

is the youngest one boy and two girls. The parents have not been able to resolve their own difficulties so when a separation occurred in 1981 resort was had to the Courts. A custody order was then made in favour of the father, but on appeal that went to the mother. That has remained the position right through until now. While that continued situation cannot determine the result of the present application, it is at least some background against which the Court can have a look at the interests of these children.

So far as custody is concerned, and I say it in front of both parents, the welfare of the children is paramount and it is not the wishes and desires of either parent which will decide a custody case. In fact to a large extent there may be cases, and this may be one of them, where the desires and wishes of parents may well not be in the best interests of the children.

From a legal standpoint, because it is so applicable to cases of this nature and is a standard which has been accepted for many years in relation to this type of legislation, I intend to follow what was set out in J v. C (1969) 1 All E.R. 788. At page 820 I quote from the decision of Lord MacDermott:

"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 all the 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. It remains to see how this 'first view', as I may call it, stands in the light of authority."

I intend to apply those words in this case.

These three children have been in the care and custody of their mother, who is now divorced so that she is free to lead a life of her own, but if she is to have the custody and control of these children she must not act in such a way as will result in their wellbeing and welfare being unnecessarily disturbed. And if her relationship with the man friend which she now has was of such a nature as to demand that a change in custody ought to be made, then I would have no hesitation in so acting because she has had it brought to her forcibly by Judge Cartwright that the Court then on the evidence which was presented was to some extent disturbed by that relationship.

The case today has been presented, I am certain, in a different sort of way and I look at what occurred here. It is plain to me from the attitude of the father that he is selfish in his outlook, arrogant in his demands and obsessed with a desire to get what I will call "his own back". After having listened to him in examination in chief I was of the view that he had really the interests of his children at heart, but after listening to his performance under cross-examination, and assessing him, my summation of him is that this particular appeal is nothing but a spite action. He has, since the date of the separation, adopted a course of

attitude which is nothing short of harrassment of his wife to the detriment of his children and he has persisted in that attitude, yet I note that he has the effrontery to produce a balance sheet which shows a \$19,000 profit. I am informed that the most contribution he can make to his children is \$50 per week. He says that he provides them with some clothes from time to time; there is not one shred of evidence to show that he pays anything into their day to day requirements or that he makes any gifts of any great description at all that they can use.

The mother, for her part, is not condemned by anybody to be a person who is not fit to have control of the children. She looks after their daily needs. I have seen the children and they are obviously cared for and they are polite. To my way of thinking, from what I am able to see although in the limited time they were with me, they are not neglected in any shape or form.

The youngest child is too young to have a preference, but in my talks to her it was quite obvious that she was very fond of her mother. K for her age showed a remarkable resilience and she showed a distinct desire to remain with her mother. C who is not the Appellant's natural child, has some attraction to the Appellant because he has at his command some of those things which interest C in his ordinary life. But C himself, who is a mature little boy, came out quite clearly to me in the way he does not want to be separated from his sisters and certainly on balance at the moment desires to remain where he is. However, he does, and I acknowledge it, desire to have contact with the Appellant. It was said that

these three children have built up a resilience to the situation and, as children always do, so are these three able to cope.

It must be a somewhat traumatic experience to know that you are being spied on all the time and to realise that there may be invasions at any time of the day by a person who is no longer living on the property and really who has no lawful excuse now to enter the premises unless invited or on a lawful occasion. When one has a look at the past performances of the husband one can but see a reflection of what, up to today, has gone on in the past. I refer to such pettiness as the removal of the rotor; the selling off of the sewing machine and the overlocking machine; the feeble minded approach to the request for capitalisation. Those are but three and more can be named.

Since Judge Cartwright made her decision Mrs Pugh has changed, to a certain degree, her lifestyle and well she might. There is no way that the Court can control what she does, but she ought to remember that whatever she does so far as these children are concerned, if it is to their detriment, then it will eventually come down on her head because it may result in her losing them. She should be circumspect in her association with Mr Haywood; more circumspect than, I suspect, she has been, but there is not in my view any power in this Court to tell her to stop. Likewise the former husband must remember that he no longer has any claim upon her and that it is not really in his court to criticise her when one has a look at the fact that their own relationship began six years before their eventual marriage.

I do not intend to review the evidence piece by piece because it is not necessary. Much of what Mr Pugh has put forward I regard as exaggerated. Much of what he has said in relation to difficulties which have arisen and to various confrontations which have occurred I am sure he has himself contributed to; I do not say entirely, but at least contributed to.

Therefore, what I intend to do now is something different from what Judge Cartwright did. I am going to cancel the joint custody order and there will be custody confirmed in Mrs Pugh. But she must realise that she has got to look after the interests of these three children. There will come a time with C when he may say that despite everything else the interests which he has are such that he now desires to go to his father. If he says that, and is mature and old enough then to make that decision, Mrs Pugh may be faced with it. I doubt whether she will face the same problem with the other two children, but in the meantime there is no warrant whatever for these three children to be split up and that was one saving grace in Mr Pugh's evidence that he was of that view.

In the meantime, and I intend this to be but an interim order so far as access is concerned, there will be access from 5 p.m. Fridays to 5 p.m. Sundays each alternate Friday commencing on Friday week which I think will be 8th June. There will likewise be access on each Tuesday, and I mean each Tuesday, from 5 p.m. to 8.30 p.m. and those times are to be adhered to. Because the parties have not in the past been able to come to any agreement on variations as to time then these times will remain fixed. In the August school holidays the father will have the children from 5 p.m. on

on the Friday of the first week of the school holidays until 5 p.m. the following Friday; that is one week. At the end of that period I will invite counsel to submit to me a memorandum by consent if they can, otherwise a separate memorandum from each, as to how access has gone up to the end of August. I will then consider the question of the Christmas school holidays and further on.

I warn both parents that if there is any more of the sort of conduct that has gone on in the past then there are grave risks which can result. So far as the father is concerned if he does not adhere strictly to what I have laid down and ceases this incessant pestering of his former wife he may find that he will lose his rights to access altogether and he ought to appreciate that incessant pestering can only have two consequences: firstly it will result in distress to his former wife, which possibly may not be of much interest to him; secondly that distress will inevitably have a deleterious effect on his children for whom he professes a love.

So far as the mother is concerned she must put forward her best foot in the interests of the children to ensure that they are properly looked after and that she retains their custody and, with it, their affection.

So far as costs are concerned as Mrs Pugh is legally aided in the circumstances the Respondent will be entitled to costs which I allow in the sum of \$350. Mr Boot's costs can be submitted to me for payment out of the Justice Department funds in due course.

P. D. L. J.

SOLICITORS:

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