IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

UNDER The Guardianship Act 1968

BETWEEN EDWARDS
of Levin, Mother
Appellant

A N D NOURADIEN
of
Ulverstone, Tasmania,
Company Director
Respondent

Hearing: 23 March 1990

Counsel: H.A. Cull for Appellant
R.M. Lithgow for Respondent

Judgment: 6 April 1990

JUDGMENT OF GALLEN J.

The appellant in these proceedings seeks to appeal against the decision of Judge Inglis Q.C. delivered on 23 February 1990 the reasons for which were delivered on 26 February 1990, by which he ordered interim custody of born on 1988 vested in the respondent, the father of the child. The respondent denies that in terms of s.31 of the Guardianship Act 1968 any appeal lies at this

stage, contending that the order is interim and an appeal lies as of right only where the proceedings have been finally determined and this question has been argued as a preliminary question going to jurisdiction.

Although there is a considerable dispute over certain factual aspects of the background, for the purposes of this application I am obliged I think to accept the general view which appears in the decision against which the appellant seeks to appeal. The background is set out in a decision of the Family Court of Australia which was before the Judge in this country and to which he referred. Both the appellant and the respondent had been living together in Australia but had eventually separated. They were both said to have remained ordinarily resident in Australia. The appellant had been born in New Zealand and has family here. The respondent was born in Australia and his family connections are there.

The child the subject of these proceedings was born in Australia on [redacted] 1988. The appellant has a son who is not a child of the respondent, [redacted] who was born on [redacted] 1982.

In March 1989 the appellant is said to have disappeared for some 3 weeks. At the end of April 1989 she is said to have disappeared again with both children. The respondent obtained an order from the Family Court in Melbourne preventing the appellant from taking the child out of the jurisdiction. On the day that order was obtained, the

appellant was stopped at the airport at Melbourne with the child and prevented from leaving Australia. That order in fact prevented either party from leaving Australia with the children.

On 20 July 1989 in the Melbourne Family Court orders were made by consent that both parties have the joint guardianship and custody of the child but the appellant was to have sole guardianship and custody of the child The respondent was to have care and control of and access to him each weekend and/or half of each holiday and was required to pay maintenance for the children at the rate of $30 p.w. for each child. There was an order restraining either party from removing either of the children from Victoria without prior written consent of the other.

Not long after those orders were made the respondent came to live in Devonport, Tasmania and at about the same time the appellant and the 2 children also moved to the same place. It is said that the decisions to move were separately made and both had separate homes. The orders made by consent were said to have been working satisfactorily. Towards the end of November 1989 there was some discussion between the parties when a problem with the children was considered. Subsequently the older boy is said to have told the respondent of some incidents of a sexual nature, as a result of which the parties were counselled by a counsellor attached to the Family Court of Australia.

On Friday 16 February the respondent called to collect his son as agreed but found no one at the appellant's home and the home appeared vacant. Subsequently he discovered that the appellant had taken the children to New Zealand and was now residing here. The respondent made an application for ex parte orders for custody and for the issue of a warrant in connection therewith in the Family Court in Australia and the appellant was aware of the proceedings and instructed solicitors to file affidavits. She had given instructions to her solicitors at least until the time she left Australia. In accordance with that application, orders were made for interim custody and the application itself came before the Family Court in Australia on the following day. The Judge was satisfied that the appellant was aware of the hearing and he proceeded on the basis of the affidavits. The Judge expressed the view that the appellant had acted irresponsibly, irrationally and insensitively in taking the child. He pointed to the fact that she made no allegation anywhere that the respondent was not fit and proper as a father or unable to provide. He expressed the view that the circumstances in which the appellant had left the home to become established in a new environment in New Zealand were not in the best interests of the child and he gave interim custody to the respondent. He directed that a warrant was to issue forthwith for the transfer of the child into the custody of the respondent. That decision which I have summarised was made available to the Family Court in New Zealand.

The respondent armed with the custody order and warrant issued by the Family Court of Australia, travelled to New Zealand. In the meantime on 19 February the appellant had filed in the Family Court in New Zealand in Levin an ex parte application for interim custody supported by a detailed affidavit. The Judge declined to entertain her application ex parte and directed that it be on notice. On 23 February the respondent filed in the Family Court at Levin an ex parte application for interim custody and sought a warrant. The Judge again declined to deal with the matter ex parte and directed that it be on notice and that it be set down for hearing later on the same day. The matter was called at 2.30 p.m. that day. Counsel appeared for the appellant and sought an adjournment on the ground that because of the short notice he had been unable to secure the attendance of the appellant. Counsel for the respondent opposed an adjournment and suggested that once the appellant was aware of the present proceedings she might attempt to take the child out of the jurisdiction. An order was made in the Family Court that the child be not taken out of the jurisdiction without the express leave of the Court. The case was stood down until 4 p.m. to provide a further opportunity to secure the mother's attendance. The hearing commenced at 4.15 p.m., counsel for the appellant again applying for an adjournment on the basis that he had been unable to locate the mother and he submitted that an adjournment was necessary because without the mother as a witness it would be impossible for the Court to form a fair

view of what the welfare of the child required. The Judge took the view that the mother, the appellant, had already filed a comprehensive affidavit in support of her application to the Court for interim custody and that although her absence was unfortunate the hearing must proceed. The Judge heard oral evidence from the father who was cross-examined at some length. Following submissions from both counsel, the Judge made an order granting interim custody to the respondent for the purpose of enabling him to return the child to the jurisdiction of the Family Court of Australia and issued a warrant authorising a Constable or a social worker to take possession of the child and to deliver him to the father. He subsequently gave written reasons for his conclusion.

The appellant then sought leave to appeal against the interim custody order. The Judge considered the application which he rejected and gave reasons for his conclusion that there was no question of law or fact in the case capable of serious argument on appeal which involved an interest beyond its direct subject-matter. He was also satisfied that an appellate Court was unlikely to reach any conclusion other than that the child should be returned to his home and family in Australia from which he should never have been removed. He accordingly refused leave to appeal.

Counsel for the appellant now contends that although the order is described as an interim order, in its true nature it is a final order and accordingly the appellant has the right

to appeal in terms of s.31 of the Guardianship Act 1968. That section is in the following terms:-

> "(1) Where in any proceedings under this Act (other than criminal proceedings or procedings under section 13 or section 14 of this Act) a Family Court or District Court has made or has refused to make an order, or has otherwise finally determined or dismissed the proceedings, a party to the proceedings may, within 28 days after the making of the order or decision or within such further time as the Court may allow in accordance with section 73 (1) of the District Courts Act 1947, appeal to the High Court in accordance with the provisions of Part V of that Act (except subsections (1), (3), and (5) of section 71A) and those provisions shall apply accordingly with the necessary modifications.
>
> (2) Every appeal under subsection (1) of this section, except an appeal upon a question of law, shall be by way of rehearing of the original proceedings as if the proceedings had been properly commenced in the High Court.
>
> (3) The Court appealed from may on the ex parte application of the appellant order that security under section 73 (2) of the District Courts Act 1947 shall not be required to be given under that section.
>
> (4) The decision of the High Court upon any appeal under subsection (1) of this section shall be final:
>
> Provided that any party may, with the leave of the Court of Appeal, appeal to the Court of Appeal upon any question of law.
>
> (5) An appeal shall lie to the Court of Appeal from any order or decision of the High Court under this Act, other than an order or decision under section 13 of this Act:
>
> Provided that if the order or decision was made on appeal from a Family Court or a District Court an appeal shall lie to the Court of Appeal only in accordance with the proviso to subsection (4) of this section.
>
> (6) Except on an appeal upon a question of law, the Court of Appeal may in its discretion rehear the whole or any part of the evidence, or may

> receive further evidence, if it thinks that the interests of justice so require.
>
> (7) The decision of the Court of Appeal shall in every case be final."

Counsel concedes that the right to appeal in terms of this section only arises where the order is one which has finally determined or dismissed the proceedings. The matter before me therefore raises again the vexed question as to when an order may be properly said to have finally determined proceedings. In Ramsey v. Ramsey 1983 N.Z.L.R. 263 Bisson J. referred to the question. He said at p.264:-

> "They were called "interim orders" but we must consider, notwithstanding that, whether they fall within s.31 (1). As I read that section, there is a right of appeal to the High Court where the proceedings have been in one way or another finally disposed of. That is to say, either an order has been made or refused, or in some other way the proceedings have been finally determined or dismissed. The words "or has otherwise" clearly limit the type of order previously referred to in that section as being an order which has finally determined and so disposed of the proceedings. In this case such orders clearly were not made because in the particular circumstances only interim orders were made and the proceedings adjourned for a hearing and final determination."

Greig J. had arrived at a similar conclusion in the case of G. v. R. (1981) 2 N.Z.L.R. 91. In that case Greig J. had to consider an interlocutory order and an interlocutory order is defined by s.71 of the District Courts Act 1947 as meaning "any decision or order made by the Court in the course of any proceedings." Counsel then drew my decision to the decision of Eichelbaum J. (as he then was) in Anderson v. Jim

Hunt and Company Limited (1986) 1 N.Z.L.R. 625. In that case the Judge referred to the continuing divergence between the two approaches to the question, in the one case where the Court looks at the nature of the application and the other at its outcome and the effect in the particular proceedings. He pointed out that for the purposes of the District Courts Act, the Legislature had indicated that interlocutory orders were those that were made in the course of any proceedings. He pointed out that with that definition the distinction was between the end determination of the litigation which was to be regarded as the final order and orders preceding that, whatever their effect.

Ms Cull for the appellant says that it is necessary to look at the substance of the order made by the Judge in the District Court as distinct from the terminology which purports to describe it. On the file it appears that the actual order made by the Judge was in the following terms:-

> "Interim custody of (born 1988) to the father for the purpose only of enabling the father to return the child to the jurisdiction of the Family Court of Australia. Warrant to issue forthwith. (Const. or Soc. Worker) Leave to father to take child out of NZ.
>
> B.D. Inglis Q.C.
> 23/2/90"

The warrant issued in accordance with that order is not described as being interim, it is numbered as being under

No.031-028-90 in the Family Court and headed [redacted] Applicant, [redacted] Respondent".

I note that the application by the appellant is shown as having the same Family proceedings number but in that she is the applicant and the present respondent is the respondent. The Judge says in his reason for the decision that he made the order on the basis of an urgent application by the present respondent. It appears from the file as though there are in fact two applications extant, one from each of the parties.

Both applications are described in the reasons for judgment as being applications for interim orders for custody and certainly the application from the appellant is expressly for an interim order for custody. The actual application made by the respondent is not before me. s.11 of the Guardianship Act 1968 allows the Court to make such interim or permanent orders with respect to the custody of a child as it thinks fit. Custody is defined in s.3 of the Act but there is no definition of an interim custody order as distinct from a final custody order. On the ordinary meaning of the word there must be an element of temporariness as distinct from finality in an interim order and I should have thought that the concept must at least contemplate the possibility that an order made lacking finality will be reconsidered. An interim order will normally be made pending a permanent order and presumably it will be possible to make an interlocutory application for an interim

order in proceedings which are ultimately contemplated to be taken to a final order but there does not appear to be any reason why separate applications could not be made in terms of the Act for an application for an interim order only. Indeed since the Court has power to make orders from time to time there could be successive applications for interim orders. Situations are conceivable where such an order would be appropriate and no final order contemplated, because for example, a temporary illness of a custodial parent. It seems to me that a disposition of a particular application designed to achieve a particular order will when disposed of, have been disposed of finally for the purposes of s.31. That will clearly not be the case where the interim order is sought during the course of an application for a final order but where the application seeks only an interim order, I cannot see that it has not been finally disposed of when an order is made in terms of its prayer.

An interim custody order could in fact last for a considerable length of time and if there is merit in there being an appeal in respect of a final custody order, then one would assume in the interests of the child and bearing in mind the possibility that orders of this kind can be made ex parte and under conditions of considerable stress and haste, that it should be open to review in the same way. In this case the applications were in both cases expressed to be made for interim custody orders. There is no suggestion that either

party proposes to take the extant application further than has already been done and on the material before me I conclude that the particular applications or at least that brought by the respondent has been finally disposed of. I considered the possibility that the order made was genuinely an interim one pending a final disposition which would await the outcome of the Australian proceedings which might be thought to have a bearing on the way in which the matter is dealt with in New Zealand. However there is nothing on the material before me to suggest that that is so.

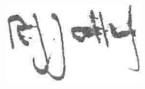
The distinction for the purposes of the Act is not between interim and final orders but between the final disposition of matters before the Courts and the determination of matters preliminary to that disposition.

The Judge refused leave to appeal and gave reasons for that refusal, but the particular point now raised be me was not raised before him or referred to by him and he has not had any opportunity to consider it. The reasons given by him for refusing leave to appeal do not bear on this question at all.

While therefore I have every sympathy for what the Judge has done and accept the reasons why he did it, in my view bearing in mind the nature of the particular application and the relief sought, the disposition is to be regarded as final for the purposes of s.31 of the Guardianship Act and an appeal therefore lies.

I note that in his reasons for refusing leave, the Judge expressed the view that if leave had been granted, it would have been granted on conditions designed to ensure that this matter was resolved with as little further disruption as possible. I wholly sympathise with that approach. In the circumstances I do not have power to impose conditions but I do express the view that it is of the greatest possible importance that this matter be given priority and dealt with at the first available opportunity.

I answer therefore the question as to jurisdiction that the order appealed against is properly to be regarded as a final disposition and therefore appealable.



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