IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

No. M.482/85

MEDIUM PRIORITY

198

BETWEEN H

Applicant

A N D C

Respondent

Hearing: 19 February 1986

Counsel: A. McIntosh for Applicant
L.M. O'Reilly for Respondent
T.M. Abbott for Child

Judgment: 19 February 1986

ORAL JUDGMENT OF HOLLAND, J.

This is a very sad matter that has caused me some considerable thought and concern. That thought and concern has been spread over a number of days because I have had before me the total Family Court file including the evidence, the affidavits and the reports of experts, as well as the very helpful memoranda from counsel appointed for the child.

The child concerned is a girl approaching her twelfth birthday. All her life she has been in the custody of her father. Her mother left home some years ago. The mother is now remarried and has back in her custody an elder child of a former marriage who had previously gone to her maternal grandmother. There is no evidence indicating that the mother has deliberately neglected her child other than deciding that on the end of her association with the child's father she would have to leave the child in the father's care. That was

a responsible decision to make because there is no criticism of the father as a father and she did not have a suitable home or a permanent arrangement to take the child with her. Since then the child has been very ably cared for in all senses of the word by her father and her grandmother. The child has been very fortunate that the grandmother has devoted the greater part of her life to caring for this young girl and she has moved into the flat occupied by the father from Monday to Friday and then left at the weekends to return to her own flat.

The history of the matter shows that there was access by the mother to the child after the separation which worked more or less satisfactorily until the mother formed an association with her present husband. For some extraordinary reason which has not yet been advanced to the Court the father of the child took a violent dislike to this man who is now the child's stepfather by virtue of his marriage to her mother. He imposed conditions of access which appear to have been unreasonable, namely that the mother was to have access to the child but not in association with her boyfriend. He does not appear to have been so troubled in relation to his own association with another woman who shares the weekends fairly regularly with the child. There is nothing wrong with that. It is an ideal arrangement, but if he is to be allowed the freedom to choose another partner, there seems to me to be little justification for his opposition to the mother also choosing another partner.

There are no doubt many more reasons than have been advanced in the Court for this opposition,

but it grew so that access became difficult and then disappeared. Because of the good advice offered to the father by his new partner, and in an attitude which is to be commended by the father himself, he agreed to an order for access to the mother on Saturdays. The mother, who had originally applied for custody, recognised that she had little chance of obtaining an order for custody in view of the very satisfactory way in which this child has been brought up by her father and grandmother over a long period and abandoned her application for custody seeking only access. In this respect she, like the father, showed good judgment and is to be commended.

Sadly the order for access was not carried out because this 11 year old child says she will not go and visit her mother. A welfare officer was appointed to endeavour to facilitate access and was unable to succeed. An application was then made for a warrant to authorise the seizing of the child to enforce access. Not surprisingly, the Family Court Judge found this a step which he was reluctant to take. I should add it was a step which the mother was reluctant to seek. For some reason which is quite unclear to me, the Family Court Judge declined jurisdiction and referred the matter to this Court. That he is empowered to do under the Guardianship Act, but the Court which is designed for the purpose of resolving disputes as to custody and access is primarily the Family Court. There is nothing this Court can do that a Family Court is unable to do. Certainly this Court could make the child a ward of Court, but such a step is quite inappropriate unless making the child a ward of Court

can be shown to give advantages to the child that otherwise do not exist. As this is simply a dispute over access by a parent, making a child a ward of Court would not make the slightest difference to the situation. The matter should not have been referred to this Court. It would, however, be quite wrong for me to simply decline jurisdiction and send the matter back because the parties are entitled to have a solution, and solution there must be.

The issue before the Court at the moment is that there is an access order made by consent which cannot be enforced because the child will not comply with it. There is before the Court an application now filed by the mother to make the child a ward of Court, but as I have already indicated I am not likely to make that order unless it can be shown that there is some advantage to the child and at the moment no such advantage has been able to be shown by any counsel.

Counsel for the father tells me that the father very properly does not seek to depart from the agreed order that was made. He does not seek an order cancelling the order for access. He does, however, resist any application to enforce the order, and I can have some sympathy with him if that is because of his reluctance to see his daughter emotionally disturbed by being physically forced against her will to be taken from his home and delivered to her mother. I decided that it was appropriate for me to see the child. I have done so at some considerable length in the presence of counsel appointed to represent her. I share the views of all who have reported on this matter. She is a highly intelligent, attractive, well brought up young girl. She

is well mannered and there can be no criticism of her upbringing other than the attitude which she now has towards her mother. She has a deep resentment of her mother, bordering on hatred. She has said that if I order her to see her mother she will probably refuse to go. When I pointed out to her that if a child of 11 is able to be allowed to defy authority and merely to do what she wants, it may show that her present environment was unsatisfactory. She immediately questioned whether I was proposing to remove her from her father. I pointed out to her that her insistence on doing what she wanted could hurt people and could hurt both her mother, her father and her grandmother. She denied that it could hurt her father and grandmother, but when I pointed out to her that she might possibly show that her father and grandmother were unsuited to care for her she then indicated that if that was so then she would see her mother.

I was not willing with an 11 year old child to enter into a bargaining act. But I am not at all staisfied that any harm can come from this child being made to see her mother. The history shows that there was a clear bitterness between the father and the mother which is not unusual, at the time of the breakup and afterwards. That bitterness may well continue, but it must not be allowed to influence the life of an 11 year old child. It is not a matter of the mother being entitled to the child. The child is entitled to the mother.

There is no suggestion here of a change of custody, nor is there any grounds for it except for this fact, that if the Court reached the view that the child's mind was being indoctrinated by those in whose custody she

is placed, the Court could very easily be persuaded that that environment was one that should not be allowed to continue and must change. Notwithstanding the very clear evidence of a close bond between child and father and grandmother, and notwithstanding the very clear evidence of the physical wellbeing that has been provided for this girl, if she is to be brought up in the presence of bigots then the harm that may come to her may be greater than the advantages of the physical wellbeing. I am not at the moment saying that the father and grandmother are bigotted. They may be. What I am saying is I am suspicious that the dislike which this child has of her mother has arisen at a stage while she is in the care of her father and grandmother. This is an area where feelings run high. It is not for me to sit in judgment over the rights and wrongs of who should dislike whom and for what reason. What I am required to say is that an 11 year old girl who knows who her mother is should be encouraged to have a close relationship with her mother, unless it can be shown positively that that relationship is harmful to the child. Apart from what the young girl herself says, there is really very little to indicate that it will be harmful.

Obviously the mother's attitude to life is quite different from that of the father. There is a solid reliability in the father and the grandmother which is to be admired, and which can be a tremendous benefit in the upbringing of a child that some security is there and that their relationship is on solid foundations. It may well be that the mother is more volatile in her lifestyle and does not have the sense of responsibility and duty which motivates the father and the grandmother. It may be dangerous

to say, however, but sometimes duty can be overdone in living, and there is a little bit to be gained by a child seeing both sides. I am quite satisfied that no matter what criticism the father and grandmother may have of this child's mother, that this child, now nearly being 12, has been so well brought up by them, and her standards have been set by them in such a way, that even if the lifestyle of her mother is different from theirs, this child is well able to adjust to that, sort it out and live with it. Instead of it being criticised, however, it has to be encouraged.

Unless this Court is advised that serious physical or mental harm is likely to come to this child, this Court will see that the order for access is enforced. I should hope that I will never reach the day when I have to order a policeman to seize a child to remove that child from one home and take the child to another, but this may be a case where I will do it. It will make the access a great deal more difficult. It will disturb the child for some while, but I have to be concerned not only with the immediate few months, but the whole life of this child, and as I said before she is entitled to her mother, even if she does not at this stage want her.

The order for access continues. I make an order suspending it for next Saturday, 22 February, but it is to resume on 1 March and to continue in the same way as ordered by the Family Court, to be done under the supervision of a welfare worker, namely Miss Trish Allen. I direct that the child is to be counselled by Miss Allen, or any other counsellor appointed by her, prior to 1 March on at least one occasion, and thereafter on one occasion or more following

access. Access is to continue weekly until this matter is referred back to me. It is to be referred back to me at 9.30 a.m. on Friday 11 April. I hope that by then anything, other than formal orders, will not be required. If, however, access has not succeeded and I am not satisfied that access is going to cause permanent harm to the child, and I am satisfied that the lack of success of access has been because of the lack of cooperation of the child, then it may well be that I will issue a warrant to direct that access be enforced by physical force. I shall be reluctant to do so. I have been impressed with the sensible attitude that both parents, through their counsel, have taken in these proceedings. I remind them of the obvious, we are dealing with an 11 year old child, a human being. She is not to be used as a weapon between mother and father. Tolerance is to be exercised on both sides. It is only in the most extraordinary circumstances that a Court would ever deprive a mother of access to the child. It is obviously very much in this child's interest that the access be carried out in as peaceful a manner as possible because I have no doubt that a forced order of access will cause harm to that child, of a temporary nature. I am not satisfied that it is of such harm to the child as will be permanent, but it is much better to be avoided.

I do not really think there is anything further I can say, but I will ask Mr Abbott to continue to act as counsel for the child and Miss Allen is free to communicate with him at any stage if the matter should need to be referred back to me in the meantime.

There is one further thing I meant to add before I concluded my previous remarks. I have set out my views

at some considerable length in the hope that they will lead to a peaceful solution of this problem. From the opinion I formed of the intelligence of Rachel in my interview with her, I do not see any reason why she should not be shown the entire record of the remarks I have made, or such part thereof as Miss Allen in the course of her counselling sees fit. Normally I would not expect what a Judge had said in a dispute between parents to be used or discussed with the child, but it seems to me that this is a case where these remarks should be discussed with her.

R. D. Holland J.