CASE NOTES

GRONOW v. GRONOW[1]

Custody — Parents equally suitable custodians — Is there a presumption that a young girl should be left in the custody of her mother — Position and role of appellate court in custody proceedings — Family Law Act 1975 (Cth) — Ss. 43(c), 64(1)(a), (2)

This is the first case on custody disposition under the Family Law Act 1975 (Cth) to go on appeal to the High Court, and is the first opportunity afforded the High Court since *Kades* v. *Kades*[2] to comment on the principles applicable in custody disputes and appeals. At the time of the appeal to the High Court, the child subject of the dispute was aged four and a half years. She was the only child of the marriage of the parties, a medical practitioner and a nursing sister. The facts of this case were somewhat unusual and when Evatt C.J. made the original order, granting custody to the father, her findings of fact indicated that there was little to choose between the parents. Each was found to be a fond and devoted parent able to provide the child with a caring home atmosphere and both were able to offer her high standards of material comfort. Each party was able to elicit the help of his or her mother if he or she were the successful party. The factor which caused Evatt C.J. to make the order in favour of the father was that the mother displayed her antagonism toward the father in the presence of the child.

The Full Court of the Family Court (Watson S.J. and Joske J.; Fogarty J. dissenting) had reversed this order on the ground that her Honour had not weighed the evidence correctly, but on appeal the High Court unanimously restored the original order. In support of the Full Court decision, counsel for the mother raised before the High Court arguments not presented to the Full Court.

From a family lawyer's point of view, the main interest in the case lies in the argument that the award of custody to the mother could be justified and supported by the "mother factor". The essence of this is a presumption that "a young child, particularly a girl, should have the love, care and attention of the child's mother and that her upbringing should be the responsibility of her mother, if it is not possible to have the responsibility of both parents living together".[3] This "preferred role of the mother" which was asserted strenuously by English courts of a century ago[4] had received support from the High Court when considering custody cases under the Matrimonial Causes Act 1959 (Cth)[5] but has

---

[1] (1979) 54 A.L.J.R. 243; (1979) 29 A.L.R. 129; [1979] F.L.C. 90-716. High Court of Australia; Stephen, Mason, Murphy, Aickin and Wilson JJ.

[2] (1962) 35 A.L.J.R. 251.

[3] *Id.* 254.

[4] *E.g. Austin* v. *Austin* (1865) 35 Beav. 257, 55 E.R. 634.

[5] *Kades* v. *Kades* (1962) 35 A.L.J.R. 251; *Lovell* v. *Lovell* (1950) 81 C.L.R. 513.

come under increasing criticism in recent years, particularly by the Full Court of the Family Court.[6]

Despite the strong statement favouring the presumption made by Glass J.A. in *Epperson* v. *Dampney*,[7] statistics presented to the Joint Select Committee on the Family Law Act indicate that it does not exercise as strong an influence as feared. A sample of contested custody cases in all Family Court Registries taken in May 1979 indicated that in 48% of such applications the mother received custody, the father in 40% of cases, and in 12% joint custody was awarded.[8] The uncertainty as to the status of the "mother factor" engendered by *Gronow* may cause some alteration in these statistics.

There was a unanimous rejection of the mother's invocation of the factor in this case, but the judgments as a whole do not afford firm guidance to Family Court judges making custody orders. The "majority" judgments of Mason and Wilson JJ. and Aickin J. blunt the force of the previous Family Court pronouncements, without any clear indication of the preference to be accorded the mother.

The clearest discussion of the problem is to be found in the judgment of Stephen J. which makes it plain that presumptions such as the "mother factor" should play only a very limited role in custody cases:

> Even in a community of unchanging social conditions, hard and fast rules or presumptions, based only upon matters of common but not invariable experience, provide a poor basis for the assessment of human behaviour compared with detailed investigation of the individuals in question.[9]

His Honour emphasises that so-called presumptions should only come into effect as a last resort when evidence is scanty or only an inadequate picture of one of the parties can be drawn. He dismisses the cases relied on by the mother, *Storie* v. *Storie*,[10] *Lovell* v. *Lovell*[11] and *Kades* v. *Kades*[12]—all pre-Family Law Act decisions—as irrelevant to the present case. *Kades*, for example, where strong statements favouring the female parent of a young girl were made, is distinguished as it was a case in which an appeal court was confronted with erroneous findings of fact and therefore was one of the rare instances in which "the so-called presumption of maternal preference may be of use".[13]

Relying upon the approach of Sir Richard Eggleston,[14] Stephen J. defines presumptions of fact as "statements that from fact A it is permissible to infer fact B" and goes on to point out that "where there is extensive evidence of fact B, in the present case of the suitability or

---

[6] *E.g. Raby and Raby* (1976) 27 F.L.R. 412; *Hobbs and Ludlow* (1976) 29 F.L.R. 101.

[7] (1976) 10 A.L.R. 227, 241.

[8] Evidence of Evatt C.J. of the Family Court of Australia, before a Sub-Committee of the Joint Select Committee on the Family Law Act, Hansard, 6 July 1979, 5757.

[9] (1979) 54 A.L.J.R. 243, 247.

[10] (1949) 80 C.L.R. 597.

[11] (1950) 81 C.L.R. 513.

[12] (1962) 35 A.L.J.R. 251.

[13] (1979) 54 A.L.J.R. 243, 247.

[14] *Evidence, Proof and Probability* (1978) 94.

otherwise of a mother as compared with a father, to have the custody of their child, there is no need to rely upon inferences".[15] He convincingly negates the arguments in favour of retaining maternal preference by reference to the instant case. The trial judge had undertaken a "painstaking examination" of all the relevant circumstances.

> For her Honour, in those circumstances, to have then given any weight, in favour of the mother, to some additional factor of "maternal preference" would have been to distort, indeed to nullify, the whole process of conscientious evaluation which she was in the course of undertaking. When the individual qualities of the parties have been closely assessed, the subsequent addition of a factor of quite imprecise weight which duplicates matters already weighed in the scales would only serve to ensure an erroneous result.[16]

From this judgment a definite view of the role of the Family Court judge emerges. He or she is to sift and ascertain the facts, and where this is done thoroughly and there is evidence of all the relevant matters a presumption becomes superfluous.

Evatt C.J. had performed this task and her findings of fact "concerning the qualities of each parent stand unimpeached and no inferential process is called for".[17] As well, Stephen J. indicates that an appellate court can only interfere and utilise any presumptions when the trial judge has not fulfilled his role properly. The thrust of the judgment is to reinforce previous Full Court pronouncements, as in *Raby*,[18] that there is no place for a presumption of maternal preference.

In a short judgment, Murphy J. lends support to the ideas expressed in the judgment of Stephen J. although his main contention is that this was not a case for appellate intervention. He cites the passage in *Raby* stating that the "mother principle" is only a factor to be considered where relevant, and that it had been much weakened in recent times.

Clarity, however, cannot be ascribed to the joint judgment of Mason and Wilson JJ. with which Aickin J. agreed on the issue of the "mother principle". Their Honours (in common with Murphy J.) trace the rise of the presumption historically and attribute it to the fact that a woman generally devoted her whole time to household management. For that reason the use of the presumption in *Kades* was understandable as the mother, by remaining at home, was able to devote all her attention to her family's upbringing. Recent social changes with regard to women in the work force are not seen as obliterating the presumption but merely as diminishing its strength. Their Honours see "a radical change in the division of responsibilities between parents" yet do not see this as cause for a complete re-assessment of a principle they concede is based on older social patterns. They prefer to steer a middle course between what they regard as the almost polar views of Glass J.A. in *Epperson* v. *Dampney*[19] (that the "mother factor" has a biological basis) and the

---

[15] (1979) 54 A.L.J.R. 243, 247.
[16] *Id.* 246.
[17] *Id.* 247.
[18] (1976) 27 F.L.R. 412.
[19] (1976) 10 A.L.R. 227.

judges of the Family Court[20] who

> have reduced the presumption to the status of "a factor", or "an important factor" to be taken into account in assessing what is in the best interests of the child. . . . the Family Court, in reaching its conclusion, appears to have proceeded according to sociological and psychological perceptions the truth of which are incapable of precise demonstration. Perceptions of this kind are very much a matter of expert opinion which is notable for its fluctuation. It therefore constitutes an insecure foundation from which to arrive at a generalized conclusion.[21]

Because they take this middle path, and see the principle as more than "a factor" they would seemingly give it a prominent role. The passage above indicates that they see this as a "generalised conclusion", albeit based on human experience, yet they do not carry their discussion the step further and consider how great a role *any* "generalised conclusion" should play in a custody case. They say:

> It is the responsibility of the Family Court to consider where the future of the child would be better served. . . . In discharging this responsibility the Family Court will give weight to the mother factor in common with other features of the particular case. The precise weight to be given to that factor will necessarily depend on the particular circumstances—the structure of the family, the respective roles of the parties within the family relationship, the personalities of the parents and of the child and the arrangements made for the care of the child. Where the mother stays at home and looks after the children while the father works and has little to do with them, the factor has more weight than it has in the case where the mother works on a full-time basis and makes other arrangements for the care of the child.[22]

This suggests that the "mother factor" is somehow an independent fact, so notorious from general experience that it must be weighed against the individual facts in the particular case. To use the factor in the manner suggested here is, as Stephen J. notes, to give these facts a double emphasis. The thrust of the earlier Family Court decisions (and of the judgment of Stephen J.) was to do away with generalisations and to emphasise that the facts peculiar to each case are the matter for the primary judge to consider. The opportunity given the primary judge in a custody case to assess the various alternatives available, aided by reports compiled by welfare officers, means that the facts of each particular case can be evaluated in some detail. It is preferable for the custody allocation of a particular child to be decided on the basis of that individual child's circumstances and not on the basis of a generalisation derived from social conditions which are no longer widespread.

Their Honours' conclusion in the circumstances of this case seems to be that because both parents worked, the factor could not aid the decision, whereas if there is a parent engaged solely in "home duties"

---

[20] In such cases as *Raby and Raby* (1976) 27 F.L.R. 412 and *Hobbs and Ludlow* (1976) 29 F.L.R. 101.

[21] (1979) 54 A.L.J.R. 243, 249.

[22] *Ibid.*

the custody balance is thereby heavily weighted in her/his favour (particularly if that parent is the mother). Surely the question the court should be seeking to answer is what contribution that parent's being at home makes towards the child's welfare as opposed to the style and quality of life offered by the working parent.

This view adopted by three of the High Court judges has skewed the custody assessment process. Some judges will now feel that failure to mention the "mother factor" will expose their decision to appeal,[23] so that it may be given even greater prominence than the High Court sought to accord it. Such a result is to be deplored. As the judgment of Stephen J. demonstrates, there should be only a limited role for presumptions of any kind in custody decisions, and the accent should always be on assessing the individual case. New Zealand proposes to state this by legislation,[24] in the form "There shall be no presumption that the placing of a child in the custody of a particular person will, because of the sex of that person, best serve the welfare of the child" and thus remove any doubts about the status of the presumption. As *Gronow* has failed to eliminate these doubts in Australia, an amendment to section 64(1)(a) in similar terms should be considered.

The other argument addressed to the Court concerned the circumstances in which an appellate court will overturn the decision of the trial judge. For the mother, the recent High Court decision of *Warren* v. *Coombes*[25] was invoked.

That case was an appeal in an action for damages for negligence. The trial judge made findings of fact as to the position on the road of the plaintiff's bicycle and the first defendant's car and from this drew the conclusion that the first defendant could not have been negligent. The New South Wales Court of Appeal refused to interfere, but the High Court (Gibbs A-C.J., Jacobs and Murphy JJ.; Stephen and Aickin JJ. dissenting) refused to let the trial judge's conclusion stand. An appellate court was held to be in as good a position as the trial judge to determine the proper inference to be drawn from undisputed facts or facts established by the findings of the trial judge. As a judge sitting alone must give his reasons, the High Court distinguished this form of review from the traditional reluctance of an appellate court to interfere with the verdict reached by a jury.

The majority in *Warren* v. *Coombes* had been very careful to limit their decision to cases where the facts had been found or settled, and it is not surprising that all the judges in *Gronow* rejected the mother's invocation of the decision. *Warren* v. *Coombes* was distinguished because the inferences drawn by the appellate court there were from facts found by a judge in a *non-discretionary* matter. A custody decision, involving the weighing and comparison of the competing personalities and home-lives of the parents is necessarily a discretionary matter. Traditionally,

[23] The "regrettable" position in many non-jury civil cases, which Murphy J. hoped would be avoided in custody cases, *id.* 250-251.

[24] By an amendment to s. 23 of the Guardianship Act 1968; Guardianship Amendment Bill (No. 2), N.Z.P.D. Vol. 247, 4548 (6 December 1979).

[25] (1979) 53 A.L.J.R. 293.

courts have been reluctant to overturn a discretionary decision[26] and the High Court underlined this reluctance by stressing the advantageous position of the trial judge in assessing the characters of the prospective custodians and weighing the evidence.

The Full Court here had disagreed with Evatt C.J. as to the weight to be given to certain facts and the High Court held that in such circumstances an appeal court should be very slow to intervene and should not have done so in this case. Aickin J. voices the criticism levelled by the whole Court at the action of the Full Court. He says it was "a mistake to suppose that a conclusion that the trial judge has given inadequate or excessive weight to some factor is in itself a sufficient basis for an appellate court to substitute its own discretion for that of the trial judge"[27] and emphasises that interference is to be limited to cases in which the trial judge has exercised his discretion wrongly.

All judges characterise the decision of Watson S.J. and Joske J. as merely an exercise of their own discretion and a substitution of their conclusion for that of the trial judge. This has never been accepted as the proper role of an appellate court.[28] *Gronow* makes clear to a court hearing an appeal on a discretionary matter, such as custody disposition, that it has only a limited ability to upset the original decision. It also makes clear to parties and their advisers that substantial grounds are needed to win such an appeal. This is in line with the general approach exhibited by the Family Court. *Warren* v. *Coombes* allows appellate judges in non-discretionary matters to decide differently from the trial judge the proper inference to be drawn from the facts as found. When a discretionary decision is appealed, *Gronow* declares that the court should be very slow to overturn that decision on the basis of conflicting assessments of the weight to be ascribed to facts.

This approach serves to discourage appeals on custody matters. Stephen J. at the commencement of his judgment questions whether the community was well-served by an appeal when the trial judge had found so little to choose between the two parents. Difficulties caused by the lengthy process of appeal are reflected in the High Court's eventual order.

Although the decision of Evatt C.J. was restored, the inadequacy of this as a custody disposition based on evidence at least a year out of date was realised by all judges. The Court's order was therefore stayed to allow the mother to make further application to vary the order on the basis of more recent evidence. As Stephen J. comments:

> The intervening period [between the original judgment of Evatt C.J. and the High Court hearing] represents a quarter of Annabel's life to date, the most recent quarter and no doubt also the most relevant period as far as predictions as to her immediate future welfare are concerned. Yet the Full Court and, in turn, this Court, involved as each has been in the appellate process, has concerned itself

---

[26] *Lovell* v. *Lovell* (1950) 81 C.L.R. 513; *House* v. *R.* (1936) 55 C.L.R. 499.

[27] (1979) 54 A.L.J.R. 243, 252; see also 245 *per* Stephen J., 248 *per* Mason and Wilson JJ., 251 *per* Murphy J.

[28] See particularly *House* v. *R.* (1936) 55 C.L.R. 499, 504-505, quoted by Aickin J. (1979) 54 A.L.J.R. 243, 251.

> exclusively with what is now long past history, regardless of any recent developments which may have a bearing upon her present well-being.[29]

Mason and Wilson JJ. mention the practice in England of an appellate court allowing in evidence of altered circumstances in the best interests of the child, but draw back from the idea of the High Court adopting such a course.[30] English courts admit the fresh evidence, that is, of changes in circumstances after the original order, so that the case can be disposed of on the facts as they are and not as they once were. The appeal court considers if the new evidence leaves the substratum of the original decision intact and, if so, exercises the discretion in the way the original tribunal would have exercised it on all the facts; otherwise the discretion is exercised anew.[31] If this were adopted by the Full Court of the Family Court (the last court of appeal in the overwhelming majority of custody cases) it may answer the problem posed by the order of the Court in this case and reduce the time spent by the parties in the custody proceedings by eliminating the need to send the matter back to the single Family Court judge for further hearing. Delays in the settlement of custody disputes can only be to the detriment of the child concerned whose future remains undecided and who faces the prospect of a possible unsettling change of custodian. The resolution of custody disputes is governed by the principle enunciated in section 64(1) of the Family Law Act that the welfare of the child is the paramount consideration, which principle should be applied to the structure for hearing custody disputes. The proposed change would be a means of achieving this end.

By staying the order in *Gronow*, the High Court held out hope to the mother that her application could succeed despite the father's ostensible victory before that Court,[32] and lengthened the proceedings between the parties even further. The overall tendency of the decision, however, is to curtail appeals on custody orders. Although the exposition of the "mother factor" is unsatisfactory, the Court has made it apparent that the primary responsibility for these decision rests with the trial judge and if he has performed his task well and exercised his discretion correctly, there is virtually no room for an appellate court to interfere.

LYN MCLENNAN*

---

[29] *Id.* 244.

[30] *Id.* 249.

[31] These principles were discussed by Megarry J. in *In re B. (T.A.) (An Infant)* [1971] 1 Ch. 270.

[32] This hope was fulfilled when the mother was granted custody in the further proceedings (unreported).

* B.A., LL.B. (Hons) (A.N.U.).