two children; the new relationship she is going to adopt will mean a reasonable standard of housing and the boy will have the added advantage of having his sister there with whom, I am sure, he has of recent date got a new found friendship. On the other hand, Mr McEwing is at the present time on his own. Notwithstanding the fact that he could obtain a benefit and be home full time with A , I think the circumstances all round are marginally in favour of his remaining where he is. It would be, in my mind, a brave Judge who at the present time would uproot this boy of years of age from where, during the last six months, by reason of the sensible conduct of both mother and father, he has been allowed to settle into a routine which is very much to his benefit and advantage. In those circumstances I am prepared to confirm his custody in Mrs McEwing. But she must realise this: the time may come, and it may not be too long away, when A may be able to express valid reasons for wanting to change to his father and it must be realised that his sister gets older every year and that by the time she is 17 and he is but 12, there may be a gap between them by reason of their difference in age and development where they will not possibly be as close as they are now. When that time comes Mrs McEwing may have to face the situation that it would be preferable for A to go to his father, but I do not think that stage has yet been reached.

That then leaves the question of access.

So far as access is concerned, what has happened in the last six months has worked tolerably well and after having invited counsel to pass any comment in relation to this particular matter it was felt that it could be well left to the parties to work out, but nevertheless reserving the question in case it is necessary to come back to the Court on it. I can understand Mr McEwing's desire to have A every weekend. I can also understand Mrs McEwing's desire to have the boy some weekends and I can understand the comment that at times A feels as though he would like to have a free weekend so that he can do as he wishes. Mr McEwing, being the sensible person he is, I am sure will take note of these comments and I think the matter can be dealt with in other ways. If there is no access every weekend it can be made up in some ways over long weekends by allowing the boy to be there from Friday to the Monday night, or at Easter from the Thursday night until he goes back to school the following week. There will be occasions when Mr McEwing will want to take him for particular sporting events and that should be encouraged. There will be other occasions when Mrs McEwing will want to take Andrew somewhere for some good reason of her own and that ought to be encouraged. With a little bit of give and take instead of rigidity this boy's stability can be maintained and made more secure. If the good sense of the parties can operate in that direction then it will be for the benefit of all concerned.

In all the circumstances, having regard to the differences which have occurred since the District Court hearing and to a probable natural desire to have that decision reheard, I think this is an appropriate case to make no order as to costs.

Mr Stuart, of course, will have his costs paid out of the appropriate funds in due course.

Accordingly custody of A to Mrs McEwing is confirmed while the question of access is reserved.

SOLICITORS:

Holland Beckett & Co., Tauranga for Appellant
Thom Sexton & Macdonald, Auckland for Respondent
D. M. Stuart, Waihi for Children