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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

No. M.430/84

BETWEEN M T

Appellant

1314

A N D H T

Respondent

In Chambers: 5 October 1984

Counsel: R.B. Leete for Appellant
E. Higgins for Respondent
J. Brandts Giesen for Child

Judgment: 5 October 1984

ORAL JUDGMENT OF HOLLAND, J.

On 27 July 1984 an order was made in the Family Court as an interim order that the respondent should have access to his child each Saturday between 9 a.m. and 6 p.m. It is obvious that the Family Court Judge regarded this as an interim measure only, and he directed that the proceedings for final orders as to custody and access be heard. The appellant wife has appealed against this interim order. No date of hearing has been allocated by this Court for the hearing of the appeal, and indeed the notes of evidence of the oral testimony given before the Family Court Judge have not even been produced before the Court.

On 24 August 1984 the matter was referred to a Judge of this Court. Without the benefit of argument the Judge then directed a stay of execution of the interlocutory order of the Family Court Judge until 5 October 1984 subject to:

"(a) The respondent having access to the child on two occasions for periods of three hours at intervals of not less than 14 days under the supervision of Miss T A at Marae and at times appointed by her.

(b) Liberty to apply."

The motion was further adjourned to 5 October.

The matter has now come before me. A further adjournment is sought on the basis that the counsellor, who is a social worker and in whom the Family Court obviously placed some confidence at the time of making a decision, is not yet prepared to recommend further terms of access than have prevailed since the matter was previously before the Court. This is the second time within this month that I have had before me, by way of interim application pending appeal, instances of decisions of the Family Court not only not being enforced but parties being encouraged not to enforce the decision of the Court.

I am told that the Family Court Judge will not deal with the matter because there is a notice of appeal. In matters of this kind relating to the welfare of children, and in particular where the decision made is merely an interlocutory one, it is obvious that the appropriate course is to apply to that Court to vary the judgment if circumstances have arisen which render the terms of his judgment either inapplicable or inappropriate, or even if facts have arisen which could persuade that Judge that his decision was wrong. If a formal application is made and the Judge is satisfied that nothing has occurred which would make him vary his decision then it will be necessary for this Court to consider the matter on appeal. He has, however, seen the parties and reached a conclusion. It is

the duty of the parties to carry out that order until that order is varied by the Family Court or on appeal to this Court.

I am not willing to agree to an adjournment of this application for a stay surrendering the decision as to the rights of the parties to the advice of a social worker. The Courts will always want the help and guidance that can be given by a social worker, but the decision ultimately is one for the Court. With respect to the Family Court Judge, he is in error if he considers that because a notice of appeal has been filed in this case he is debarred from varying an order that he has made if he is persuaded that it should be so varied.

There is before the Court no formal application for a stay. It was raised on the notice of appeal. In so far as there is an application for stay made orally and adjourned to today's date it is dismissed. There is no evidence before the Court to indicate any risk of harm to this child. A Family Court Judge has decided that by way of an interim measure before that Court can make final decisions of custody and access the continued association between the child and his father should remain. It will be extraordinary for that view to be departed from in the absence of evidence of harm to the child, and there is none before me. It may well be that common sense is required by both parents, but the custodial parent should be told, that with this order of the Court in existence it is her duty to comply with it, and ultimately the test of whether she is a suitable person to have custody of her child will be affected by the questions of her tolerance and her ability to observe and apply Court orders no matter whether she likes them or not.

This interim measure is one that it should not be necessary to have before the Court. With a reasonable approach from both parents satisfactory arrangements should be able to be made for the relationship between the father and his daughter to continue until the Family Court can dispose of the matter. Sadly, in so many of these cases reason does not prevail, but if bigotry is going to replace reason there may well be good cause to satisfy the Court that it is in the interests of the child to be removed entirely from the environment of both parents until they can adjust to satisfy the Court that they are able to recognise that a child is normally entitled to the benefit of both a father and a mother, and until the father has been guilty of actions relating to that child or the child's welfare that will render such association harmful to the child the activities of the father towards the mother will be of little importance. I am not unaware that we are dealing with matters where human emotions prevail, but I am quite disturbed that a number of mothers of children who consider that they have been badly treated by their husbands, and indeed who may in many cases have been so badly treated, are depriving or attempting to deprive the children of their rights to a father merely by way of revenge. I am not saying that that is so in this case because as I have said in the first place I have not considered the facts, nor have I had the advantage that the Family Court Judge has of hearing at least some evidence. My observations are to be regarded as general and not directed particularly to the parties in this case.

A D Holland J