IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.361/84

BETWEEN C DIXON of Te Kuiti, Married Woman

Appellant

A N D K DIXON of Te Kuiti, Panel Beater

Respondent

Hearing: 27th September, 1984.

Counsel: D. K. Wilson for Appellant.
Miss H. McColl for Respondent.

Judgment: 3-10-84

JUDGMENT OF TOMPKINS, J.

The Appellant, Mrs. Dixon, has appealed against an order made in the Family Court at Hamilton on the 3rd September, 1984, pursuant to which the learned Family Court Judge made an order pursuant to s.20(3) of the Guardianship Act, 1968, refusing leave to Mrs. Dixon to take G Dixon out of New Zealand without further order of the Court.

Mrs. Dixon is an American. The Respondent, Mr. Dixon, is a New Zealander. They were married in the State of Washington on the 16th February, 1980. The only child of the marriage, G Dixon, was born on the , 1982.

The marriage was a short and it seems a tempestuous one. Following the marriage Mr. and Mrs. Dixon lived in the United States. Mr. Dixon came to New Zealand in July, 1981. Because of differences that had already developed they had separated some six or seven months before. However, in February, 1982, Mrs. Dixon came to New Zealand and the parties lived together again here. G (as the child is called by his

parents) was born in New Zealand. On the 8th December, 1983, Mr. and Mrs. Dixon again separated. They were then and have since remained living in Te Kuiti. An agreement made between them dated 20th December, 1983, settled all issues of separation, custody, access and matrimonial property. Pursuant to the agreement Mrs. Dixon is to have the custody of G The husband is to have reasonable access to him. The husband agreed to pay maintenance for him.

For the first few months following the separation Mr. Dixon exercised his rights to access but not on a regular basis. Then some three or four months ago, at the instigation of Mrs. Dixon, the access arrangements were put on to a regular footing. G now goes to his father every other week-end from Friday evening until Sunday afternoon. In addition, Mr. Dixon has him on other occasions to suit Mrs. Dixon's convenience, such as when she is going to be away from Te Kuiti for a few days. These access arrangements have worked well.

Shortly after the separation Mrs. Dixon formed a relationship with Roy Victor Atkinson who is a director and part owner of the company which owns the Te Kuiti hotel. He manages it. Mrs. Dixon is employed at the hotel as assistant manager. Mrs. Dixon described her relationship with Mr. Atkinson as very close. They plan to marry as soon as she is free to do so.

Mrs. Dixon now wishes to take G with her on a trip to the United States. Her desire is to leave on the 15th October, 1984, returning to New Zealand on the 18th December, 1984. The immediate reason is that her younger sister is to be married on the 24th October. Her mother, her step-father, her three older brothers, and all of her grandparents will be present at the wedding. She wants to take this opportunity to meet with all these members of her family again. Further, she wants G to become familiar with these members of her family. Her

grandparents are not in good health. The mother also suffers poor health. She thinks this may well be the last opportunity for G to know at least some of his maternal family.

At the time of the hearing in the Family Court her proposed itinerary was to fly from Auckland to Vancouver, where she would be met by her mother and stepfather. They would then drive some two hours to Bothall in the State of Washington where her mother and stepfather live. She intended to stay there until the 5th December, attending the wedding on the 24th October. On the 5th December she intended to fly from Bothall to Los Angeles, and between the 5th and 12th stay with friends at Las Vegas. Then she was intending to fly from Los Angeles to Honolulu where she would stay again with friends until the 18th December when she returned to New Zealand. At the hearing before me she said that this itinerary had now been changed. Initially it was proposed that Mr. Atkinson would accompany her and G Ross. For reasons to which I shall shortly refer this will not now occur. Because she does not wish to travel extensively just with G she has now decided that she will stay with her mother and stepfather in Bothall for the whole of the time she is away. The trip therefore now involves a flight from Auckland to Vancouver on the 15th October, 1984, and a return flight from Vancouver to Auckland on or about the 18th December, 1984.

Initially Mr. Dixon indicated that he would raise no objection to the proposed trip. There was discussion between the solicitors about her putting up a bond to secure her return. Then in a discussion she had with Mr. Dixon she said that even if she did put up such a bond she could disappear into the United States with G without trace. I shall return to the circumstances in which this statement was made. However, the result was that Mr. Dixon then applied to the Court for an order preventing G 's removal from New Zealand or, alternatively, allowing the removal upon such conditions as the Court considered

just. At the hearing in the lower Court and on this appeal Mr. Dixon did not support the alternative order. He sought an order preventing G 's removal.

In accordance with s.31(2) of the Act, the appeal before me was conducted by way of a re-hearing of the original application as if that application had been commenced in this Court, Hence, although the affidavits filed in the lower Court were, by consent, used in the course of the hearing, Mr. and Mrs. Dixon both gave evidence before me.

Mrs. Dixon in evidence before me gave her undertaking to the Court that if she were allowed to take G with her she will bring him back on or about the 18th December this year. Mr. Dixon repeated the basis of his objection to G 's removal, namely, that he did not trust Mrs. Dixon to honour the undertaking that she had given. Particularly in view of the remark to which I have referred, he is apprehensive that despite the undertaking she may not return. In that event he considers that it will be virtually impossible for him to maintain any sort of contact with his son.

On behalf of Mr. Dixon it was urged that the proper course would be for G to be with him during the two months that Mrs. Dixon was to be away. He has arranged for his sister to come to Te Kuiti to look after him. Mrs. Dixon fairly acknowledged that she has no personal objection to Mr. Dixon's sister and that she is quite sure that this sister could adequately care for G for two months. However, she made it clear beyond doubt that if she cannot take G with her she will not go. Although in explanation of this attitude she mentioned one or two matters concerning Mr. Dixon, the real reason for this attitude is that she simply cannot bear the prospect of being apart from him or leaving him with anybody. That was a prospect that she could not handle. This decision of hers, therefore,

is not based on considerations that relate directly to G , it is based on her determination not to be parted from him, for reasons personal to her.

The learned Family Court Judge arrived at her conclusion for two principal reasons. First, she considered that the trip then proposed would be gruelling for a child of G 's age. Over a period of two months he would be travelling great distances and not remaining in any one place for any length of time. Secondly, she was left with an impression that Mrs. Dixon could not be trusted to return with G . Further, she thought that the advantage of his meeting his American relations would be fleeting and superficial. She considered that the possibility of G remaining in America against the wishes of one of his parents, deprived of the contact with that parent, would not be to his benefit. She decided most reluctantly that she must grant the application. She expressed her particular reluctance because she accepted that Mrs. Dixon had a genuine wish and reason for going to the United States herself.

S.20(1) of the Act provides that a Judge -

> " . . . . . who has reason to believe that any person is about to take a child out of New Zealand with intent to defeat the claim of any person who has applied for or is about to apply for custody or access to the child . . . .
>
> (a) may issue a warrant directing any constable or social worker to take the child . . . .
>
> (b) may in addition order that any tickets or travel documents (including the passport) of the child or the person believed to be about to take the child out of New Zealand, or both, be surrendered to the Court . . . . . "

Then subs.(3) makes it an offence for any person without the leave of the Court to take or attempt to take any

child out of New Zealand knowing that proceedings are pending in respect of the child, or that any order of the Court, including an order registered under s.22A of the Act, conferring custody of or access to the child on any other person, is in force.

It was not at issue between the parties that the elements required to be established for the Court to have jurisdiction to make orders under this section have been fulfilled.

I was referred to a number of decisions in this Court, in the Family Court and in the United Kingdom where applications of this kind have been determined. Although they provide interesting illustrations of factors that in the circumstances of those cases were considered relevant in deciding how the discretion of the Court should be exercised, they do not and indeed cannot determine the principles that should guide the Court. Those principles are expressed in s.23 of the Act. In determining this application the Court must regard the welfare of the child as the first and paramount consideration. Neither counsel submitted otherwise.

In applying that consideration a factor that must, in this case, be of importance is my assessment of the worth of Mrs. Dixon's undertaking to return with G to New Zealand on or about the 18th December, 1984. If she breaches that undertaking and does not return, then I agree with the learned Family Court Judge that G welfare will be prejudiced. This is primarily because the inevitable result must be a complete severing of his ties with his father unless Mr. Dixon were then to succeed in obtaining custody.

I have no reason to doubt that Mrs. Dixon does have, as she put it, a close personal relationship with Mr. Atkinson and that they intend to marry. Further, she expressed a strong personal preference for living in New Zealand rather than the United States.

She also stated her firm belief that G must, in his own interests, keep in close contact with his father. This belief is reinforced by her own personal experience in growing up without having any contact with her own father. As I have already indicated, it was apparently at her instigation that the arrangements for Mr. Dixon to have access to G were put on a regular footing.

The main reason why Mr. Dixon and the learned Family Court Judge doubted her undertaking was the statement that she acknowledges she made about disappearing into the United States without trace. However, I am satisfied that, as she said, this was a statement she made in the heat of one of the frequent arguments that occur between her and Mr. Dixon. I do not regard it as a considered statement of her intention. Indeed if that were her intention stating it would be the last thing she would do.

A further factor urged on me by Miss McColl was that her only assets in New Zealand are some furniture and personal effects. No members of her family (other than G) live in New Zealand. She has few close friends here. Therefore, it was submitted, she has little reason to return. But this submission, in my view, overlooks the nature of her relationship with Mr. Atkinson. If it be as she states it, then it constitutes a strong tie with New Zealand.

Then some reliance was placed on Mr. Atkinson's conviction at the end of July of two counts of offering to supply cannabis and two counts of selling cannabis. For these he is to be sentenced in October. It was put to her that if he were sentenced to a term of imprisonment, she may well then decide not to return. She said that on the contrary, in that event she would cut short her trip and return within a week or two to take over the management of the hotel during his enforced absence. The events giving rise to these charges occurred before their relationship

commenced. She said she regards it as an isolated occasion that will not happen again. She asserts that whatever happens it will have no bearing on their relationship.

I have anxiously considered the matters to which I have referred. I have taken account of my own impression of Mrs. Dixon when she gave evidence. I believe that she is genuine when she gives her undertaking to the Court that she will return with G in December. But the question still remains whether the trip is in G 's best interests.

Mrs. Dixon places some reliance on the benefit to him in establishing a relationship with her family. I accept that there may be some benefit. But its degree, having regard to his age, will not be substantial. His memories of her family will largely fade from such a young mind, although they may not disappear entirely.

Dr. Gillies, a paediatrician, gave evidence on behalf of Mr. Dix n. He spoke of the likely effect of the proposed trip on a child of G 's age. He had not met G , but did not consider that this would affect his opinions.

The trip itself he thought would be tiring but of little more significance than that. Of more concern to him would be the consequences of a change of environment from where the child is currently living here in New Zealand to a north American home. He said that children under three years depend very much upon consistency in their environment. He thought the more satisfactory alternative would be for G not to move from his present familiar surroundings. In terms of his ultimate satisfactory development, and speaking as he put it as the advocate for the child, he would be unwilling to risk the trip to America in the face of the alternative offered of G staying in

New Zealand. As he put it, the major benefit of his going to the States would be to the relatives rather than to the child.

But it is also his view that any detrimental effect would be lessened if G remained in the care of his mother while he was away. Maintaining that close bond will have a valuable stabilising effect. The detrimental effect that he spoke of was a regression in the child's developmental pattern. The doctor acknowledged that even if a regression of that type occurs it would be made up in a relatively short time. Children of that age are very adaptable and respond under the best circumstances without any significant problem.

It is my conclusion, particularly having regard to the amended itinerary, and on the basis, of course, that G remains with his mother throughout the trip, that the trip itself is unlikely to have any significant detrimental effect on the child.

There is a further factor to which I attach some weight. It was apparent from their evidence before me that there is between Mr. and Mrs. Dixon considerable mistrust and even antagonism. I do not propose to review the reasons, but the existence of that attitude can only be harmful to G Fortunately and to the credit of his parents their attitude to each other has not prevented the exercise of full access by Mr. Dixon. But it is clearly critical to G 's future development to ensure that his parents' attitude to each other should not deteriorate further. If it does, he will be the loser.

If this Court confirms the order made on Mr. Dixon's application prohibiting her taking G to America and if, as I believe would be the case, she then cancels the trip, her attitude towards Mr. Dixon will be soured further. Further, Mr. Dixon may well believe that his strongly expressed distrust of

Mrs. Dixon has been confirmed by the Court. On the other hand, if the Court declined to make the order Mr. Dixon sought, and if, as I believe to be the case, she honours the undertaking she has given to the Court, then not only will that give her increased confidence generally and in looking after G in particular, but it may also demonstrate to Mr. Dixon that contrary to his present view, at least in matters relating to G , Mrs. Dixon can after all be trusted.

I therefore propose to allow the appeal, to quash the order prohibiting G 's removal from New Zealand, and in lieu to grant to Mrs. Dixon leave to take him to the United States in the manner she proposes. But I intend to require a substantial bond to be given to secure G 's return to New Zealand. I do so not because I do not trust Mrs. Dixon - if I did not I would not allow the appeal - but because I believe Mr. Dixon is entitled to at least that degree of reassurance. Further, if she betrays the trust that the Court has placed in her, Mr. Dixon is entitled to a substantial sum that he can then use to prosecute proceedings for custody in the United States.

In Williamson v. Williamson (M.42/77, High Court, Invercargill, 1.12.77) Somers, J., on the authority of Jeffreys v. Vanteswarstwarth (1740) Ban, C. 141, 27 E.R. 588, and Biggs v. Terry (1836) 1 My. & Cr. 675, 40 E.R. 535, held that the Court had jurisdiction to require security to be given. It is a course that has been followed in a number of more recent cases.

It is therefore a condition of the granting of leave that Mrs. Dixon provide security to the satisfaction of the Court in the sum of $10,000. The bond evidencing the giving of this security should affirm again her undertaking to return with G say not later than the 20th December,

1984, and she should further undertake that she will adhere to the itinerary she now gives as set out above, that G will remain in her personal care throughout the trip, and that while she is in the United States she and G will continually reside in her mother and stepfather's house at Bothall. She may put before me her proposals to ensure that the bond provides an adequate security. As an indication I would consider it satisfactory if the bond were supported by a payment by her into Court of the sum of $4,000 (an amount she indicated she would be able to pay) together with a personal guarantee by Mr. Atkinson in support of the bond. If her relationship to Mr. Atkinson is as she has indicated, then this should be no problem. In view of the urgency of settling this condition, a draft order and a draft bond can be submitted to me in Auckland with memoranda from counsel. Alternatively, I will see counsel in Chambers later this week or early next.

Mrs. Dixon should be left in no doubt of the consequences of her breaching her undertaking. Although, of course, I cannot bind any Court in New Zealand or elsewhere called upon to determine G 's future, I record my firm conviction that if Mrs. Dixon breaches the solemn undertaking she gave to the Court on oath that will be affirmed in the bond she is required to give, that would be an event of such seriousness as to indicate strongly her unfitness to have G 's future in her care. She should be under no illusions that a breach of that undertaking is likely to be decisive in any future application by Mr. Dixon for him to have custody of G .

The appeal is allowed in the manner and on the terms I have indicated. There will be no order as to costs.

Solicitors:

Thom, Sexton & MacDonald, Auckland, for Appellant.
Tompkins, Wake & Co., Hamilton, for Respondent.