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Batterworth

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M.218/82

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

387

BETWEEN L

ASHWORTH

Appellant

AND J

ASHWORTH

Respondent

Hearing: 19, 20 March 1984

Counsel:

Judgment: 20 March 1984

ORAL JUDGMENT OF EICHELBAUM J

The parties were married in when both were aged Patrick was born a year later. In the separation occurred. The husband prevented the wife from taking Patrick with her as she had planned. However, after a contested hearing in the Family Court in custody was awarded to the wife with access to the husband. That situation has prevailed for almost two full years. However, changes have occurred on both sides since the Family Court hearing. The marriage has been dissolved. The wife has married a young man, D , with whom she struck up a friendship soon after the separation. They have a daughter of their own, now aged nearly one. They are living in a rented house but hope to buy their own home shortly. For his age Mr D appears to have quite a responsible position with the Railways Department, with prospects of promotion.

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The appellant's position has also altered as I shall mention shortly.

As to the principles involved, the first and paramount consideration of course is the welfare of the child. The conduct of any parent is relevant only to the extent that it bears on the child's welfare. The considerations relevant to that issue are different from those that pertained two years ago. Pursuant to s 31(2) of the Guardianship Act 1968 the hearing has taken place de novo. I have to form my own conclusion on the merits independently of that of the District Court Judge from whom appeal is brought, see K v K 1979 NZLR 91.

I should commence by making some remarks about P . He is now aged nearly . Apart from some susceptibility to chest complaints he is a healthy boy. His plunket records show that he has made average progress. A recent certificate from a doctor describes him as in very good health and a happy well mannered little boy. He does not appear to have any problem in relating to any of the persons with whom he is in contact. I should mention that Mr Ashworth gave evidence that on occasions he had seen P cringe, as he described it, in the presence of Mr D but I discount this evidence.

Turning to what the respective sides have to offer so far as P welfare is concerned, commendably the parties have directed their attention to what is important as of today and have not laid undue emphasis on the events of two years and more ago. For that reason and because it is largely irrelevant I propose to say little about the breakup of the marriage. Indeed I am

not really in a position to speak about it in any depth in view of the evidence that has been led. I think by this time both parties realise that their own lack of maturity and experience was a contributing factor. At this stage too I think both parties recognise there are no serious deficiencies in the other's ability to care for the child in a physical sense. Each had a few criticisms to make of the other in this respect but I do not find anything proved of a nature that materially detracts from the ability of either party to provide a good home environment for P. This accords with the views expressed by counsel for the child.

Having referred to the background in general terms I say now that I am satisfied that in the interests of Patrick, custody should remain with the mother. I will proceed to state my reasons.

I have already set out the respondent's present position. I am satisfied of her and her present husband's ability to provide a satisfactory home for P so far as material aspects are concerned. Nothing has come out to lead me to have any serious reservations about her present ability as a mother, nor in regard to Mr D's qualities as a provider or a parent. The extended family situation is also satisfactory so far as the D's are concerned. P has been accepted as a member of the family. He has the advantage of being in a household where there is another young child, but in a situation where he does not have to compete unduly for attention with her. Mrs D is senior and so far as I can tell her husband appears able to play the role of grandparents without being over intrusive.

I turn to the appellant's position. In the period from the date of separation to the Family Court decision he looked after P himself, with assistance from his own mother. Considering that P was only ten months old at the start Mr Ashworth managed very commendably. During this time he was unemployed, being on the Domestic Purposes Benefit, so that he could care for P but subsequently, after losing custody, he resumed his occupation as a chef. Although he has had a number of changes of work positions over the years he does not have any difficulty in obtaining and staying in employment. He has formed a relationship with Miss B which has now continued for about two years. They plan to marry shortly. Miss B ability as a mother and the joint qualities of Mr Ashworth and Miss B as a parental team are necessarily untested.

Another aspect affecting the appellant is that on the evidence I have to conclude that his parents played an excessively prominent part while the marriage subsisted. No criticism against Mr Ashworth's parents was made in regard to any recent events, but the history I have mentioned leads to a slight question mark against what might follow if the appellant again had custody. Finally, I was impressed by the efforts that Mr and Mrs D junior had made to recognise and allow Mr Ashworth his right of access to P. Conversely it is clear Mr Ashworth and his parents were not similarly motivated during the time when Mr Ashworth had custody, although I think today Mr Ashworth has a much better appreciation of what is in P and for that matter his own interests in this respect. I do not feel complete confidence that if Mr Ashworth had custody, the access arrangements would be as unimpeded as is in P

best interests.

In short the present custody arrangements strike me as being satisfactory. To reverse custody at this stage, with all the attendant upset, would only be justified if I were satisfied on the balance of probabilities that such a move was necessary in P's best interests. While I believe that the appellant is in a position to provide equally well for P from a material point of view, I think that from that angle P's prospects in the next few years may be better in the D's household in that respect also. However, even regarding the position in that respect as equally balanced, the other factors I think are all in favour of the present arrangement. Mr Ashworth and his fiancée are an untried parental combination and there are the other possible disadvantages already canvassed. Finally and importantly a change of custody would result in P passing substantially into the care of a person who is not a blood relative and with whom he has had comparatively slight contact to date. That change from the present situation would take place without, at any rate at the present stage, substantially increasing the time and attention that his father would be able to give to Patrick.

One cannot help but admire the tenacity with which Mr Ashworth has pursued the question of custody. Unfortunately in these cases there has to be a final result one way or the other. Neither parent should regard the outcome of the present hearing as a personal success or a personal defeat. I am sure that Mr Ashworth will realise that he has an important contribution to make to Patrick's life in the future. I expect that

Mr and Mrs D likewise will continue to recognise Mr Ashworth's rights and the part that he can play in P's best interests and in their own. Litigation necessarily produces tensions. Now that this hearing is over I express the hope for P's sake that the four persons principally concerned will be able to build a worthwhile relationship that will overcome the difficulties and differences of the past.

I think there is some force in the submission that one risk of the continuation of the present arrangements, and indeed it is inherent in any arrangement of this kind where both sides have formed new relationships, is that M Ashworth may become replaced as P's father, or at any rate relegated to a subsidiary role. J and her new husband should be alert to do what they can to avoid this happening.

I am obliged to Mr Brandts-Giesen for his efforts as counsel on behalf of the child. At his suggestion I direct that within six months of today counsel for the child should convene a meeting of the appellant and the respondent and such other persons as he considers appropriate with a view to monitoring and evaluating the present access arrangements, and that counsel for the child should thereafter arrange such further meetings, or arrange for a mediation conference, as he in his discretion may think necessary.

For the reasons I have given earlier the appeal is dismissed.

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I direct that the exhibits may be
returned to Mrs Ashworth.

~~By [unclear]~~

Solicitors :

Parry Field & Co (Christchurch) for Appellant

Harman & Son (Christchurch) for Respondent

Lane Neave Ronaldson (Christchurch) as counsel appointed
for child