In the marriage of RICE, M.A. and ASPLUND, C.J.

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(1979) FLC ¶90-725

Other publishers' citations: (1978) 6 FamLR 570

Full Court of the Family Court of Australia at Sydney.

Judgment handed down 22 November 1978. Received from Court 22 January 1980.

Custody — Change of custody order made in the previous year — Correct approach of Court considering application to vary custody order — Family Law Act 1975 — sec. 64(1).

In October 1975 a court made an order granting the custody of the one child of the marriage born December 1971, to the father. Approximately nine months later, in June 1976, the wife made an application to vary the order for custody. The court varied the order for custody granting custody to the mother. The husband appealed.

Held: The court should have regard to any earlier order and the reasons for that order and the material on which that order was based. A court should not lightly entertain an application to reverse an earlier custody order. Therefore, the court would need to be satisfied by the applicant that there is some changed circumstance which will justify such a serious step, some new factor arising or, at any rate, some factor which was not disclosed at the previous hearing which would have been material. These are not necessarily matters for a preliminary submission, but they are matters that the judge should consider in his reasons for decision. There should be circumstances which require the court to consider afresh how the welfare of the child should be best served. Once the court is satisfied that there is such a factor, then the issue of custody is to be determined in the ordinary way. While the court should give weight to any earlier decision, the judge is not bound to the earlier court's assessment of the parties or views as to the best interests of the child. So the second judge was not bound to follow the first judge's view as to the parties or as to their truthfulness, even though the second judge did not expressly state reasons for departing from the view of the first judge. Appeal dismissed.

McManus v. McManus (1969) 13 F.L.R. 449 and *Hayman and Hayman*1976) FLC ¶90-140 considered.

(Parts of the judgment relating to considerations of the status quo and property questions are not reported.)

Appearances: Mr. M.D. Broun (instructed by Bartier, Perry & Purcell) appeared on behalf of the appellant/husband; Mr. P.R. Arden (instructed by J.P. Grogan and Co.) appeared on behalf of the respondent/wife.

Before: Evatt C.J.; Pawley S.J. and Fogarty J.

[78905]

Extracts from judgment reproduced below.

Evatt C.J.: This is an appeal from the decision of *Ross-Jones* J. given in the Family Court of Australia at Sydney on 5 May 1978 in a matter concerning custody, access and property. It is an appeal by the husband.

The parties were married on 18 November 1967. There is one child, J, a girl, born on 1 December 1971. The parties separated on 16 February 1975 when the wife left the matrimonial home with the child. She was for some period after the separation in company with Mr. Asplund.

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On 25 February 1975 the husband took the child from the wife against her wishes. Proceedings were commenced shortly after in the Hornsby Court of Petty Sessions. On 13 March 1975 the wife applied to the Supreme Court of New South Wales for custody and access. On 1 October 1975 after a contested hearing, *Larkins* J. ordered that the husband have custody, that the wife have defined access.

On 18 May 1976 the husband applied for orders to reduce the period of access granted to the wife. On 23 June of that year the wife applied for custody. On 3 September 1976 a decree nisi was granted on the husband's application. The wife married Mr. Asplund in that same month, September 1976. The hearing of the matter commenced in August 1977 and was completed on 29 September. Judgment was given on 5 May 1978 when *Ross-Jones* J. ordered that the wife have custody of the child and that the husband have reasonable access. The child was handed over into the custody of the mother shortly after. It is against that order of *Ross-Jones* J. that the husband has now appealed.

The substantial point of law argued by counsel for the appellant was that in order to justify the review of an earlier custody order, the applicant must satisfy the court that there has been substantial change in the circumstances since that earlier order. It is not sufficient, in his submission, that the court takes a view different from that taken by the judge who first heard the matter. In this case it was submitted that there was no change in circumstances since the date of *Larkin* J.'s order of October 1975 to warrant a review and a change of custody and that insufficient weight was given to the view which *Larkins* J. formed of the parties and of the issues. Counsel for the appellant relied on the case of *McManus* (1969) 13 F.L.R. 449. In that case the father applied successfully to vary a consent custody order. The Full Court of the Supreme Court of New South Wales allowed the appeal, finding that the judge, *Selby* J., had given insufficient weight to the earlier decree, and I quote:

> ``The decision to overturn such decree made with the consent of the father, consent given in the light of the then known circumstances, is one which requires most substantial grounds. A reversal of the decree would require the discharge of a particularly heavy onus on the husband, a criterion not found in the affirmative by his Honour. One would look for new facts and circumstances to be revealed before this onus would be discharged."

The case of *McManus* was referred to by the Full Court of the Family Court in the case of *Hayman* (1976) FLC ¶90-140 at p. 75,680. That case, like the one before us, concerned a custody decision in which a Judge of the Family Court had reversed an earlier custody order made by the Supreme Court. One ground on which the appeal was allowed was that the Family Court Judge did not have regard to the prior decision of the Supreme Court, or to the reasons for that decision. In fact, the Family Court had neither the transcript nor the reasons for that decision before it.

The principles which, in my view, should apply in such cases are that the court should have regard to any earlier order and to the reasons for and the material on which that order was based. It should not lightly entertain an application to reverse an earlier custody order. To do so would be to invite endless litigation for change is an ever present factor in human affairs. Therefore, the court would need to be satisfied by the applicant that, to quote *Barber* J., there is some changed circumstance which will justify such a serious step, some new factor arising or, at any rate, some factor which was not disclosed at the previous hearing which would have been material (passage quoted in *Hayman and Hayman (supra),* at p. 75,680). These are not necessarily matters for a preliminary submission, but they are matters that the judge should consider in his reasons for decision. It is a question of finding that

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there are circumstances which require the court to consider afresh how the welfare of the child should best be served. These principles apply whether the original order is made by consent or after a contested hearing. The way they apply and the factors which will justify the court in reviewing a custody order will vary from case to case.

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Once the court is satisfied that there is a new factor or a change in circumstances, then the issue of custody is to be determined in the ordinary way. The court must apply the principles of sec. 64 and weigh up the factors for and against the proposals of each party, having regard to the welfare of the child as the paramount consideration. One of these factors is the length of time the child has been in a particular situation. Another is any earlier decision of the court, and the reasons for that decision. The possible advantages or disadvantages of a change in custody need consideration along with all the other usual factors. While the court should give weight to any earlier decision and, in particular, to any findings of fact, the judge is not bound by the earlier court's assessment of the parties or views as to the best interests of the child. These are matters which cannot be determined by any fixed or absolute standard.

How did his Honour approach the case in regard to the principles that I have discussed? His Honour said:

> ``Custody applications cannot be allowed to be recommenced without some significant change occurring after the original hearing. In this case there are some significant changes, in that the wife has now stabilised her accommodation, has married Mr. Asplund and J was to commence schooling which made the previous access orders unworkable and unrealistic. Whether the wife was responding to the husband's prior application, or whether she believed such changes merited her application, I believe her application is justified on both counts."

His Honour has approached the issue, in my view, on the basis of the need to establish a significant change. There is no error in this approach. His Honour, in the passage quoted, listed the factors which he considered relevant to that issue.

As regards the wife's remarriage, counsel submitted that this had been seen as a probability at the time of the hearing before *Larkins* J. It is true that *Larkins* J. did not accept the wife's evidence about her relationship with Mr. Asplund, believing it to have been of a closer nature than she would admit. This finding, his impression of her as a liar and as a naive being and foolish person, and the fact he had not seen and knew little of Mr. Asplund and took an unfavourable view of him, were significant factors in *Larkins* J.'s decision. Counsel for the appellant submitted the wife could not rely on her marriage to Mr. Asplund and on his present suitability as a stepfather when it had been her choice not to call him as a witness before *Larkins* J. As their relationship was a probability foreseen by *Larkins* J. it was not, he submitted, a change in circumstances which could be relied on. This submission seems to be very special pleading. The court cannot determine the welfare of the child by applying some sort of estoppel rule. The fact is the wife's future in late 1975 was fraught with uncertainties, most of which have now been resolved. The remarriage was, in the circumstances of this case, a sufficient reason for reopening the issue of custody, although not necessarily for changing custody. That decision has to depend on the future of all the relevant factors.

Another ground of appeal was that his Honour ought not to have been ready to substitute his view of the parties for that of the judge who had previously decided the question of custody without substantial reasons. *Larkins* J. extolled the virtues of the father, describing him as a model father, whereas the mother he considered to have a degree of instability, to be of poor morality and low intelligence. *Ross-Jones* J. adverted to *Larkins* J.'s judgment and stated that because of it he carefully observed the wife. He reached a more evenly balanced view of the parties, finding that J would be adequately and properly cared for by either parent. He accepted the wife as a person of truth, warmth and understanding. He accepted Mr. Asplund as a witness of truth. He made some comments critical of both parties. He found the husband to be inflexible and suspicious and that the wife had been highhanded on one occasion. He concluded:

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> ``J has been and is being adequately physically cared for by the husband in the former matrimonial home and he has done a very good job with the help of his mother and sister and latterly more self reliant. However, I am concerned that his nature and outlook and relationship with the wife are such that they would inhibit the overall welfare of J. The wife, I believe, sees J's needs more realistically than the husband and in addition will be available on a full time basis to care for her as she has undertaken to give up her employment. The husband has the support of his mother which is not

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> and will not always be available and in any event she has a rather restricted outlook as regards J's relationship with her mother. Mr. Asplund has satisfied me that he has and will maintain a good relationship with J and encourage her continued regular contact with her father.
>
> The overall proposal of the wife and her second husband are to me the more meritorious of the competing proposals and I reach that decision with reluctance and after careful consideration, particularly as the husband has displayed a concerted and consistent devotion to J which he can continue during regular access periods."

In my opinion his Honour was entitled to form his own view of the parties once there were circumstances which justified a re-examination of the custody issue. He was not bound to follow *Larkins* J.'s view, even though he did not expressly state reasons for departing from that view.

There are surrounding circumstances which could account for a considerable change in the wife's demeanour. Her own position and her relationship with Mr. Asplund had been uncertain at the earlier hearing. The case before *Larkins* J. was heard before the commencement of the *Family Law Act,* which removed fault as a factor in matrimonial causes. She may well have felt at a considerable disadvantage in her situation under the earlier legislation. It is not, however, for us to speculate. His Honour's findings are supported by the evidence before him.

The order proposed then is that the appeal be dismissed.

Pawley S.J.: I agree. I have nothing to add.

Fogarty J.: I also agree and do not desire to add anything further.

Appeal dismissed.

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