NZLR

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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.741/83

No Special Consideration

468

IN THE MATTER of the Guardianship Act 1968

BETWEEN F PITT

Applicant

NAMES NOT TO BE PUBLISHED

A N D C PITT

Respondent

Hearing : 27th March 1984

Counsel : R.N. Burnes for Applicant
W.G.C. Templeton for Respondent
J.D. Ray for Children

Judgment : 19 April 1984

JUDGMENT OF BARKER, J.

This is an application to vary an existing custody order; by consent, it was removed into this Court from the Family Court.

On 27th September 1978, I delivered an oral judgment on an application under the Guardianship Act 1968 ("the Act") brought by the present respondent for custody orders in respect of the three children of the parties, viz. M Pitt, born 1963, S Pitt, born 1970 and C Pitt, born 1972.

Despite their divorce, it will be convenient to refer to the parties as "the mother" and "the father".

At the time of that hearing, all three children had been living with their father, the present applicant. I awarded custody of S and J to the mother and custody of M to the father.

The father appealed to the Court of Appeal against my decision; the appeal was dismissed on 27th September 1979.

In 1980, the father brought another application for custody in this Court; he discontinued those proceedings.

Subsequently, the ~~mother~~ Father "removed" the custody order made in this Court into the District Court at North Shore pursuant to Section 26 of the Act. The father then applied to the Family Court at North Shore to vary the removed order. After much jurisdictional argument between solicitors, the application was eventually removed to this Court by a Family Court Judge pursuant to Section 14 of the Family Courts Act 1980 on 4th May 1983.

The essential history of the parties and of the children up to 1978 is set out in my earlier judgment; it does not need to be repeated; updating facts only need to be recorded.

The mother lives in Glenfield in a permanent de facto relationship with a Mr M . He is separated from his wife; he has two children of his marriage, aged and to whom he enjoys weekend access frequently.

Although there was an unfortunate incident - doubtless generated by the enduring bitterness between the parties - wherein Mr M assaulted the father, no real criticism can be levelled at Mr M affidavits were filed as to his good character. The father admitted in the witness box that Mr M treats the boys "quite well".

The mother works fulltime. Her working does not interfere with the boys' proper care. No criticism can be levelled at the way in which the mother has looked after her boys since 1978, nor of the accommodation she currently provides for them. The boys are obviously well cared for; their school reports show them settled in their environment and performing reasonably at school. The constant tensions between their parents must have their effect on them.

The father lives alone in his own home at he has a lady friend whom he sees occasionally; he has not entered into any permanent relationship with her. The accommodation he offers for the boys is quite adequate. There is nothing of substance to choose between the residences of the parties, nor in the care which each is prepared to offer. The father's mother and other members of his extended family live at ; he and the boys visit them most Sundays.

The eldest son of the parties, M , has lived with the father over the last 6 years; he has obtained a BSc degree and is now training to be a pilot in the Airforce. He stays with the father when he is on leave. The father, a skilled tradesman,

works in an engineering shop; he has arranged with his employer (and this proposal has been confirmed by Mr Ray, counsel for the children) that if he obtains custody of the boys, he will be able to work "glidetime" virtually any time he likes, provided he works for a certain weekly number of hours. He plans to work during the mother's periods of access.

J is in Form I at Intermediate School. S attends Boys' High School in Takapuna and is in Form III. Both are keen on soccer, particularly J ; he apparently shows particular promise at this sport; he told me of his ambition to be a professional soccer player. Both boys appear happy at what is for each of them this year a new school. If the father gains custody, no change is envisaged in either boy's schooling.

I interviewed the boys separately in my Chambers in the company of Mr Ray, counsel for the children. I was pleasantly surprised to find that children who are the subject matter of bitter wrangling over their custody should both be so well adjusted, and prescient about the competing forces affecting them. Both expressed a clear and unequivocal wish to live with their father. Mr Ray, in his submissions to the Court, confirmed that, throughout his various discussions with the boys, they had been unswerving in their wish to live with their father. The reasons for their wish were difficult to isolate - they just seemed to think they would be happier with the father.

The mother's solicitors obtained a report from a child

psychologist, Mr J.W. Steel. He performed a number of tests on the boys and interviewed them. J told Mr Steel that he preferred to live with his father because "he spends time with us and really cares for us". S told Mr Steel, as indeed he told me, that his mother and Mr M often argued. Mr Steel also considered that, despite their expressed preference, the boys were quite content living with their mother. From my observation, I think Mr Steel's observations were valid.

Although the role of de facto stepfather must be a difficult one, I did not detect any animosity between the boys and Mr M ; as mentioned earlier, Mr Pitt does not claim that there is.

Mr Steel considered that both boys love both their father and mother. He opined that there is much antagonism and distrust between the parties, that the father was very bitter, and that the boys may have tended to side with him.

Both parties impressed me as really caring for the boys and wanting the best for them. The mother's mistrust stems from the time about 10 years ago, as recorded in my earlier judgment, when the father abducted the boys from New Zealand. That incident, which played a significant part in the last custody decision, cannot be held against him indefinitely. My view is that he has become just a little more flexible in his attitudes than he was at the last hearing. However, he has not heeded the suggestion made at the earlier hearing that the parties endeavour to act in a sensible way, the one towards the other, for the sake of the children to discuss questions of access etc. in a controlled way.

One disturbing factor weighing against the father is his failure to pay maintenance for the children since the last hearing. Admittedly, there was no Court order forcing him to; I am at a loss to know why the mother did not prosecute her application more diligently. However, I think the father should have paid something without an order. My assessment of his personality is that he would have paid had there been an order made.

In the end, I feel there is very little between these parties and that the children would be reasonably happy with either of them. In the absence of major factors, minor difficulties were raised in cross-examination and submissions, as is common in cases of this nature. One was the question of school transport for S if the father gained custody, from the father's home in to High School in Takapuna. The father spoke of taking S by car to his work; then the boy would cycle about half a mile to the school. When I discussed this question with S , he was quite happy with that arrangement, or with the idea of travelling the whole distance by bus. S s school transport is not a real issue.

About the only thing the parties seem agreed upon is that the boys' interest in soccer should be fostered; this would happen whichever parent had custody and so is not a factor.

In this case, the weightiest factor appears to be the wishes of the children. Section 23(2) of the Act requires me to ascertain the wishes of the children and give such weight to them as is necessary or as is demanded by their maturity and all the circumstances. I am satisfied that the wish expressed by each

boy is a genuine one; the fact that it is not a fickle one is borne out by Mr Ray's discussions with them over a much longer period. One can understand why the boys would want to be with their father. They see him as someone who can devote himself fulltime to their interests; there may well be an element of hero worship of the elder brother, M . On the father's behalf, it must be conceded that he has made a good job of bringing up M as witnessed by Mark's success at University and in being accepted for the Airforce. M must receive much of the credit for facilitating the generous access that the father has enjoyed over the last 6 years. He now is on good terms with his mother.

Mr Templeton submitted that before there should be a change in the status quo, it ought to be shown that the existing arrangements are detrimental to the children or that there will be a positive benefit to them from the change. He cited Miller v. Low, (1952) N.Z.L.R. 575, 589 and D v. D, (1978) 1 N.Z.L.R. 480 in support. I fully accept that principle; however, the clear wishes of intelligent boys of 12 and 14 do constitute a significant factor - far more so than in 1978; after all, at the age of 16, both could go to the father in any event. One must look at their going to the father in the light of asking whether there will be a positive benefit to them from acceding to their very clear wishes.

Mr Templeton referred to the comments the mother made to Mr Steel that the boys are "her life"; she had a strong sense of purpose and obligation to care for them. He also referred to the school reports and to the stability there recorded, particularly in the case of J

Counsel submitted if the father had custody, his long-standing antagonism to the mother would mean that he would create difficulty for her over access. This factor concerned me most; it may well be capable of being alleviated by the appropriate counselling. The evidence showed that the mother has made an effort to ensure that the father enjoys liberal access. In view of the antagonism which the father still displays to the mother and his failure to have any real dialogue with her over the boys, I am not confident that he would reciprocate to the same degree.

If I were here dealing only with S - now aged - his wishes would be determinative and custody of him would be awarded to the father. However, I am dealing with the two boys and nobody has suggested that they be separated from each other. Indeed, it would be wrong to separate them.

I am confident that the father has the means and desire to care for them well. If he mellows his attitude to the mother and can be persuaded that he should confer with her in a sensible way in the important decisions that have to be made for the boys in the next few years, the the question of custody will have to be reconsidered.

I defer a final decision until the end of this year. If then the boys still want to go to their father, then, in the absence of any other complicating factors arising in the meantime, his application may well succeed.

The generous access currently enjoyed by the father

can be increased a little. I suggest that the boys go to the father every alternate weekend direct from school on Friday, returning directly to school on Monday; this is a system which worked in another case involving boys of this age who had non-communicating parents; under this regime, the occasions for communication are reduced. Both parties will ensure that the boys keep up their sporting engagements. The Sunday visits to the father's extended family may have to be reduced to those occasions when the father has access.

On those weekends when the boys do not stay all the time with the father, he is to have access for half a day. I hope that the parties will be flexible over the time to fit in with the boys' sporting and social engagements. Probably Saturday would be preferable, so that the mother can take the boys to Church on Sunday. She claims she currently cannot do this. The father is to have access for half of all school holidays in May and August and half the long holidays with Christmas Day alternating.

I realise that this solution is far from ideal. However, it must be realised that the boys' wishes will be very relevant as they grow older. The father has the will and the ability to look after them. The major thing which stops him having custody now is his uncompromising attitude to the mother. If this can improve, and my later order offers a means whereby it can, then he can come back to the Court.

Liberty to apply is reserved to both parties over the question of access.

The application for custody is adjourned until a date to be arranged by counsel in December 1984.

I discussed with counsel whether I had power to require the parties to undergo counselling and/or mediation on the question of access. I requested counsel to file a memorandum which they have now done.

The first point for determination is the status of the order which was removed to the District Court from this Court pursuant to Section 26 of the Act pursuant to an application duly made by the solicitors for the mother.

Section 4(3)(a) of the Act permits the Family Court to entertain an application where there is a High Court order relating to the custody, guardianship or access, which has been removed to a District Court under Section 26. It seems to me clear that the District Court (Family Court Division) had jurisdiction to entertain the application for variation of custody made by the father.

Section 14 of the Family Courts Act 1980 reads as follows:

> "14. Transfer of proceedings to High Court - Subject to the Act under which any proceedings are brought, a Family Court may, on the application of any party to the proceedings, or of its own motion, order that the proceedings be transferred to the High Court if it is satisfied that, because of the complexity of the proceedings or of any question in issue in the proceedings, it is expedient that the proceedings be dealt with by the High Court; and in any such case the High Court shall have the same power to adjudicate on the proceedings as the Family Court had."

The Family Court Judge acted under this section when he transferred the application to this Court. In case I am wrong to think that the Family Court had jurisdiction to entertain the application before it to make the removal order, then I treat the present application as one made to this Court to vary the 1978 order of this Court. I record these matters so that the custody application can be dealt with without the procedural and jurisdictional wrangles evidenced in the correspondence between the parties' solicitors.

Section 19 of the Family Proceedings Act 1980 requires the Family Court in all proceedings between a husband and a wife over custody and access to "take such further steps as in its opinion may assist in promoting reconciliation or, if reconciliation is not possible, conciliation. Section 10(4) of the same Act gives certain powers to the Family Court Judge in respect of applications under the Guardianship Act. Counsel are correct when they submit that, since these parties are divorced and no longer have the status of husband and wife, the abovementioned provisions of the Family Proceedings Act 1980 have no application.

Counsel, however, pointed out that the Court is entitled

to make a custody order under Section 11(2) of the Act on such conditions as the Court thinks fit. Section 15 relating to access does not give the power to make a condition. I therefore make an interim custody order in favour of the mother on condition that both parties undergo such counselling on the question of access as may be indicated by the Counselling Co-Ordinator of the Family Court at Auckland. The father in particular must realise that he is on trial so far as access is concerned. If he does not change his attitude, his chances on a reconsideration of the custody position in December might not be good.

I note that Section 14 of the Family Courts Act seems merely to give the High Court power to "adjudicate" on an application; it does not confer on the High Court the various incidental powers contained in the Family Proceedings Act given to a Family Court.

Both parties are to pay their own costs. The costs of Mr Ray as counsel for the children are to be dealt with as directed by Section 30 of the Act.

R. D. Barker J.

SOLICITORS:

Burnes, Burnet & Co., Auckland, for Father.

Sellar, Bone & Partners, Auckland, for Mother.