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: 24-28 August 1987

Counsel: B McClelland QC & H W Riddoch for applicant
G W Allan for respondent
A D Barnett for children

Judgment: 28 August 1987

ORAL JUDGMENT OF EICHELBAUM J

This has been a sad and difficult case and I am obliged to all counsel for their assistance. It is an appeal against a decision of the Family Court given on 16 June 1987 awarding custody of the two children of the parties, G now aged 10, and C now aged 7, to the respondent. As directed by S 31(2) of the Guardianship Act 1968 the appeal has been conducted by way of rehearing as if the proceedings had been commenced in this Court. On such a hearing this Court's duty is to form an independent conclusion as to the order that is in the best interests of the children, without being circumscribed by the principles ordinarily applicable to appeals from the exercise of a discretion. There is no presumption that the decision under appeal is correct. See K v K [1979] 2 NZLR 91. There has been an extensive hearing concluding with submissions on this the fifth day. A few

moments ago I announced my decision namely allowing the appeal and giving custody of both children to the appellant. I now give my reasons.

A very considerable body of evidence has been presented. The appellant was in the witness box for the equivalent of two full days, and the respondent for more than one. In addition there has been a quantity of documentary evidence, including affidavits filed in connection with the Family Court proceedings plus a number of affidavits placing information from the Bahamas before the Court. It would be impossible to make detailed reference to every facet in this judgment but I have considered all the material submitted.

As to the principles involved, the first and paramount consideration of course is the welfare of the children. The conduct of any parent is relevant only to the extent that it bears on the children's welfare. The case does not raise any issues about the legal principles applicable, which are familiar. As was said in G v G [1978] 2 NZLR 444 at 447:

> "An overall view must be taken. Undue emphasis must not be given to material, moral or religious considerations, or for that matter any other factor. All aspects of welfare must be taken into account and that will include consideration of the child's physical and mental and emotional well-being and the development in the child of standards and expectations of behaviour within our society."

That passage refers to "our" society, but nothing has been said to suggest that this case involves any question of a conflict of the values, standards and expectations of society in nd New Zealand respectively. I would reject any suggestion that upbringing in New Zealand society is necessarily to be preferred, not I add that any such submission was advanced.

Other helpful authorities regarding the applicability of the expression "the first and paramount consideration" are J v C [1970] AC 668, per Lord MacDermott at pp 710-711, and In re F [1969] 2 Ch 238, 241 per Megarry J.

The appellant was born in London in 1935. His father was a New Zealander, and in 1945 the appellant returned to New Zealand with his parents who still reside in Nelson. After completing his secondary education here the appellant for 10 years was in business in New Zealand. In this period he worked as a carpenter and later as a topdressing pilot. Evidently he was hard working and successful as he accumulated a substantial amount of capital. In 1965 he left New Zealand to travel the world, eventually settling down in where he lived from 1967 until 1986. There he met the respondent, a of African ancestry some six years younger than himself. After living together for about three years they married in 1975. The elder of the two children concerned in these proceedings, G He is the natural child of the parties. The younger child, (He is not the natural child of either party. They adopted him in 1981. The parties were informed and believe that he is child of a caucasian mother and a coloured father. Until June of 1986 the two children were brought up in

1980s. While obviously there must have been boom years the evidence suggeted that with changing attitudes towards expatriates and expatriate investment a period of general decline set in. In addition it was said there was an upsurge of criminal activity including a good deal of drug related crime. I would not presume to make definitive judgments or comparisons on the basis of the necessarily limited information which can be placed before the Court on an occasion like this, some of it naturally partisan although I do not put Mr Murray's

evidence in that category. I feel satisfied that for persons of sufficient means, and in that I include Mrs Evans in her current circumstances, it is still possible to enjoy a good lifestyle

Reverting now to the course of events, in retrospect, because of differences in culture, background and temperament, this marriage faced formidable difficulties from the outset. There is evidence of deep problems even before G birth. But on the other hand the agreement to adopt another child in 1981 and the joint trip the parties made to New Zealand at around the same time shows that at that stage they expected the relationship to continue.

An aspect which added to the strains of the marriage was the difficulty experienced by the appellant in connection with his ability to work in having regard to his status as an expatriate. From 1976 until 1983 the appellant chose to spend several days of each week in the USA in order to run a business from there. The appellant, who was a qualified pilot, ran an air courier service from Miami and Fort Lauderdale to Freeport. There was a house in the joint names of the parties in Miami. Towards the end of 1983 the appellant obtained permanent status in but shortly afterwards lost the newspaper contract which was a key element of the courier service.

I believe that soon afterwards the marriage relationship underwent a deterioration. On the appellant's account it is difficult to be certain of the causes because at different points of his evidence he gave differing reasons, or placed varying emphasis on various facets. I suspect that one basic factor was that since he was now living with the family full time he was in a position to take a greater part in the parenting than previously, but found the respondent, who had borne the brunt of it for the previous eight years, unwilling to give way to his ideas or preferences. Sharp differences now also occurred over monetary matters, arising out of the household's reduced income following the loss of the newspaper

contract. Unfortunately the parties seemed to have been at or towards the opposite ends of the spectrum as to their attitude towards money and budgeting. In the wife's eyes the appellant was mean, while in his she was a spendthrift. As I assess him, the appellant is by nature a methodical careful person while the respondent's approach to life is more relaxed and carefree. From the beginning of 1984 the appellant tried to ensure that the household would live within its means. Previously there had not only been a good income but also a healthy accumulation of capital on which to fall back. The wife's response seems to have been to institute a kind of go-slow. The housework suffered (she had previously had a maid) and she resisted attempts to make her conform to rule. I hope I will resist the temptation to be judgmental except where this is unavoidable in order to give an explanation of the course of events. I think I can say without offence that Mrs Evans is a strong willed, determined, self-reliant, confident person used to and capable of looking after herself verbally and physically. The husband on the other hand, coming from a background that was kinder to him, and being by nature a gentler person, would have found it difficult to make much impact on his wife if she was bent on pursuing some course different from his own inclinations except by taking the firmest possible stand, which he was not in a position to do prior to 1984. When at that stage he decided to stand his ground there resulted a series of confrontations in which the respondent demonstrated not only her determination not to buckle under, as she said repeatedly on one occasion, but also a command of language which matched the volubility of the appellant, and drew on a wider and coarser vocabulary.

In regard to household expenditure, the appellant took various steps to enforce his point of view. He insisted that his wife provide him with shopping lists which he then filled on an economical basis. He reorganised his businesses so as to cut off the wife's access to ready cash.

In his evidence the appellant raised a catalogue of complaints against his wife, many of which if substantiated, would bear on her parenting abilities and hence on the welfare of the children. I must say now that in my opinion, for the period 1975 to 1983 the vast majority of the parenting was performed and well performed by the respondent. The children's physical needs were properly met, they were well adjusted and normal. The respondent had some traits or inclinations which were less than ideal, by some standards, such as her physical chastisement of the children, her use of bad language in their presence, and her disinclination to encourage visitors whether at an adult or children's level, but none of these detract seriously from my assessment of the respondent's capabilities as a mother. I have to add that such deficiencies as she had were matched by demerits on the appellant's part, notably that he adopted a lifestyle which perforce deprived the family of his company and support for much of each week. The appellant had a wider range of complaints including the respondent's associations with persons who he believed were involved in the drug scene, and with high Government officials whom the appellant regarded as corrupt, and excessive smoking and consumption of alcohol; but on the evidence, I do not regard any of these as proven.

Over the period from the beginning of 1984 until the middle of 1986 there was a continuing deterioration in the marriage. The appellant endeavoured to arrange counselling, or psychiatric or psychological treatment, but the respondent was not receptive to these suggestions nor generally to the appellant's wishes to mould their life to what he would have regarded as a more conventional and satisfactory pattern.

The appellant maintained that his decision to depart with the children in the middle of 1986 was made more or less on the spur of the moment. Although there is no clear evidence to the contrary I am sure he must at least have mulled the concept over in his mind for a significant time. Some of the steps he took beforehand were, to put it neutrally, unusual. I mention them only because they have some relevance in the tally of

plusses and minuses of each parent which the Court must have in mind in reaching a decision as to what is best in the interests of the children. With the respondent's knowledge the appellant commenced to tape some of their arguments. Although the extracts played during the hearing were largely indecipherable as to detail they demonstrated that the children were sometimes present while Mrs Evans hurled abuse at her husband - a state of affairs however for which I regard the husband as equally responsible. They show that the parties also allowed Mrs Evans's mother to become involved. The husband involved members of his own family and on one occasion of hers in the marital troubles by way of correspondence. I have no doubt he did this mainly to establish a record of events. Viewing as I do both the tapes and the correspondence as self serving exercises I do not regard either as greatly assisting the appellant's case.

Indeed at this hearing the respondent said she perceived all the appellant's efforts as directed towards building up a case to have her regarded as an unfit mother with a view in effect to getting rid of her and keeping custody of the children. She professed that the appellant's efforts to set up some form of dialogue through a third party were a sham. At the time she certainly rebuffed all such efforts. My impression is that at some stage, probably during 1984, both parties knew that it was only a matter of time before the marriage ended. Quite unbeknown to the appellant, Mrs Evans had commenced a liaison with an occasional visitor to the Island, with whom she from time to time spent nights at an hotel. The appellant did not learn anything at all about this until a chance conversation during the Family Court hearing and the full details did not come out until cross examination during this last week. Mrs Evans admitted that the association had continued until Christmas last, and I am afraid that her responses left me with the impression that even now she had been less than entirely frank about it. While the husband knew nothing of it at the time, the continuation of an illicit sexual association of this kind very likely coloured her attitude towards the husband during 1984 to 1986 and

contributed to bringing the marriage to a nadir where each party virtually abandoned respect for the other.

In June 1986 the appellant left with the two children, taking them first to Florida, thence immediately to London and finally to New Zealand. The appellant felt he was faced with the choice of proceeding by stealth or not at all. Although I think that generally the appellant gave his evidence honestly I am afraid that in this particular area he succumbed to some self deception. So far as his wife and children were concerned his deceit was total and deliberate. He paid no regard to the shock which both must inevitably have suffered and I think succeeded in shutting out of his mind the devastating blow which fell on his wife. I do not believe that he entertained any real expectation, let alone hope, that his wife would follow him to New Zealand and resume cohabitation here.

The boys I am sure also reacted more to the trauma of their disruption than the appellant's evidence suggested but in their case, with the resilience of youth, they were able to put it behind them to a large degree. They have settled well into the New Zealand environment. Now, over a year later, they are well established at a school within comfortable distance of the home which the appellant purchased in Nelson. They have become involved in a wide range of activities. They have suffered little in the way of any prejudice on account of colour, at least so far as the evidence goes. Photographs indicate that (African heritage is obvious whereas C is described as more Latin in appearance. It would be unrealistic to suppose that they could go through life in New Zealand without suffering a degree of prejudice. However, if they continue to live here it is reasonable to infer that their education and upbringing will probably cushion them from such problems to a significantly greater degree than average. Evidence from the school headmaster and the recent reports produced indicated that allowing for the disruption they had suffered both boys were doing well. There was also confirmation that the

appellant had concerned himself in their schooling and related activities to a high degree.

The appellant has not been employed since he arrived back in New Zealand. He has devoted himself to parenting and has done so entirely successfully. The comments by the psychiatrist engaged by counsel for the children as to the state of presentation and adjustment of the children can only be regarded as complimentary to the appellant's inherent capabilities and his capacity to adapt to a new role. He has cooked and kept house. There was no suggestion of any proposed changes in this regime. The appellant intends to develop a business but proposes to work from home, and in a manner which will leave him free to devote as much time as is necessary to the boys' needs and activities. I accept that those are his intentions and that because he is by nature an organised person that he is likely to carry them into effect. Like most persons the appellant has some characteristics which detract from his parenting skills. I think he has a tendency to verbalise problems where sometimes more decisive action would be called for. Having regard to some of the major decisions he has made in the past, there must be some doubts about his powers of judgment. When faced with problems I think he may have difficulty in isolating and concentrating on the vital issues. He may fasten on some areas of concern to the exclusion of others, sometimes to the point of obsession. The courses he endeavoured to steer within his marriage do not strike me as always having been realistic.

The appellant has an understandable disaffection with life in His dissatisfaction is multifaceted and complex, involving a mixture of grievances arising from his personal life, his perception of officialdom and the nature of society in general. While I accept that his evidence regarding thse aspects represents his honestly held views it would be unsafe to use that material as a basis for any firm conclusions on a comparison of what life may hold for the children in as distinct from New Zealand. The aspect on which Mr Evans focussed most attention was drugs.

Today they pose almost a world wide problem and it would be idle to pretend otherwise than that it is such in New Zealand. On the material submitted one would have to accept that it appears to be a major danger to young people in In this respect the appellant's views are supported by the evidence of Mr Murray, a businessman who lived in for seven years departing in 1973, who was able to supplement his experiences during that period by observations made on a brief return visit in 1982. Enquiries made by the psychologist also confirm the presence of the drug problem. Nothing would be achieved by dwelling on the point but it is entitled to weight in the overall balancing exercise. By comparison Nelson must, I think, be seen as offering a more secure environment.

I should mention the evidence of Mr Evans's unmarried sister who is a number of years younger than the appellant and lives near him. Miss Evans, who pursues an interesting and successful artistic career, has formed a good relationship with both children. While she is under no obligation in relation to their upbringing, it is I think of some comfort that a sympathetic female ear is at times available to them. In addition, her wide range of interests and friends is likely to provide the opportunity for some stimulation in widening the children's interests.

I turn now to Mrs Evans. She had a secondary education to the age of 16, achieving a Higher School Certificate. Her father having died when she was 4, the start she received in adult life was left to her own efforts. She learned shorthand typing at night school and also obtained some knowledge of bookkeeping. When she was 26 she had a child, a daughter now aged 20. s father died shortly afterwards. As the respondent had to continue working to support herself she arranged for her own mother to have care of the child. has as I understand it come to regard her grandmother as if she were her own mother. The respondent however supported her upkeep out of her earnings. After she married the appellant, the latter took over that responsibility. I have not placed undue significance on the respondent's initial

decision to have brought up by her grandmother. However, the failure to reclaim responsibility upon her marriage, being then 9, casts some light on the strength of the respondent's sense of parental responsibility.

Prior to her marriage the respondent had become a partner in a cleaning business. She also commenced a separate enterprise reselling jewellery and cosmetics. At this time, as the respondent put it, she was making loads of money. After the appellant left in 1986 the respondent was left to pick up the pieces of his gardening enterprise. The majority shareholding was in fact in her name, but until his departure the appellant had been running it and doing the work with the aid of staff. In addition the respondent has some other business interests. In my view she has established that she is an able, enterprising businesswoman capable of earning at a sufficient level to support herself and, if she had custody, the children, in a style similar to that enjoyed by the family prior to the separation in 1986.

If Mrs Evans gained custody, the children would again live in their childhood home. From the photographs and descriptions available it is comfortable and well equipped and surrounded by a large area of land in which the children can play. They would go to the same school (a private school) which they attended previously. The evidence is to the effect that such primary schooling in is of a standard comparable to that available in New Zealand. The evidence about the secondary schooling obtainable was less definite. Mrs Evans said that those who could afford it sent their children "away" for secondary schooling. Her own suggestion was that the children should return to New Zealand for that purpose. That may have been intended in part as a conciliatory gesture and I do not criticise it but it points up a practical difficulty in the longer term if Mrs Evans had custody. However, even G secondary schooling is a little too far in the future to play any great part in the present decision.

Not unexpectedly the appellant and the respondent contradicted each other on many points. I have dealt with those I regard as important and do not think it necessary to analyse the others. I can sum up to this point by saying that if Mrs Evans gained custody the children would be living in their family home, situate in what to them has been their home town. There should be no difficulties in settling them back into their schooling. The respondent would be in a position to cater for their material needs in a perfectly satisfactory way. As to personal qualities, Mrs Evans struck me as an intelligent, capable person with business acumen who was also warm, likeable and with a sense of humour. I understand her children's comment that they find her fun to be with. I agree with counsel for the respondent that coming from boys of that age that is a considerable compliment. From my own observations I would like to add that I admired the way she has comported herself during this hearing, in a foreign land and without the benefit of the family support available to her husband. Like the appellant the respondent has a commitment to religious views and each is anxious to pass these on to the children.

I have been greatly assisted by two meticulous reports by Mr M J Greer, a psychologist engaged by counsel for the children. Mr Greer interviewed each parent, observed the children with the respective parents, and later repeated the whole exercise for purposes of a second report. In addition he made a number of other helpful enquiries, including telephone discussions with persons in who had knowledge of the family and a New Zealand schoolteacher with teaching experience in In particular I mention that Mr Greer conducted full interviews with the children on two occasions and set out the boys' reactions and his own interpretation of them in his reports. By consent those reports were taken as part of the evidence and Mr Greer was cross examined on them. Against that background I decided that nothing would be gained by interviewing the children myself. No counsel pressed me to do so. G had shown some resistance to an interview during the Family Court hearing and

I could not see that I would be able to add anything useful to what had already been achieved by a skilled professional.

It would be impossible to do justice to Mr Greer's lengthy and closely reasoned reports by a summary and I do no more than select a few points of particular importance. On the basis of his enquiries he regarded Mrs Evans's reactions to the marital discord (described by one person who had heard the tapes as loud, hostile and verbally abusive) as explicable by reasons of race and background rather than pathological as Mr Evans was inclined to maintain. Mr Greer gave some support to the appellant's view that the respondent had deprived the children of as wide an opportunity for interchange with other children as was available. He commented that the appellant was much more likely intentionally to involve the children in social and cultural activities for developmental reasons than was Mrs Evans. He was generally complimentary about Mr Evans's parenting and home keeping skills, and his ability to provide support in their education. Mr Greer described the appellant as a good and caring parent with the necessary skills to aid the boys in their development and cope with child rearing difficulties.

The opportunities to form a judgment on the respondent's parenting abilities naturally was more limited. She is obviously a person with a very different approach to life from her husband, direct and lively and more physical by nature. In Mr Greer's assessment she had a more authoritarian and positive but less reasoned approach to the children and their problems. In his observation the children reacted reasonably well to both styles, although on occasions they appeared to regard their mother as too assertive and their father as too fussy. While making the point (I think validly) that each parent's style was more appropriate to his or her own cultural and racial background, Mr Greer did not see "definitive deficits" in either party's parenting skills.

Based on his observations in New Zealand, Mr Greer made some adverse comment on the mother's attitude to C as compared with G Mr Evans himself did not think this had been a problem in the concluding stages of their life in although he had been conscious of it earlier. So far as Mr Evans's own attitude was concerned there was no suggestion that he treated the boys other than completedly even handedly. While on the evidence I do not regard this as a major concern this aspect represents a small minus against Mrs Evans.

I turn to the question of the children's own wishes, which S 23 of the Guardianship Act directs the Court to ascertain, and which I have to take into account to such extent as the Court thinks fit having regard to the age and maturity of the child. So far as C was concerned Mr Greer was satisfied that on account of his age he was unable to understand the implications. In any event his responses were ambivalent. In G case there was a more definite although not completely unambiguous preference in favour of living with his mother. For various reasons which I need not repeat Mr Greer thought that that view was, to use his expression, a contaminated one. He did not mean that in any sense as a criticism of the respondent's influence or conduct but simply that he did not think the view could be taken as indeed expressing any clear preference in favour of the mother. It is I hope a fair summary of Mr Greer's opinion in this respect that the children both thought that their mother was more of a fun person to be with, but that C in particular was already mature enough to perceive that their father would be a more helpful person if they had a problem. Even for emotional support, in Mr Greer's opinion, they would tend to turn more to their father.

Mr Greer concluded that in a number of ways, indeed in evidence he said in most ways, Mr Evans had more to offer the children than did their mother. In particular he thought Mr Evans had a greater degree of patience with them, a greater ability to subordinate his own preferences to theirs, and greater ability to offer opportunities for their development.

Points of weakness, so far as the appellant was concerned, were his tendency to be over fussy, a tendency to be overconcerned with issues, which I took to be a polite way of saying that Mr Evans could be somewhat obsessive. Finally, perhaps on account of the fact that he had become a parent rather later in life than is average, Mr Evans in Mr Greer's opinion lacked the ability to be sufficiently flexible with the children, a disability which the children themselves had perceived. However, having regard to the boys' well adjusted state, Mr Greer concluded that life with their father did not pose any real problems for them.

On Mrs Evans's side Mr Greer thought her main strength and an important one was her ability to relate easily to the children. Demerits were that Mrs Evans was more likely than her husband to subordinate the children's position to her own, although she would be regretful about it afterwards. She would not be as likely to think through their developmental or educational needs. I am not of course in a position to say anything based on observed interactions between the respective parents and the children, but this apart my own assessment of the qualities of Mr and Mrs Evans is in all respects in accord with Mr Greer's in the terms just recorded.

As a separate topic I should mention the views expressed by Mr Greer on the question of the prospect of the boys being cut off from their cultural roots, or a part of their cultural roots, should they remain in New Zealand. Not a great deal was said in evidence on the topic. The particular history of their home town makes it likely that the general values there prevalent were American rather than in some ethnic way particular to Perhaps, and I do not mean this unkindly, the point is illustrated by the respondent's expressed wish to have the opportunity to take the children to Disneyland. (of course is in a peculiar position in that his true roots are uncertain. However, like G his early years have been spent predominantly in a background. Mr Greer expressed the view that so far as he could detect the children did not place great weight on their racial origins,

although understandably it is evident that they have a degree of homesickness for The children being of mixed blood it is inevitable that whichever way the Court's decision goes, from the aspect of cultural input they will suffer some deprivation compared with the situation which would have obtained had their parents' marriage continued. Because of their appearances one may tend to think of them as or in C s case hispanic, but the fact is that each is half caucasian. The deprivation will be more complete if they remain in New Zealand. There is more weight in the argument that in a society where white people remain in the majority they face the risk of being or at least feeling disadvantaged at some stage of their lives. The evidence give by Mrs McKinnon gave some support for the view that the problems related to differences of culture and race need not be regarded as insurmountable.

Under the heading of the wishes of the children themselves I should also mention the careful submissions made by Mr Barnett, counsel for the children, to whom I express my appreciation. As befitted his role he was studiedly evenhanded but in presenting an analysis under various headings, came down to a submission that but for one factor he would favour custody with the father in Nelson as best in the children's interests. The reservation related to the factor discussed later in my judgment that if the mother had custody and the father was able to exercise liberal access in that solution would give the children the most benefit from all the advantages which the parents jointly could muster. The reservation Mr Barnett rightly had about that arrangement lay in the questionmark over its likely success. Recognising the risk that if it did not work out then in fact it could be detrimental to the children rather than beneficial, he rightly said the evaluation of that risk was a finely balanced exercise. In the end, he felt that in this situation weight had to be given to Mr Greer's opinion, which came down in favour of custody to the father in Nelson.

In drawing up the final balance sheet of the welfare of the children there is much to be entered on both sides of the ledger. I do not propose to differentiate between the children since it has been accepted on all sides that they should stay together in the immediate future. From (s perspective in particular it is important that this should be so.

I mention three factors at the outset. First, this case cannot be decided simply on the basis of the parent who historically has done the parenting. Undoubtedly until 1984 that was predominantly the respondent. From then on the appellant took a greater part, although still on a lesser plane than the mother. In the last year the parenting has been done by the father alone. There is no evidence that either child fixes psychologically upon one parent exclusively.

Secondly, it goes without saying that a decision to deprive young children of the benefit of a mother's care is made only after giving full weight to that aspect. Both boys however, G especially, are approaching the stage of their lives where the availability of a stable, caring male parent is equally important.

Thirdly, I am satisfied that both parents are capable of carrying out the required parental duties. To make this quite clear, and using the expression to which the respondent herself has referred several times, I do not regard her as an unfit mother. In his closing address leading counsel for the appellant disclaimed any such submission but to the extent that the appellant personally may have wished so to prove he has failed. From the point of view of satisfying material needs, in the short term there is little in it, but in the long term I believe the children will benefit from from being with the appellant. With his experience and all round capabilities I believe he is likely again to build up a successful business venture of some kind, without sacrificing the time required for the children's care. From the angle of the children enjoying their childhood I think the scales come down slightly in favour of a life with their father in New Zealand. On the evidence,

as best I can judge I think a New Zealand lifestyle offers a wider range of activities and that the father has shown a greater resourcefulness in stimulating and developing their interests and activities. But again there is little in it. At the moment the children do not fully appreciate the fairly structured nature of the father's programme, preferring the mother's more carefree approach. While Mrs Evans had high abilities as a mother while the children were in their infancies, in various ways she exhibits limitation as to her capacities at the next stage of their development. There is a certain narrowness in her horizons. The strongest point in favour of the father - it is really a collection of points - is that in my view the path of these children to a well developed, mature, sensible, secure and worthwhile adulthood is more likely to be assured if they remain with their father.

In reaching that conclusion one factor which naturally has caused me concern and on which I have reflected throughout the hearing, is the gross and cruel deception practised by the appellant on his wife and on the children themselves in the manner of his departure. It is not my function to attempt to explain, justify or excuse the conduct. Custody is neither a prize for matrimonial merit nor is it withheld in disapproval of or punishment for misconduct. Conduct comes into consideration only to the extent that it is relevant to the welfare of the children. Here the chief significance lies in evaluating the strength of the appellant's avowed commitment to the children for the future; whether he can be trusted to maintain the admirable programme he has followed so far and equally importantly to cooperate in ensuring the respondent will obtain reasonable access in face of the obvious practical difficulties. On the best judgment I can form I believe that the father can be trusted; indeed I have considerable confidence that he can.

In this case the question of access for the unsuccessful party is a significant factor in the primary decision the Court has to make about custody. The appellant said that if custody went to the respondent he would return to the Bahamas with a

view to making the best contribution he could to the boys' upbringing. It was, or became, a main plank in the respondent's case that giving her custody would therefore result in the best of both worlds. Certainly that approach has attractions but the critical question is whether it would work. It will be obvious, as I have already mentioned, and as Mr Barnett submitted, that there are distinct risks of grave drawbacks as well. Mrs Evans made it clear that she was happy to have the appellant out of her life. She would have the difficult task of coping again with having him, as it were, on her doorstep. I accept that the appellant would give it his best effort as I think he would do with any endeavour to which he put his mind, but it is clear that his task would be fraught with difficulty. As I judge Mrs Evans her method of response to problems is inclined to be instinctive and emotional and notwithstanding her evidence to the contrary, I fear she might not be able to resist giving way to the bitterness she feels about her husband's betrayal. Being far from convinced that access available to the appellant in the Bahamas would be satisfactory, I am concerned that the situation might well develop into a negative one from the children's point of view that they would again become embroiled in conflicts between their parents in a manner which could damage the relationships they have with them and their respect for them. I feel much greater confidence that in a New Zealand setting, backed by resources with which he is familiar, the appellant would be able to control any difficulties in a satisfactory way and could be trusted to see that in the interests of the children Mrs Evans would be treated fairly. I wish to make it clear that my concern about the exercise of access by the appellant in the Bahamas is not based on any reservations about the legal system there. The respondent's advisors have gone to trouble to place before me information about the Court system in the Bahamas. It is based upon and run according to British traditions and I have no reason whatsoever to feel other than confidence in its integrity. The evidence is that issues of custody are determined there on similar lines to our own. My

unease relates solely to the likely personal interactions between the parties.

The next element, one to which I attach importance, is the risk that Mrs Evans's devotion to the children, which normally I believe is of a high order, could become subordinated to her personal interests. I do not wish to attach undue importance to the mere revelation that the respondent has been having an affair. One would not expect a spirited woman in the prime of life to lead a monastic existence. The discovery of her deception goes some distance to counterbalancing reservations about the appellant's trusthworthiness becaue of his own conduct. Where however the most pertinent doubts arise is in relation to associations she may form in the future. If I went into detail it would be hurtful but in brief the evidence of the respondent's two relationships or associations and her one marriage do not leave any high confidence in her judgment. The person under discussion, with whom she associated for over two years, was a married man with children who came to Freeport sporadically to gamble. She had known him for many years but was unsure of his occupation. All this lends some force to the reality of the risk that the respondent, to her subsequent regret, might impulsively take some step to the detriment of the children. No such risk in my judgment would exist if Mr Evans had custody.

I have already referred to the children's own views and to the submissions of their counsel, which merge into the next and final heading. Importantly I am supported in my overall conclusion by the psychologist Mr Greer upon whose expertise the Family Court Judge, who was familiar with his work, went out of his way to comment. Mr Greer had prepared his report for the Family Court under some pressure. Before the hearing in this Court, he had the opportunity to re-interview all the persons concerned, and in addition to conduct further enquiries, including conversations with persons in the Bahamas with information to contribute. While Mr Greer still thought it was a finely balanced decision, he did not amend any of his earlier conclusions. Against that additional background I can

I think give greater weight to his views than was appropriate earlier.

In summary my conclusion is that the best base or springboard for the future development of these two children will be if they remain with their father. At the moment none of the reasons I have given are likely to seem convincing to the respondent. I hope that in time she may come to accept that they have been given with a very sympathetic appreciation of her own position. If feelings of the heart were the test I would have been happy to award her custody, but under the legal approach I have to follow it is my view of the welfare of the children that is paramount. On that test I must find in favour of the appellant.

It is with regret that I differ from the experienced Family Court Judge. I have given his reasons careful consideration, believing as Cooke J said in K v K at p 94 that the response of another judicial mind to the problem, albeit on materials not wholly identical, will be a valuable help. We have differed on points of emphasis rather than in general approach. I believe that the appellant's case may in a few respects have been fractionally stronger than at the earlier hearing. Such differences of emphasis as there have been in our respective summaries have been sufficient, in a closely fought case, to tip the balance.

I allow the appeal and award custody of both children to the appellant. So far as access is concerned the respondent is entitled to the most liberal access within New Zealand. I do not attempt to define that more precisely, as there has been no sign of disagreement to this point. However, the question of making the children available for access outside New Zealand will have to be faced. It is preferable that that should be the subject of a precise application related to specific circumstances with such assurances as the respondent is prepared to offer by way of guarantee of the return of the children. Information would also be required regarding the provisions for registration and enforcement of this Court's

orders in I reserve all questions of costs. They may be dealt with either by way of hearing at a venue to be arranged or by way of memorandum.

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