NZLR 19/9

IN THE HIGH COURT OF NEW ZEALAND M 802/84
AUCKLAND REGISTRY

No Special Consideration

1140

BETWEEN CORDING

Appellant

AND SHARMAN

Respondent

Hearing: 11 September 1984

Counsel: W J Spring for Appellant
M J Corry for Respondent
Anne Hinton for T

Judgment: 11 September 1984

ORAL JUDGMENT OF THORP J

This is an appeal pursuant to s 31 of the Guardianship Act 1968 against the judgment of the Family Court at Auckland on 21 June 1984, by which the custody of T

born 11 April 1978 and accordingly now 6 years 5 months of age and who had for the past two and a half years years living with her father, was given to her mother, Ms Sharman.

In terms of s 31(2) the appeal is to be by way of rehearing of the original proceedings as if they had been properly commenced in this Court. That provision means, when construed in the light of K v K [1979] 2 NZLR 91, that this Court is required to inform itself fully, by a de novo hearing, on all the matters which bear on the question where custody should go, having regard to the paramount interests of the child.

In the circumstances which now exist it is also necessary to note the provisions of s 23(2) of the Act which

require the Court to ascertain the wishes of the child if the child is able to express them.

The application on which the order under appeal was made, was made by the mother (who had previously, by consent, left the child in her father's care when the mother went to Australia in December 1981) after she became aware that Mr Cording's household in New Zealand was to be removed to Perth, and that he proposed to establish a new home there.

The learned Family Court Judge heard evidence from both parents and from their present partners, a Mrs Mays and a Mr Whittingham, and also saw the child herself. Mrs Hinton, who was and remains counsel appointed for the child, informed me that T is advanced for her age and well able to express her own opinion. Mrs Hinton submits that it is desirable, and indeed her term was "vital", that I see the child before deciding her custodial arrangements.

Following the decision of the Family Court Ms Sharman and the child went to Brisbane where T is now at school and according to a brief affidavit, which is the only evidence I have from the mother, appears to be settling down reasonably well. I do not go into that matter any more deeply except to note that the brief comment I have just made was somewhat contested by Mr Cording in the course of evidence, which was endeavoured to be limited to matters dealing with the exercise of the Court's discretion under s 5(2) of the Guardianship Act.

The appeal was then filed by Mr Cording a few days after the decision. It was given a prompt two day fixture some eight days ago. In the result Mr Cording appears today and has made arrangements for the attendance of a former teacher of T to give evidence, but Ms Sharman appears only by her counsel, Mr Corry, and advises me, through him, that she has been unable to arrange for her appearance at this Court. Equally, of course, T is still in Australia.

In view of the ruling in K v K, I am satisfied that it is not possible for me to determine this dispute in the absence of the mother and child. I say this all the more because I note that the learned Judge's view was that both parents were caring parents and capable of looking after the child. This means that, unless I form a totally different view the decision is likely to be a fine one which could not possibly be reached without taking every advantage available to the Court in the ordinary way.

This means that the most that could be achieved if the sitting proceeded today would be a partial hearing, taking Mr Cording's evidence and the teacher's evidence. Even that step would not necessarily prevent him having to incur a further considerable expenditure to return at the resumed hearing.

In all these circumstances I was asked at the outset by Mr Corry to decline to accept the primary jurisdiction which I believe the Court has because of the provisions of s 5(2), which reads:

> " 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 should note that Mrs Hinton raised the question whether the Court had primary jurisdiction. In my view the Family Court, clearly had jurisdiction under s 5(1)(b), because the child was present in New Zealand when the application was made, and jurisdiction to hear that application to its final resolution, including hearing any appeal, would not be avoided simply by the circumstance that a party or parties had moved out of New Zealand's territorial jurisdiction.

However, the existence of primary jurisdiction still leaves the question whether or not this Court should decline jurisdiction upon either of the two grounds stated in s 5(2).

There are no decisions on s 5(2) that counsel or I have been able to find. I do, however, agree with the editor of Sim & Inglis Family Court Code, contained in the note to that section, which indicates as his view that utility and desirability need to be measured having regard to the provisions of s 22A - L relating to reciprocal enforcement of orders, and the fact that any discretion under this legislation must in any event be exercised having regard to the paramount interest of the child concerned.

I think it is significant that the discretion arises if the person against whom an order is sought and the child are both outside New Zealand. In other words, it could arise even though the applicant remains within New Zealand's jurisdiction. That circumstance suggests to me that when all parties are outside the jurisdiction the Court should be cautious about exercising jurisdiction.

Counsel provided for me copies of the Family Law Act 1975, Australia, which particularly in s 68, disclose that similar provisions exist in the Australian Federal legislation to those set out in s 22A, B and C of our Guardianship Act 1968.

The effect must be that if I decline jurisdiction on this appeal, unless an undertaking is obtained from the respondent not to put forward the decision of the Family Court as an overseas order in terms of s 68(3) of the Australian legislation entitling her to have the decision of that Court given some legal or persuasive authority, and instead accepts that if a new application is made in Australia it may properly be dealt with by that Court as a de novo application, one major consequence of refusing jurisdiction would be to prejudice the position which Mr Cording would otherwise have on the resolution of this dispute. To do so in my view would create a significant injustice, and unless Ms Sharman is prepared, through her counsel, to indicate that she will accept an appropriate condition I would not be prepared to exercise my discretion as she asks.

Two other matters appear to me to require determination before I can justly exercise discretion under s 5(2). The first and most important concerns the question of delay. Mr Cording received advice in Perth, so he informed me today, that he could well be asked to accept a delay of seven to twelve months in Australia if he did choose to start fresh proceedings there. Any such delay would equally in my view, be a considerable injustice. Every month which passes, of necessity, makes it less desirable to change T. custodial arrangements and to contemplate a seven to twelve month delay would again, in my view, be effectively a denial of the right of appeal or any proper settlement of the dispute.

Accordingly it would be a further condition of the exercise of power under s 5(2) that counsel, having made due enquiries, are able to inform the Court that assurances have been obtained that a hearing is available if immediate application is made in Australia, for a fixture by Christmas. This assumes that both are prepared, of course, to co-operate in obtaining the earliest practicable fixture.

In this regard I do note that this Court felt obliged, in view of its belief that the parties were both travelling from Australia, as the file discloses to have been the Registrar's belief, to give it an urgent hearing. I hope that the Australian authorities, on being informed of this, will do all they can to give any application there as high a priority as practicable.

The third condition which I believe should be accepted by Ms Sharman on any grant of her application, would be her acceptance that Mr Cording's costs in respect of the preparation for this appeal and his travel and accommodation. He could not have avoided these because he had absolutely no notice before he left for New Zealand that it was intended that Ms Sharman would endeavour to persuade the Court not to proceed with the appeal. Indeed, her actions pointed rather the other way. Such costs are to be accepted by both parties as costs in the cause in the application contemplated in Australia and to

be dealt with by that Court according to its usual exercise of discretion as to costs.

I think in fairness to Mr Cording I should say a little more about the reasons why I believe the balance of undesirability points against my dealing with the appeal in this Court if conditions such as I have indicated, can be settled. The first is that in the interests of the child I believe it is desirable that she not be removed from Australia purely to come here and indicate to this Court her preferences. I would rather she be allowed to remain where she is until the question of her custody is finally determined. Secondly, the evidence I have of existing difficulties over access point to the desirability that this matter, as well as custody, should be settled by the Court which will be able to service and enforce such orders. Thirdly, since there is no evidence that either parent intends to return to New Zealand the inference must be that T will grow up in Australia, and it seems to me in her interests that decisions on her custody from this point should be made by Judges with knowledge of Australian conditions and with the judicial philosophy in this area of the law which will, from this time in any event, determine where she lives.

The case accordingly stands over part heard at the moment until 10 am tomorrow morning in the hope that counsel may be able to settle conditions as between themselves. I should be grateful if Mr Corry will at least ensure that he has clear and unqualified instructions from his client as to her attitude to the conditions which I have indicated. If she finds them unacceptable then I should certainly wish to reconsider the exercise of s 5(2) jurisdiction and that point should at least be able to be clarified.

The matter stands adjourned.

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ADDENDUM TO ORAL JUDGMENT

This appeal will be stood down on the basis considered and discussed in the ruling given yesterday afternoon.

I have been informed by Mr Corry in Chambers that his client instructs him that she is willing to accept all three conditions which seemed to me necessary in the interests of justice if the Court were to exercise its discretion to decline jurisdiction on the appeal pursuant to s 5(2) of the Guardianship Act, namely -

(i) Both parties to join in obtaining the earliest possible hearing in the Family Court in Brisbane of an application to be made by the father to that Court, for custody of his daughter, T . Counsel advise me that they are informed by the Registrar of this Court that a fixture should be obtainable for such an application this year.

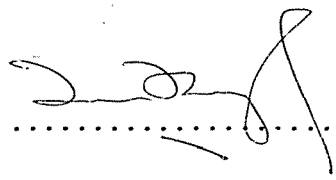
(ii) That the respondent accepts, as a condition of any grant of her application under s 5(2), that such action will not be used by her as a basis for or to support any contention that the decision of the Family Court at Auckland in her favour creates any onus against the father on any application made by him to the Australian Courts.

(iii) That the respondent further accepts as a condition of the grant of her application, that the father's costs in respect of this appeal, including his travelling expenses to New Zealand for that purpose, shall be costs in the Australian proceedings and dealt with in accordance with that Court's rules as to the determination of liability for costs.

Because as a practical matter, the first condition cannot be fully satisfied until an application for the determination of custody is filed in Brisbane, this appeal is adjourned to 11 October 1984 at 9:15 am for that matter to be dealt with. If counsel prefer, they

may file a memorandum over their signatures confirming that the conditions have been satisfied, in which case an order under s 5(2) will be made, though no doubt it will need to be made in open Court.

Appeal adjourned accordingly.



12 September 1984 .....

Solicitors
Simpson Grierson, Auckland for Appellant
Milne Meek & Co, Auckland for Respondent
Hesketh & Richmond, Auckland for child