MAUGER v. MAUGER[1]

Matrimonial causes—Desertion—Offers to resume cohabitation—Discretion to refuse petition—Principles for appellate court review—Custody and access—Effect of parent's extreme religious beliefs.

The parties had married in 1945, living happily together until about 1960, there being five children of the marriage. Sometime in 1959 the husband had adopted the religious beliefs and practices of the Exclusive Brethren sect and, from that time on, the marital relationship worsened to such an extent that within three years the marriage was completely ruined.

During this period the husband's attitude had changed entirely. He became solemn and severe in his manner, constantly pressed his wife to join the sect, forbade her social intercourse with persons who were not members of the sect and was guilty of cruelty towards the two eldest children in his attempts to force them to join the sect. Despite the husband's intolerable conduct in the name of his religion, the wife did nothing to end the marriage.

In May 1962 however, the husband deserted his wife, taking the children with him. The wife applied for a custody order and in July 1962 Mansfield C.J. granted her custody of the three youngest children, with provision for access by the husband.

On 8 March 1965 a divorce raid took place and the wife was found in the act of committing adultery. The husband took the two youngest boys out of her custody on that date, leaving only the youngest child, a daughter, remaining in the wife's custody.

Subsequently, the husband filed a petition for dissolution of the marriage on the ground of adultery. The wife, in her answer to the petition, denied the allegations of adultery and sought a dissolution on the ground of desertion.

The trial judge, Hart J.,[2] refused to make a decree on the husband's petition, but exercised his discretion in favour of the wife, granting her a decree *nisi* on the ground of desertion. His Honour also awarded custody of the three children concerned in the proceedings, (the two younger boys and the daughter), to the wife and refused the husband any access to the children.

The husband appealed from this judgment and, in determining the appeal, the Full Court of the Supreme Court of Queensland was substantially concerned with four main issues. These were:

(1) whether the period of desertion running against the appellant had been terminated by his offers to resume cohabitation;

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[1] [1967] Qd. R. 62. Supreme Court of Queensland; Lucas, Wanstall and Skerman JJ. The High Court on 19 October 1966 refused an application for special leave to appeal from the Supreme Court judgment, and the Judicial Committee of the Privy Council refused leave to appeal on 4 July 1967.

[2] (1966) 7 F.L.R. 484. This report deals only with the judgment of the trial judge on the issues of custody and access.

(2) whether the trial judge had erred in the exercise of his discretion by refusing the appellant's petition while granting the respondent a decree despite her adultery and lack of frankness with the Court;

(3) whether the trial judge had been correct in awarding custody of the children to the respondent, particularly in view of the indefinite nature of the association between the respondent and co-respondent;

(4) whether the trial judge had properly exercised his discretion in refusing the appellant any form of access to the children.

Desertion

Appellant's counsel conceded that the initial withdrawal constituted desertion, but submitted that there were genuine offers to resume cohabitation which prevented the necessary period of desertion from being established. The essential question was whether the respondent was justified in her refusal of the appellant's offers.

The Full Court unanimously rejected the appellant's submissions and upheld the findings of the trial judge on this point. His Honour had ruled that on the facts, the respondent was justified in refusing the offers because—

(a) by her acceptance, the respondent would be subject to the same intolerable treatment as before;

(b) the word of the appellant could not be relied on.

In relation to the first ground, the trial judge found that the appellant had become fanatical in his religious beliefs and still was so at the date of the trial. As a result of his religious beliefs he had continually urged the wife to join the sect, called her ' unclean and iniquitous ' when she refused to do so and attempted to break her down physically and mentally.

He forbade her to associate with persons not members of the sect, including her mother, who was seen as iniquitous because she had a wireless set. The appellant had humiliated the wife on other occasions, notably at the funeral of the wife's father. Despite her not being a member of the sect, the wife was compelled by the appellant to obey certain rules of the sect under which she had to endure irksome personal restrictions.

On these facts the Full Court was not prepared to interfere with the trial judge's conclusion that the appellant's desertion was a result of his religious beliefs, and that his treatment of, and conduct towards, the respondent subsequent to joining the Exclusive Brethren in 1959 were attributable to his fanatical adherence to the rules of the sect.

The Court held that as such treatment would be likely to continue if cohabitation was resumed, the respondent was justified in refusing the appellant's offers.

As to the second ground, the evidence indicated only one specific instance of a broken promise by the appellant. The Court, however,

accepted other evidence which pointed to a history of broken promises by the appellant and held that this evidence justified the wife's disbelief in the sincerity of his offers.

Discretion

A problem common to the remaining three issues was the scope for appellate review of discretionary judgments. The Court proceeded upon well established principles,[3] and, in examining the trial judge's exercise of his discretion on each issue, was concerned to find whether he had acted upon a wrong principle, or given weight to extraneous matters, or failed to take relevant considerations into account or made a mistake as to the facts.

In her answer to the appellant's petition, the respondent had denied adultery. During the course of the proceedings she was given leave to amend her answer by admitting adultery on 8 March (the date of the divorce raid). His Honour also advised her to file a discretion statement, telling her that unless she was completely frank with the Court she would prejudice her interests.

The discretion statement disclosed only the single act of adultery but, nevertheless, his Honour found that the respondent and co-respondent had committed adultery on a number of other unspecified occasions. It was argued for the appellant that the discretion available to the trial judge under section 41 (a) of the Matrimonial Causes Act 1959-1966 (Cth), should have been exercised against the respondent and substantial reliance was placed on the English decision of *Bull v. Bull*.[4]

His Honour had little difficulty in rejecting the appellant's argument. He stated that the appellant was guilty of more perjury than the respondent who, except in the matter of her adultery, had generally been very truthful. Upon consideration of *Bull v. Bull*,[5] his Honour was of the opinion that public policy required that a decree be made. In his Honour's view the appellant was entirely responsible for the breakdown of the marriage and he therefore granted the wife her decree, dismissing the appellant's petition.

The Full Court concerned itself mainly with a discussion of the use of the word ' perjury ' in this context. Lucas J., with whom Skerman J. agreed on this issue, decided that the trial judge did not use the word as it was defined in the Criminal Code, but used it merely to indicate his disbelief of the respondent's evidence as to her adultery. Moreover, as between the parties, the trial judge was quite entitled to infer from the facts and according to the accepted standard of proof, that further adultery had occurred without necessarily being conclusive as to the truth in an absolute sense.

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[3] Lucas and Skerman JJ. adopted the principles of review stated by Kitto J. in *Australian Coal and Shale Employees' Federation v. The Commonwealth* (1953) 94 C.L.R. 621, 627. Wanstall J. adopted a similar statement of principle from the joint judgment of Dixon, Evatt and McTiernan JJ. in *House v. The King* (1936) 55 C.L.R. 499, 504-505.

[4] [1965] 1 All E.R. 1057; [1965] 3 W.L.R. 1048.

[5] *Ibid.*

He then reviewed the authorities[6] in point and concluded that it was by no means unprecedented to exercise the discretion in favour of a spouse who persisted in denying adultery which had been found to have been committed.

Wanstall J. reached a similar conclusion also after a careful examination of the relevant authorities.

The Court, having found that the trial judge had exercised his discretion in a proper manner, refused to interfere with the exercise of that discretion and affirmed his decision on this issue.

It is interesting to note that the decision in *Bull v. Bull*[7] ultimately turned on the ground that the interests of the community in the *administration of justice* were such as to prevent the decree being granted in that case to a petitioner who had not frankly disclosed the full extent of her adultery, despite the disastrous consequences which would befall the parties to the case as a result of the decree being refused. Here, in a similar situation, neither the trial judge nor the Full Court specifically advert to this factor, preferring to make their decision in accordance with the wide general principles enunciated in that case.[8] This omission becomes the more notable in view of the trial judge's statement that lack of frankness with the Court on the part of the respondent would seriously hinder her chances of being granted a decree.

Custody

It was argued for the appellant that the trial judge had determined custody solely on the ground of religion to the exclusion of, or alternatively, without giving sufficient weight to, other factors and, in particular, to the respondent's association with the co-respondent and the express wishes of the two boys.

His Honour had found one of the rules of the sect to be that member spouses should withdraw from (*i.e.* desert) non-member spouses. He stated that the question of custody really turned on the question of religion and then proceeded in the following terms:

> In my opinion the rule of the sect as to the withdrawal of married spouses is harmful to the spouses, harmful to the children and harmful to the community. *It is also contrary to public policy.* The refusal to allow the children to take part in the life of the community is . . . very detrimental to them. . . . In my view it is very much against the children's interests to allow them to be brought up in the tenets of the sect. I am therefore going to give custody to the respondent.[9]

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[6] *Chetwynd-Talbot v. Chetwynd-Talbot* [1963] P. 436; *Howarth v. Howarth* [1964] P. 6; *Paton v. Paton* (1964) 7 F.L.R. 62.

[7] *Supra.* n. 4.

[8] In *Williams v. Williams and Harris* [1966] 2 All E.R. 614, the Court of Appeal was also faced with a similar problem, but made no reference to the wide principles enunciated by Sir Jocelyn Simon P. in *Bull v. Bull* [1965] 1 All E.R. 1057; [1965] 3 W.L.R. 1048.

[9] (1966) 7 F.L.R. 484, 486 (italics added).

During the proceedings, counsel for the respondent stated that the sect professed ' a religion contrary to public policy to which children should not be exposed ', and his Honour had commented that the issue might appropriately be considered by the High Court sometime in the future.[10]

The Full Court declined to make any such consideration and in fact was careful to dissociate itself from any comment on public policy issues arising from the case.

Section 85 (1.) of the Matrimonial Causes Act 1959-1966 (Cth) requires the court to ' regard the interests of the children as the paramount consideration '. The Full Court, after interpreting its role under that section, concerned itself with an examination of whether the trial judge had made a correct assessment of the principles involved.

The Court found that the trial judge had considered the appellant's religious beliefs and the rules of the sect only in so far as they affected the interests of the children. His decision as to custody was made on the basis that it would be adverse to the children's interests for them to remain with the appellant, given that he would continue his current attitudes and way of living, it being irrelevant for these purposes whether his behaviour was motivated by his religious beliefs or otherwise.

The Full Court considered that the correct approach was to decide who was the proper custodian as between the parties in all the circumstances, of which religion was but one factor, having due regard to the fact that the interests of the children was the paramount consideration. The approach adopted by the trial judge was, in the opinion of the Full Court, a correct approach to the problem and it therefore refused to interfere with the exercise of his discretion on this ground.

As to the other grounds, the Court decided that the fact that his Honour required an undertaking from the respondent that she would not bring the children into contact with the co-respondent unless and until she married him was sufficient indication that he had considered the possible effects of the association between the respondent and co-respondent, and they therefore rejected argument on this ground.

The small importance attached to this argument is in contrast to that given to similar arguments in other cases. In *Priest v. Priest*[11] and *Anderson v. Anderson*[12] the association between the respondent and co-respondent was a vital factor in determining the custody issue, and both cases clearly demonstrate the inherent danger in accepting mere undertakings from prospective custodians. The acceptance of the respondent's undertaking by the Full Court is all the more surprising in view of the Victorian Supreme Court's recent decision in *Priest v. Priest*,[13] where a similar undertaking was ruled to be insufficient and used as a basis for reversing the trial judge's decision as to custody.

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[10] *Supra* n. 1. The High Court refused an application for special leave to appeal from the Supreme Court judgment.

[11] [1965] V.R. 540.

[12] (1960) 34 A.L.J.R. 65.

[13] *Supra.* n. 11.

There was a division among the Court on the final point however. Skerman J., who was in the minority on this issue, after making a careful review of the authorities, concluded that no order as to custody should be made with respect to the boy Martin (aged 14) in view of his express wish to remain with his father. The majority, Lucas and Wanstall JJ. decided, however, that custody of all three children should go to the respondent, notwithstanding the wishes of the children.

Wanstall J. dealt with the argument in considerable detail. The evidence indicated that during the period in which the appellant had regular access to the boys under the original custody order of Mansfield C.J., he had influenced them in a marked way. Upon their return to the respondent's custody after contact with the appellant, the boys were often extremely disobedient towards their mother, were disrespectful and difficult to control. Wanstall J. stated that it was open to the trial judge to find, as he did, that the boys were being indoctrinated during their periods of contact with the appellant. On these facts it was correct to treat the boys' views with some reservation. The trial judge still has a responsibility to reach an objective conclusion as to what was best for the children and, in the circumstances, Wanstall J. was not prepared to conclude that his Honour had been in error in overriding the express wishes of the two boys.

Access

The trial judge had said that access was the most difficult question and this becomes readily apparent in the judgments of the Full Court. In refusing access, his Honour had given as his reasons:

(1) It is in the interests of the children that they should make a clean break with the teachings of the sect. If the petitioner is allowed access this will not be possible. He is a fanatic who could not be trusted not to try to indoctrinate the children whenever he saw them. He has done so in the past.

(2) If he is given access, the children will have no chance of getting away from the teachings; whereas if he is denied access I think they will probably escape.

(3) If he does have access, the children will cease to obey their mother and will have no respect for her whatsoever.

(4) In my view the prior access which the petitioner had whilst the respondent had custody was extremely harmful to them. They were torn both ways and became extremely disobedient to their mother.[14]

The Court realized that to deny access was a drastic order to make. Lucas J., however, was of the opinion that the circumstances of the case justified the denial of access, his main fear being that access by the appellant would prevent the respondent from preparing the children for a normal adult life. His Honour stressed, however, that the order was not irrevocable and that a future change in circumstances could bring about a re-opening of the issue.

[14] (1966) 7 F.L.R. 484, 487.

Wanstall J. was rather more reluctant to uphold the refusal of access. His Honour stated that if the reasons given by the trial judge were intended as a condemnation of the sect's teachings, then the trial judge would clearly have been in error.

He was prepared, however, to find that the trial judge, in refusing access, had not been so concerned with the appellant's religion as with its practical consequences. His Honour held it to be unnecessary for him to determine whether there was any error in the reasoning of the trial judge and proceeded to uphold the denial of access on the ground that the award of custody would be frustrated by allowing access.

Skerman J. was again in the minority on this issue. He was of the opinion that the trial judge had misinterpreted evidence as to previous occasions when the appellant had access to the children and, further, that he had failed to give sufficient weight to the respondent's uncertain future and the Court's lack of knowledge regarding the co-respondent.

His Honour pointed to the very real difficulties confronting the appellant in any attempts he might make to ascertain the whereabouts of the children, or even whether the respondent and co-respondent had married. In view of the complete uncertainty as to the plans of the respondent and co-respondent, it was possible that the children could suffer adversely (as by coming into contact with the co-respondent),[15] while the appellant, without access, had no means of determining the true position.

The refusal of access was also criticized by Skerman J. on the ground that, in making the order, the trial judge had failed to properly consider whether access could have been granted on terms which would have precluded any possible further indoctrination of the children. His Honour cited *Barker v. Barker*[16] as a case in point and there, in similar circumstances, just such a provision had been made. Despite his being in the minority on this issue, Skerman J. raises considerations which are worthy of close attention from courts dealing with similar problems in the future.

In the result, however, the Court, despite some misgivings, upheld the trial judge's order in refusing any form of access to the appellant.

A. CORK

[15] On this point, see *Anderson v. Anderson* (1960) 34 A.L.J.R. 65.
[16] (1966) 8 F.L.R. 267.