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ROYAL COURT

6th January, 1993 1A.

Before: P.R. Le Cras, Esq., Lieutenant Bailiff, and Jurats Orchard and Herbert

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Between: JM **Petitioner**

And: CM **Respondent**

Advocate J.C. Gollop for the Petitioner.
Advocate P.C. Harris for the Respondent.

JUDGMENT

THE LIEUTENANT BAILIFF: The husband, JM following the break-up of the marriage seeks care and control of the three children of the marriage aged presently 12, 9 and 6 who are, subject to access arrangements, in effect living with the mother.

The husband is aged 54 and the wife 32 and it is clear to us that when the parties married he was very much a father figure.

Both parties have suffered ill health; and this would appear to have been the cause of the break-up of the marriage. The husband is unable to work on account of emphysema. Both have suffered from depressive illness.

The dispute over care and control has been a long one and the husband strongly disputes his wife's ability to look after the children properly.

He bases his case on three main counts:

1. that there has been sexual interference with the children;
2. that the wife has neglected them;
3. that the present arrangements cause a sense of insecurity in the children.

To these he added, in effect, a fourth in that he thoroughly dislikes and disapproves of the man his wife hopes to marry.

The first allegation, in our view, showed the mother to have been less vigilant than she should have been: but we are satisfied that she is now well aware of the problem and on her guard against it with the help be it said of the Children's Department.

The second allegation is not, in our view, sufficiently supported by the evidence for us to place any weight on it.

The third allegation concerns us greatly. It has quite clearly caused a great deal of concern to the authorities as well, as the Children's Office has been much involved, as has Mr. B. Jordan of the Probation Service to whom we are indebted for a lengthy and valuable report and whose evidence we have heard. Although he agreed that there was serious substance to each of the allegations made by the husband, he nonetheless still recommended a continuance of the *status quo*.

In his view, the children were affected by the uncertainty as to future care and control.

It is quite clear that the children were much affected by the break-up of the marriage and are equally as fond of their parents as they are of them.

We accept the evidence of the husband that there were often distressing scenes when the children had to return to the wife, especially when the children were at La Chasse. There is less of a problem now but, he says, it still exists. We accept this.

On the evidence before us, Dr. M. Young, whose evidence was of great assistance to the Court and who has looked after the family for many years, expressed the view that when the parties were living together the husband had had the dominant rôle, magnified it would seem by the age gap and the wife had then been immature. The husband is a much older man with several children by previous marriages and, in our view, is convinced that he knows best for the children. His concern is genuine, but we agree with Mr. Jordan that - as was manifest from the evidence of the wife - the effect is less positive. The criticism which is expressed by the husband as being for the children, albeit genuine, is not perceived in that light by the wife.

He has, it is clear, (e.g. separation agreement of 7th February, 1991) suffered bouts of ill health, and although his health has improved over the last few years he is still not fit for physical work, although he could possibly do a sedentary job.

Neither Dr. Young nor Mr. Jordan have any reservations regarding his ability to look after his children. For that

matter, neither do we: the question before us is whether, subject to access, they would be better with their mother or their father.

The wife quite clearly has had considerable problems of her own, which we see no need to detail. She has, however, in general, managed to cease taking medication prescribed by the doctor.

Although she is still immature, and has made clear mistakes, which she has admitted, in the treatment of the children, which have given cause for concern to the husband, she has in the view of witnesses from outside the family shown herself to be competent to have the care and control of the children. KM despite her evidence as to the children's preferences, stated that although there were scenes at home when they went back to their mother she found them mostly all right and happy there. Her stepmother would ring her if she had a problem.

Dr. Young's view, endorsed by two reports before us from the Children's Office, has now altered since the break-up of the marriage. He thought the wife was now capable of looking after the children with supervision (a condition which the wife was prepared to accept) provided access could be properly arranged.

In addition to the views expressed above the mother was judged fit by Mrs. Hopkins, the Principal Officer at La Chasse, who stated that while there she progressed to being able adequately to cope; and this opinion is, of course, firmly supported also by Mr. Jordan.

We were much indebted to the evidence of KM the husband's daughter by a previous marriage. We agree with counsel for the husband when he suggested she was a credit to her father.

Now aged 20, she has managed to keep on good terms with the parties and the children. Quite clearly she had a lot to do with the children whilst the marriage was falling apart. Equally clearly she still continues to play a considerable part when the children come to their father. It is clear to us that the father would have a difficult time coping by himself at his age, with the behaviour of the children as she describes it.

Her view was that the children want to live with dad but spend a lot of time with their mother each day. This evidence was not, however, borne out by Mr. Jordan. She added that the parents do pull together for the children. We were not clear as to whether the fact that KM was there might not be a considerable factor in the children's desire to be with their father.

The original access was very limited, and at one point some two years ago an agreement was signed by the parties at a time when the husband's health was suffering severely.

By agreement, access has been considerably altered, and more recently it has, we understand, operated as follows:
One child goes to the father on Wednesday night;
One child goes to the father on Thursday night; and
One child goes to the father on Friday night, and stays until Sunday afternoon or evening, being joined by the other two for Sunday. The system is worked on a rota basis.

Both the wife and KM stated that the increased access helps the children, though in her answer, the wife confirmed that she would be happier if KM were there. She accepted, without hesitation, that the children have a right to see their father.

KM's view was that these arrangements gave a chance to do more things and to share more activities together. The children, she said, look forward to coming up and the weekend child is easier on a Sunday.

Counsel were agreed on the Law. Among the cases put to us were two which we should, perhaps, include.

The first, cited in GM -v- LM (12th November, 1992) Jersey Unreported was:

> ***"We think that the most useful remarks were those of Butler-Sloss LJ, in Re S (a Minor) August [1991] Fam. Law 302:***
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> ***"BUTLER-SLOSS LJ, allowing the appeal, said that the child's welfare was the first and paramount consideration. There was no presumption that one parent should be preferred to another parent for the purpose of looking after a child at a particular age. It was likely that a young child, particularly a little girl, would be expected to be with her mother but that was subject to the overriding factor that the child's welfare was the paramount consideration. It was natural for young children to be with mothers but, in dispute, it was a consideration rather than a presumption"."***

The second cited in In re H (a Minor) (20th June, 1990) TLR was:

> ***"Mother is not always better***
>
> ***In re H (a Minor)***
>
> ***The welfare of the child displaced any presumption that the mother might be the better custodial parent.***

The Court of Appeal (Lord Donaldson of Lymington, Master of the Rolls, Lord Justice Butler-Sloss and Lord Justice McCowan) so stated on June 7 in allowing an appeal by the Divisional Court of the Family Division (Mr Justice Johnson) who had allowed the mother's appeal from the magistrate's order granting the custody of a girl born in October 1988 to the father, and remitting the matter to the local magistrates for an expedited hearing on such further material as was currently available.

LORD JUSTICE BUTLER-SLOSS said that what was of paramount importance was the child's welfare. There was no presumption under the Guardianship of Minors Act 1971 that one parent was to be preferred to the other at any particular age of the child.

It might have been thought previously that young children and girls approaching puberty should be with their mothers and that older boys should be with their fathers. That was not, in her Ladyship's view, applicable any longer.

It was true that there were Court of Appeal dicta to the effect that it was likely that young children would be with their mothers, but subject to the overriding consideration that the welfare of the child was paramount.

Where there was a dispute, it was for the magistrates or the judge to decide which parent was better for the child: it could not be "best" because the parents were not together.

While it was natural for young children to be with their mothers, where there was a dispute, it was but one consideration, not a presumption.

The MASTER OF THE ROLLS said that the question might largely be a matter of semantics. In his view it was natural that young children should be with their mothers.

But there was a change in the social order whereby it was clearly much more common than in days gone by for fathers to look after children so that it must follow that they were more equipped to do so than formerly.

The courts could therefore more easily conclude that fathers could look after them. However, his Lordship emphasised, the bottom line was always the welfare of the child".

We respectfully endorse the proposition that the necessity is to decide what is better for the children; and that it cannot be "best" because (in this case by force of circumstance) the parents are not together.

It is in the light of these remarks that we approach our finding.

After hearing the witnesses we are in no doubt as to the decision which we should make. Joint custody has been agreed; and we award care and control to the wife, the present arrangements as to access to stand until further order.

We realise this decision will be a disappointment to the father, but we urge him to channel his undoubted affection for the children towards the support of their mother in what is a difficult task. Although acting from the best of motives, we feel that his efforts for the family have to some extent been misguided and we ask him to reconsider his approach.

There are several other matters which we believe we should mention.

First, we would not like the occasion to pass without remarking on the contribution to the family made by KM.

Second, we are grateful to Mr. Jordan for the care and trouble he took not only in preparing his report, but in investigating the worries - not without foundation - of the husband.

Third, we note the reappearance on the scene of Mr. G now unofficially engaged to the wife. This is a situation which must be handled with some care, and she will clearly have to give careful consideration to the effect on the children.

Fourth, although a supervision order was suggested, we do not think it is necessary or requisite in this case. The wife is getting, already, the help she needs from the public authorities, and we are satisfied that she will continue to do this so long as it is necessary. We should, perhaps, add that, whatever their relationship with the husband about which he makes complaint, they have, it would seem, been most supportive of the wife.

Fifth, the parties, on a practical basis, seem well able to arrange access. We note the wife is not entirely satisfied with the present arrangements, though that may be the case whatever they are. Should the parties wish to alter the arrangements then they should either advise the Greffier of their agreement or take out a summons before him. As we have heard the witnesses we would wish any further proceedings, whether on an appeal from the Greffier or by way of variation of the present order, to come before the Court as at present constituted.

Authorities

Woods -v- De las Casas (2nd July, 1992) Jersey Unreported.

GM -v- LM (12th November, 1992) Jersey Unreported.

Poutney -v- Morris (1984) FLR at p.381.

In re H (a Minor) (20th June, 1990) T.L.R.