22/2.

NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.1176/89

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BETWEEN: G[illegible] CORNWELL
of Auckland, [illegible]

Appellant

A N D: P[illegible] SMITH
of Pukekohe, [illegible]
and
C[illegible] SMITH, his wife

Respondents

Counsel: P M Molloy for appellant
D M Carden for children

Judgment: 11 February 1991

JUDGMENT (NO.2) OF HENRY J

This judgment is concerned only with the appeal against orders made against the Appellant under s.29A (6) and s.30 (7) of the Guardianship Act 1968. Under the former, the order was for payment of the sum of $650.00 in respect of the costs of the Court-appointed specialist (which totalled $1200.00) and the sum of $5500.00 towards the costs of counsel for the children (which totalled $9012.24).

At the hearing of the appeal I directed that the Solicitor-General be advised of the appeal against those particular orders, it being inappropriate in my view for those issues which directly concern the Crown to be considered without opportunity being given for argument in support of the orders being adduced.

Crown counsel has now lodged a memorandum in which it is submitted that because this is an appeal under s.31 of the Act the appeal is a hearing de novo pursuant to subsection (2), with this Court exercising its discretion under both provisions in question, in the same way as this Court deals with the substantive issues on appeal (K v K [1979] 2 NZLR 91. This is therefore common ground as between the Crown and the appellant, and I am prepared to proceed on that basis which seems to me to be in accord with the provisions of s.31 (2).

Crown counsel did not wish to make submissions as to whether or not orders should be made and noted that the overriding principle that the welfare of the child was to be paramount (s.23) was applicable.

I can see no proper reason for now making orders against the appellant under either s.29A (6) or s.30 (7). As matters have eventuated the substantive appeal was successful, and as a consequence the appellant now has custody of the two children. He is legally aided. He has no assets of any substance which sensibly could be realised. His income as a tow truck driver is moderate ($270.00 per week) and he now has the responsibility of maintaining the two children who are both attending boarding school. It is clear that any award would not only be difficult for him to meet, but also would have a

substantial effect on his ability to provide for the needs of the children, to their detriment.

Accordingly, the appeal is also allowed in respect of Order No. 7 contained in the decision of the Family Court dated 7 July 1989, which is now quashed. The fees and expenses of the specialist are to be met from money appropriated by Parliament for that purpose pursuant to s.29A (6).

I observe that in this case it appears that the orders in question were made in a reserved decision following the hearing of the substantive application, but without any prior indication that they were under consideration. If the Family Court has in mind the exercise of its discretion to make such orders, the party to be affected must be given the opportunity of being heard. It must also always be necessary to ensure that any award properly takes into account the financial position of the affected party.

Henry J.

Solicitors:

P M Molloy Esq., New Lynn, for appellant
D M Carden Esq., Auckland, for children