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IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.39/84

IN THE MATTER of the Guardianship Act 19

A N D

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Martin

IN THE MATTER of D MART
B MARTI
and
R MARTIN
(Infants)

BETWEEN: C MARTIN
of Matamata, School Principal

Applicant

A N D: S FENTON (formerly S MARTIN) of Street, , New South Wales, Australia, married woman

Respondent

Chambers Hearing: 2 February 1984

Judgment: 2 February 1984

Counsel: P R Heath for applicant

JUDGMENT OF BISSON J.

The applicant is the father of three children, namely, D Martin, born B Martin, born and R Martin, born . All of these children were born in New Zealand, the two boys being the natural children of the marriage between the applicant and the respondent, and the daughter being legally adopted at the age of weeks.

On the 1980 a decree absolute in divorce was granted in the High Court of New Zealand at Christchurch, the applicant and the respondent at that time having been living apart for some 3 years and 8 months. Consent orders were made granting custody of the three children to the respondent, reserving reasonable access to the applicant.

Following the dissolution of their marriage, both paties remarried - the respondent to D Fenton, in New Zealand, in 1981; and the applicant to S Stock, in New Zealand, on 1981. After the divorce the children remained with the respondent and when she remarried the children continued living with her and her husband. At that time both the respondent and the applicant lived in Canterbury, and the applicant had regular contact with the children pursuant to reasonable access reserved to him by the Court.

A very unhappy relationship developed between the eldest child, D and his stepfather. As a result it was agreed between the applicant and the respondent that D should live with his father, which he has done since 1982. In May 1981 the applicant and his wife moved to Taihoa, near Matamata, in the North Island. Taihoa is a farming centre of approximately 5,000 people, where the applicant is the School Principal of the primary school. Due to the large distance between Matamata and Waimate in the South island where the respondent resided with the other two children, the applicant was unable to have regular direct

contact with them during the school term. However he spoke to them by telephone, and to the respondent who, in one of those conversations, indicated that she may be leaving New Zealand to attempt a reconciliation with her husband who was then in Sydney. The applicant wrote to the respondent offering to have the children if she wished to go to Australia. As a consequence, at the beginning of September 1983, the two younger children came to live with the applicant at Taihoa. R attended the school at which the applicant is the principal, and B attended the Matamata Intermediate School. A long affidavit by the applicant gives details of the children having settled in well in their schools and in the Taihoa district, and the children got on well together and with their stepmother.

On the 26th October 1983, the applicant's solicitors wrote to the respondent, from which letter I quote the following extracts :

> "We understand that since September 1982 D has by consent of both yourself and Mr Martin been living with Mr Martin and his wife. Since September of this year the other two children have also been with Mr Martin, again by consent.
>
> We understand it is your wish to have all three children visit you in Sydney and for you to continue to have custody of the two youngest children after that visit during the summer school holidays.
>
> Section 20 of the Guardianship Act requires that the consent of a court (or the other party) be given if children are to be taken out of New Zealand jurisdiction.
>
> The effect of the two youngest children living in Sydney would be to defeat our client's rights to reasonable access. ... ... The children are New Zealanders, their custody and access was determined by a New Zealand court, and it is therefore right and proper that a New Zealand court should determine this matter."

Following telephone conversations between the parties, and an exchange of letters, the respondent, by letter dated the 8th December 1983, wrote to the applicant. I set out the following extracts from her letter :

"Dear D

In reply to your letter of the 27th of November and following our telephone conversation, I am setting out in writing what I agree to for this period in question.

A. D will return to New Zealand in tim for school 1984.

B. D ; custody by consent has already been settled with my solicitor, Mr MacGeorge.

C. I will retain custody of B

D. For these holidays only, D and I agree to pay all the travel costs.

E. Future arrangements over travel costs and/or maintenance can be worked out when I gain full-time employment.

F. I give an undertaking that R will return to New Zealand at the end of the holidays.

G. I reserve the right to contest her custody after she has returned to New Zealand.

... ...

The decisions that I have made have been based on the advise of my solicitor, who has made it perfectly clear to me, although it upsets me greatly to do so, R must return to New Zealand.

Yours sincerely,

Sgd: 'S "

On the basis of that letter from the respondent and relying on her undertaking in paragraph F, the applicant allowed the three children to visit their mother in Australia during the school holidays. On the 19th January 1984 the respondent wrote to the applicant as follows :

"Dear D

This letter is to advise you that Rebecca will not be returning to you on the 29th of January. She has requested an interim trial period of the first term 1984 in which she wants to live with us here in Oatley and attend the Oatley School.

As we are both primarily concerned with the welfare of the children and are concerned that the children are happy in a stable environment, I am sure that you will agree to this requested trial period.

R has said she was worried about coming to Australia, as she didn't know what it would be like, but after a few weeks here has come to really enjoy living here. She is very happy and settled and cannot wait for school to start. If after the first term she wishes to return to you then we will re-assess the situation.

I have sought advice from a Chamber Magistrate at the Kogarah Municipal Court, and he has told me that I will be doing nothing illegal by keeping Re with me as I have been granted her custody.

If you cannot agree to this interim trial period of the first term 1984 then I have asked my solicitor to make application to the New Zealand Court for consent for this time. If there is still areas of dispute then the matter will be referred to an Australian Court where I will be heard.

Please keep in mind that I have the interests and welfare of all the children uppermost in my mind.

Yours sincerely,

Sgd: 'S ' "

D has since returned to New Zealand on the 29th January 1984. It has been agreed that the respondent retain custody of R so that it is only in respect of R that the applicant seeks custody.

The applicant has applied to have the custody order made in the High Court at Christchurch transferred to

the District Court, and he has filed in the District Court at Morrinsville an application to have that custody order varied. On the 31st January 1984 Judge Cartwright made the following orders in the District Court, upon the application of the applicant, to vary the custody and access orders :

> "(a) Ordering substituted service on solicitors for the respondent. Those solicitors are Messrs Henderson MacGeorge Wood and Blaikie, 68 Queen Street, Waimate. A copy of the proceedings is to be served on Mrs Fenton by A.R. Registered Post. There will be twenty-one days from the date of service to take any steps in the proceedings.
>
> (b) Transferring the file to Hamilton."

The applicant has applied to have all three children made wards of the Court, under s.9 of the Guardianship Act 1968, pending the final determination of his application for variation of the custody and access orders. It may be helpful if I set out s.9 in full. It reads as follows :

> "9.(1) The High Court may upon application order that any unmarried child be placed under the guardianship of the Court, and may appoint any person to be the agent of the Court either generally or for any particular purpose.
>
> (2) An application under subsection (1) of this section may be made -
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> (a) By a parent, guardian, or near relative of the child:
>
> (b) By the Director-General:
>
> (c) By the child, who may apply without guardian ad litem or next friend:
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> (d) With the leave of the Court, by any other person.
>
> (3) Between the making of the application and its disposal, and thereafter if an order is made, the Court shall have the same rights and powers in respect of the person and property of the child as

"9. (3) (Cont'd)...

the High Court possessed immediately before the commencement of this Act in relation to wards of Court:

PROVIDED THAT the Court shall not direct any child of or over the age of 18 years to live with any person unless the circumstances are exceptional:

PROVIDED ALSO THAT where any child under the guardianship of the Court marries without the Court's consent the Court shall not have the power to commit that child or his or her spouse for contempt of Court for so marrying.

(4) A child who has been placed under the guardianship of the High Court shall cease to be under such guardianship when the Court so orders or when the child reaches the age of 20 years or sooner marries, whichever first occurs.

(5) In relation to the custody of, or access to, any child who is under the guardianship of the High Court or who is the subject of an application under this section, the High Court shall have all the powers of a Family Court and any order of the High Court which relates to the custody of or access to any such child may be enforced under this Act as if it were an order of a Family Court."

In McInnes v McInnes & Others (C.A.18/82, unreported judgment 4 October 1983), Woodhouse P., in giving the judgment of the Court of Appeal, referred to s.9 in the following way :

"The long title to the Guardianship Act 1968 indicates that it is not concerned in the same special way with under-privileged or deprived children or those facing some environmental or social risk but with the status and rights generally of children and their parents or the guardians who might be appointed to care for them. The statute describes itself as "An Act to define and regulate the authority of parents as guardians of their children, their power to appoint guardians, and the powers of the Courts in relation to the custody and guardianship of children". Furthermore the long-standing jurisdiction asserted by the court which stems from the role of the Crown as parens patriae of the ultimate right of supervision over all infants is given explicit statutory recognition by s.9."

In view of the present conflict between the two parents of R I believe it is in her best interests that this Court exercise its discretion under s.9 by way of supervision until the present dispute is resolved. Although R is at present in Australia, this Court has jurisdiction by virtue of s.5 (1) (c) of the Guardianship Act 1968, which reads :

> "5. (1) The Court shall have jurisdiction under this Act in any of the following cases :
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> ...
> ...
> (c) Where the child, or any person against whom an order is sought, or the applicant, is domiciled or resident in New Zealand when the application is made."

The applicant is domiciled and resident in New Zealand. The child has a New Zealand domicile by virtue of s.6(1) and (4) of the Domicile Act 1976, which reads :

> "6. (1) This section shall have effect in place of all rules of law relating to the domicile of children.
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> ...
>
> (4) If a child whose parents are not living together has its home with its father it has the domicile for the time being of its father; and after it ceases to have its home with him it continues to have that domicile (or, if he is dead, the domicile he had at his death) until it has its home with its mother."

R has her home with her father, being only on holiday with her mother.

I have considered s.5(2) of the Act, which reads as follows :

> "5. (2) Notwithstanding the provisions of subsection (1) of this section the Court may decline to make an order under this Act if neither the person against whom it is sought nor the child is resident in New Zealand and the Court is of the opinion that no useful purpose would be served by making an order or that in the circumstances the making of an order would be undesirable."

I believe this is a proper case to make the order sought as the mother herself, although in breach of her express written undertaking to return R to New Zealand at the end of the holidays, has expressed an intention to make an application to the Court in New Zealand for consent to have R for an interim trial period for the first school term of 1984. I expect the respondent will respect this Court's jurisdiction and continue to care for R as this Court's agent, in the best interests of R welfare, until the further order of this Court. At this point an order for the peremptory return of R to her father in New Zealand is not justified, and a possible Tasman shuttle is to be avoided.

I respectfully adopt and stress the words of Vautier J. in Green v. Manson (M.405/81 Hamilton Registry, judgment of 4 November 1981, unreported) :

> "Orders under that section (s.9) are, in my experience, quite frequently made in this Court simply with a view to preserving the status quo while the question arising as to the custody of a child is properly investigated and considered and each party concerned has had the opportunity of properly presenting a case to the Court. I wish to stress, therefore, that in making this order, I am not in any way making any determination as to what the position should be in the future with regard to these children..."

The following orders are meant to be helpful and in no way pre-judge or prejudice the outcome of the custody or access proceedings. This Court hereby orders :

1. THAT R MARTIN born on the be placed under the guardianship of this Court pending the final determination of an application to vary custody and access orders made in this Court at Christchurch on the 19th day of December 1980 under D.316/80, which has been filed in the District Court at Morrinsville.

2. THAT pending determination of the said application to vary custody and access orders, the respondent be appointed as the agent of the Court for the purpose of keeping in her care the child until further order of the Court on the following conditions :

(a) THAT the respondent should bring the said child before this Court forthwith whenever directed so to do.

(b) THAT the applicant do pursue with all due diligence the application which he has made seeking a variation of the custody and access orders made in the High Court at Christchurch under D.No.316/80 which has been filed in the District Court at Morrinsville.

(c) THAT the applicant do forthwith APPLY FOR AN ORDER transferring the proceedings from the District Court to this Court.

3. THE respondent shall be at liberty to apply to vary or rescind this Order within twenty-one (21) days of the date of service upon her of this Order.

4. THAT should any proceedings be instituted by the respondent for custody or access orders in the Family Court of Australia or any other Court of competent jurisdiction in the Commonwealth of Australia, then a copy of this Order and the reasons therefor of this Court shall be made available to such Court by the Registrar of this Court.

5. THAT leave be granted to the applicant to serve this Order upon the respondent in the Commonwealth of Australia or elsewhere out of the jurisdiction of this Court as she may be residing. A copy of the applicant's Motion and affidavit in support and of this Court's judgment shall be served on the respondent together with such Order.

6. THAT the costs of and incidental to these proceedings be reserved.

Solicitors:

Schofield Petersen Greenfield, Matamata, for applicant