SING v. MUIR[1]

Matrimonial causes — Custody — Section 85(2) Matrimonial Causes Act 1959-1966 — Welfare officer's report — Judicial discretion — Disclosure — Admissibility — Relative claims of mother and father over 11 year old boy.

In the Tasmanian Supreme Court, in an as yet unreported decision, Burbury C.J. was called upon to consider the status of a welfare officer's report in a custody dispute. In delivering his judgment, his Honour points to some of the deficiencies of the use of the adversary system and of reliance upon the traditional rules of evidence in custody hearings.

At the hearing of an application for a variation in an order made under the Matrimonial Causes Act for the custody of an eleven year old boy, Burbury C.J. adjourned the proceedings and directed that a welfare officer should interview the boy and investigate the comparative living conditions of both parents. Section 85(2) of the Matrimonial Causes Act 1959-1966 (Cth.) provides:

> The court may adjourn any proceedings [with respect to the custody, guardianship, welfare, advancement or education of children of a marriage] until a report has been obtained from a welfare officer on such matters relevant to the proceedings as the court considers desirable, and may receive the report in evidence.

Placing considerable reliance upon the views of the welfare officer making the report, his Honour refused a change in custody. However, a further application when the boy grows older was not foreclosed by the court.

In ordering this report, Burbury C.J., like the Victorian Supreme Court in *Votskos v. Votskos*,[2] assumed that he did not require the consent of the parties as the matter was within his "independent discretion".[3] Prior to the delivery of his judgment,[4] his Honour became aware of the expressions of opinion by the South Australian Supreme Court in *MacGillivray v. MacGillivray*.[5]

In *MacGillivray v. MacGillivray*,[6] Travers J. refused to admit a welfare report of a similar nature into proceedings under the Guardianship of Infants Act 1940 (S.A.). Upon appeal, the South Australian

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[1] Supreme Court of Tasmania, Burbury, C.J. Not reported. References are to the Court transcript.

[2] (1967) 10 F.L.R. 219, 221; the judgment of the Supreme Court was delivered by Winneke, C.J.

[3] Transcript, p. 3.

[4] Transcript, p. 3.

[5] [1967] S.A.S.R. 408.

[6] *Ibid.*

Full Supreme Court avoided the issue by finding that consent could be inferred from the conduct of the parties at an earlier stage of the hearing.

The obvious corollary to the consent issue is the question of disclosure. In *Sing v. Muir,*[7] disclosure of the report had already been made to each party's solicitor. This is probably why Burbury C.J. did not refer to the conflict existing between the English case of *Official Solicitor v. K.*[8] and *dicta* by Barry J. in *Reeves v. Reeves (No. 2)*[9] on the question whether disclosure of the full contents of the report is mandatory.

Some consideration should be given to the ramifications of the attitude of the House of Lords in *Official Solicitor v. K.,*[10] to the effect that non-disclosure may be proper in exceptional cases. In view of the failure of their Lordships to specify what they meant by "exceptional cases", it is pertinent to pause and see just what cases spring to mind. First, consider the situation where the welfare officer receives considerable assistance from an informant who is adamant about concealing his identity from the parties. Should the welfare officer be able to respect this confidence or must he discard valuable information in the interests of full exposure? Alternatively, consider the unenviable position of the welfare officer who is informed by a medical practitioner of one of the parties that his patient is suffering from an incurable disease the nature of which the doctor would rather keep from his patient. Other borderline situations might be canvassed.

Perhaps, the answer lies in partial nondisclosure of the contents of the report or alternatively full disclosure to the counsel engaged by each party but not to the parties themselves. Query, whether nondisclosure may be circumvented by way of subpœna and cross-examination of the welfare officer himself. *Reeves v. Reeves* (*No.* 2)[11] indicates that this is unlikely. However, salvation may lie in an appeal on the ground of denial of natural justice if the English authorities of *Fowler v. Fowler and Sine*[12] and *In re K.* (*Infants*)[13] attract support in Australia.

To the objection by counsel for the appellant that the report was inadmissible as containing matters of hearsay and opinion, his Honour answered:

> Objections of this kind proceed from a failure to perceive that the statutory provision in section 85(2) . . . represents a departure

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[7] Transcript, pp. 5, 8.
[8] [1963] 3 All E.R. 191.
[9] (1961) 2 F.L.R. 280.
[10] [1963] 3 All E.R. 191.
[11] (1961) 2 F.L.R. 280.
[12] [1963] P. 311, 317 per Willmer, L.J.
[13] [1963] Ch. 381, 405 per Upjohn, L.J.

> from the entrenched tradition that a Court may only act on such evidence conforming to the rules of legal admissibility which the parties choose to put before it.[14]

Burbury C.J.'s approach was consistent with that laid down by Gowans J. in *Priest v. Priest*,[15] and which was approved in *Votskos v. Votskos*:[16]

> It will no doubt be inevitable . . . that the welfare officer will travel outside the mandate given to him or her, and in doing so introduce matters of hearsay, but as long as the judge excludes from consideration that which he has not asked for, and gives to what is asked for only such weight as its sources properly deserve, the procedure is not likely to render itself susceptible to impeachment. To impose more stringent requirements on welfare officers who are not trained as lawyers, or greater limitation on the use that may be made of their reports by judges hearing these cases, would be likely to emasculate a useful procedure.

Burbury C.J. emphasised that a judge has considerable discretion as to the weight to be given to various aspects of the report. He advised parties wishing to challenge any part of a welfare officer's report to call evidence in rebuttal, a course of conduct which neither party chose to follow in *Sing v. Muir*.[17]

The remainder of the case is concerned with the actual question of custody of the eleven year old child of the dissolved marriage. Although the dominant reason for ordering the report was to explore the likely male influences on the boy, a factor which he considered most important, Burbury C.J. adopted the same approach as *In Re H.*[18] and *Re C.(A) (an infant): C. v. C.*,[19] in retreating from the attempts of Sachs L.J. in *W. v. W. and C.*[20] to return to a presumption of law that an older boy is better off with his father. Burbury C.J.'s unwillingness to accept such a presumption is to be welcomed,[21] for he conceded that male influence may be exerted by persons other than a father — an opinion shared by Sir Herbert Mayo in *Besanko v. Besanko*.[22]

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[14] Transcript, p. 5.

[15] (1963) 9 F.L.R. 384, 408-409.

[16] (1967) 10 F.L.R. 219, 222.

[17] Transcript, p. 5.

[18] [1940] G.L.R. 165, 168 as approved by Myers, C.J. in *Reid v. Reid* [1941] N.Z.L.R. 952; *M. v. M.* [1941] N.Z.L.R. 851; *Re Hylton* [1928] N.Z.L.R. 145 and *X. v. Y.* (No. 4) [1955] V.L.R. 105.

[19] [1970] 1 All E.R. 309.

[20] [1968] 3 All E.R. 408.

[21] Despite the conclusions of the authors of a recent American article: P. C. Ellsworth and R. J. Levy, "Legislative Reform of Child Custody Adjudication — An Effort to Rely on Social Science Data in Formulating Legal Policies" (1969) 4 *Law & Society* 167, 201-215.

[22] [1949] S.A.S.R. 275.

His Honour noted that the availability of a welfare officer's report did little to remove the "nagging anxiety"[23] that exists in all custody cases. However, section 85(2) does provide in custody proceedings a "flexible, practical and useful means of obtaining relevant information".[24] It is to be hoped that the expense and delays involved in obtaining such a report do not deter judges from exercising their discretion under section 85(2) for it is a welcome "mark of the times that judges are turning to professional probation and parole and welfare officers for information enabling them to perform certain duties."[25]

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[23] *W. v. W. & C.* [1968] 3 All E.R. 408, 409, per Sachs, L.J.
[24] Transcript, p. 7.
[25] *Reeves v. Reeves* (*No.* 2) (1961) 2 F.L.R. 280, 281 per Barry, J.