

IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

M 29/87

BETWEEN

EVANS of Nelson
Businessman

Appellant

A N D

EVANS of

Businesswoman

Respondent

Hearing: 6 July 1987

Counsel: H W Riddoch for Appellant
A D Barnett for children
G W Allan for Respondent

Judgment: 6 July 1987

ORAL JUDGMENT OF EICHELBAUM J

In the District Court, by a judgment delivered on 15 June 1987, custody of two children, both boys, presently aged 10 and 7 respectively, was given to Mrs Evans, the respondent in the present proceedings. Mr Evans, the father of the children, has now made application to the Court, in effect to stay the custody order pending the hearing of the appeal which he has lodged. On the day on which the District Court Judge delivered judgment on the husband's application he made an order varying the custody order by suspending the operation of the order for a period of four weeks, provided that an appeal were brought within seven days, so as to enable this Court to consider whether a further extension should be granted pending determination of the appeal.

Because of the absence of the District Court Judge I do not have a note of his reasons for judgment but for present purposes I accept the information given by counsel for the children that in his own opinion the question of custody has been finely balanced and that the same description may well apply when the matter comes before this Court on appeal. As I understand it, until about a year ago the family unit was based in _____ and the family had lived there for some years. At that stage the father, without notification to the respondent, departed for New Zealand with the children. The order now under appeal results from the mother's application, in pursuit of which she has come to New Zealand where she at present remains. She had intended, if her application was successful, to return to _____ with her children. Her present intention is that she will return there at the end of the present month.

The choice with which the Court is faced is between permitting her to return to _____ with the two boys, a move which would run the risk that in the event of a successful appeal the children would once again have to be uplifted and returned to New Zealand; or on the other hand if this Court allows the continuation of the suspension of the custody order granted for a limited period by the District Court, the likely effect is that the mother will have to return to _____ coming back to New Zealand at the time when the appeal is ready for hearing. That of course is not only disadvantageous to the mother but holds disadvantages for the children in that the custody which the District Court Judge has decided is the most appropriate in their interest is postponed. It is accepted of course that the only consideration at this stage, as at all stages, is the best interests of the children. I have to balance the disadvantages flowing from the possibility of their lives being disrupted on two further occasions as distinct from one, against the disadvantage already mentioned in that the situation of custody thought to be in their best interests is being postponed. In reaching a decision on that question I am assisted by the views which have been expressed by the psychologist who has reported to the Court, which are contained

in two reports presently before me, the latest made only a few days ago; and also in the submissions made on behalf of the children by counsel appointed to act in their interests. Both his submissions and the views of the psychologist favour taking the course which avoids the risk of a double move. As against that there are the views expressed by the headmaster of the school presently attended by the children, whose conclusion is not so definitely in favour of what might be called a conservative course. He says that both are secure in the school situation and "it may be" that they can make the further adjustment required quite readily. This much is clear : that the children are presently well settled and in all respects properly looked after. It is clear that the children have been through one traumatic experience and if the custody order stands will of necessity face another major move. Each time such disruption occurs the risk of retrograde results as to the long term future of the children is higher. Appreciating fully the difficulties of the mother's position my conclusion is that I should take the course which would avoid the risk of a further double disruption. Clearly the most satisfactory outcome would be if the appeal could be disposed of at the earliest date and if possible without the mother being faced with having to return to the Bahamas with a further journey to New Zealand for the appeal. So far as is possible I will protect her position by a suitable condition. The formal orders of the Court are as follows:

- 1 Until further order of the Court or the determination of the appeal the custody order made by the District Court at Nelson on 15 June 1987 be varied in that the operation of the order is suspended.
- 2 Pursuant to S 29A of the Guardianship Act the Court directs that a further report be obtained from the psychologist, Mr Greer, for purposes of the appeal.

- 3 As a condition of the order under (1) the appellant is directed to make every reasonable effort to bring the appeal on for hearing at the earliest possible date. The appellant is to explore the possibility of an early hearing at Nelson, Wellington and Christchurch.
- 4 Counsel are to attend before me at Wellington on a date to be arranged in the week commencing 20 July 1987, either personally or by their agents, in order to advise the Court of progress towards obtaining a fixture. Counsel for the appellant to be responsible for making the arrangement.
- 5 Mr Barnett is reappointed counsel to represent the children.
- 6 I direct that the District Court provide a transcript of the evidence and of the reasons for judgment.
- 7 Leave is reserved to all parties to apply further.
- 8 Costs are reserved.

Referred to the District Court

Solicitors for appellant: Fell & Harley, Nelson

Solicitors for respondent: Pitt & Moore, Nelson

Solicitors for children: Smythe Le Gros Barnett, Nelson