IN THE SUPREME COURT OF THE
TERRITORY OF PAPUA AND NEW GUINEA

NO. 162

M.P. 2 of 1960.

MARK HAINES WINNER

Applicant.

-v-

BERNICE JUNE WINNER

Respondent.

J U D G M E N T.

This is a Motion for the custody of an infant GAIL MARION WINNER, the child of the parties. The husband is Applicant on the record, but it is submitted on the Respondent's behalf and not disputed that having regard to Section 7 of the Infants Ordinance it is open to the Court to order custody to the Respondent wife, if such course seems appropriate.

Applicant and Respondent, whose respective ages are thirty-five and twenty-eight years, were married at Sydney on the 23rd March, 1956. On the 17th April, 1956 the Applicant left for the United States to resume his employment as an Insurance Salesman. On 20th June, 1956 the wife arrived in the United States and the parties took up residence in Tampa, Florida. In December, 1957 the child the subject of this Application was born. She has never since been out of the Respondent's custody. In June, 1958 the Respondent and the child, with the husband's consent, left for a six-months' visit to Australia. She made an abortive effort to return in March, 1959, to which later reference will be made, but with the exception of about four days, remained in Sydney until June, 1959, when she came to Port Moresby where she and the child have remained since. The husband arrived in Port Moresby in January, 1960 and launched these proceedings in February.

The marriage has been the reverse of peaceful. Prior to the marriage the wife had been conducting a kiosk. Her losses were considerable. The husband agreed to make good those losses but it seems reasonably clear that he did not appreciate their extent. At best the Respondent broke the news in stages,

playing down the real position. At worst she committed him to a payment the extent of which was probably more than double of what he originally anticipated. In all, he paid the equivalent of nearly £1,000 in discharge of these debts. One withdrawal by the wife within two weeks of the marriage of the sum of £500 from a joint account led to a bitter argument, in the course of which the husband mentioned the possibility of divorce. That threat sometimes in a context otherwise affectionate has recurred many times since. The Applicant is a man with some commendable qualities; they include a deep affection for his child and the willingness to use his assets and energies to the maximum advantage of his wife and child, but he is emotionally extravagant, a prey to the most startling suspicions of his wife on the flimsiest of grounds, and a man whose word must be regarded with reserve on matters which touch his vital interests. In that role he is a firm believer that the end justifies the means.

Tension developed between the parties as early as October, 1956. The parties sought psychiatric advice from the same practitioner, the husband also submitting to treatment by him. The main result seems to have been to provide each party with a battery of sinister-sounding psychiatric terms which they have not failed to use and mis-use on one another. The Affidavits filed in this matter paint the picture vividly.

In April, 1957 the parties moved to New Orleans; the wife meantime became pregnant. Groundlessly, as he now concedes, the husband told his wife and her mother that the child was not his and further that when the child was born she could take it with her to Australia. That bitterly hurtful attitude he maintained until the birth of the child; as from then he was proud and happy to claim the infant.

After the birth of the child the relationship between the parties improved. For some months they were relatively happy, though it seems doubtful whether they were ever really at ease with one another. As has been stated the wife and child left the United States in June, 1958 supposedly for a six-months' trip to Australia. The Respondent there took up residence with her parents who own a large home in Wahroonga. As time went by she was periodically assailed by doubts as to whether the marriage would hold together, and more particularly whether it could do so in the United States. In a letter written on 18th January, 1959, about a month after the expiry of the agreed period of separation, the wife stipulated for certain conditions before returning to the United States. To these the husband expressed himself as being agreeable. On

the 18th March, 1959 the Respondent set sail with the infant on the "Himalaya" for the United States. At Auckland she disembarked, returned to Sydney, telephoned her husband, and on the 23rd March, 1959 wrote to him in these terms: "Mark, I asked you this morning on the phone to come out here. I wasn't arguing. I was asking you to do the only thing to solve this problem. I have been worried and upset for months now about returning to America and I had to force myself to go back and that's no good. I know now that I just can't do it. Mark, please listen to me, you can always buy security but you can't buy back unhappy years or lost time. You want everything your own way - you are not considering me as an individual or making allowances for my feelings. If you want to make this marriage work you must consider my happiness and Gail's future happiness. You must have known months ago that I didn't want to return to America and I think that if you really cared for us you would have been out here long before now."

The suggestion that the parties might settle in Australia had been the subject of previous discussion between them. The husband was not averse to the idea but considered it better from the family's economic point of view that he remain in the United States for the time being. I am satisfied that the wife's decision not to return to the United States was formed between Sydney and Auckland, not at an earlier point of time. The husband's reply on the 27th March, 1959 contains these phrases: "Although it was saddening to learn of the disruption of our plans I am not angry with you and I do understand your emotions." He reviews their past, analyses his prospects with his present employer Company, then adds: "I again repeat that I will go to Australia to <u>live</u> within four years during which time I will have prepared myself to be better able to provide for you and Gail." He tells her of a house in Tampa which he says he feels will appeal to her. He says that he has been back to see Dr. Rubio, the psychiatrist whom the parties consulted in 1956 and 1957, and he now advises that "if you and the baby would not return to me of your own free will then I should accept the decision as final." Then follows this passage: "In view of Dr. Rubio's advice and considering your decision I retained a lawyer. The lawyer said that the divorce would not take long under the circumstances. Final decision several weeks after filing." He adds that she will have no alimony, no benefit under his Will, that a Sydney lawyer will make direct payments for Gail's support after the divorce, and that the lawyer would also advise him periodically on Gail's well-being and so would the State Department. "This is not like having my dear baby and you in

my arms but it is better than nothing." He sends his love and concludes. It is a baffling missive. Put summarily, it says in effect "Don't be upset, I understand. In any event we will be settled in Australia within four years. Won't you reconsider your decision in the meantime. I am divorcing you and making arrangements for a complete rupture with you and with Gail." As emerged in evidence, the promise to settle in Australia was not a genuine one, and the supposed legal advice was a pure invention. In point of fact the Applicant had been advised that he had no grounds for divorce at that stage, but so far as I am aware, the threat of divorce has never been withdrawn. It is small wonder that the wife had difficulty in understanding where she stood.

In June, 1959 the Respondent came to Port Moresby. She did so at the invitation of her sister. On the 14th July, 1959 the Applicant wrote another letter - simply a normal, affectionate husband-to-wife letter - sending his love to wife and child and expressing pleasure to their being in Port Moresby. On the 27th July he wrote still another, stating his intention of coming to Australia to settle as soon as practicable with a view to seeing Gail as frequently as possible. The whole tone of the letter suggests that he has no intention of assuming matrimonial relationship with the Respondent.

On the 8th January, 1960 the Applicant came to Port Moresby. The parties did not live together but arrangements were made for the Applicant to spend the maximum time possible with Gail, and in point of fact he has done so. On the 4th February, 1960 these proceedings were initiated. Seriatim the allegations made against the Respondent are these: That she failed to take adequate precautions for the protection of her child's health; that she failed to provide proper food and clothing for the child; that she had no deep affection for the child. Each of those submissions I emphatically reject. The next allegation was that the Respondent neglected the child in that she left the child in the care of a native servant, as the Respondent did during her working hours (she was obliged to supplement her own income) and on such occasions as she was away at functions or social outings. Better arrangements could probably have been made, but the evidence will not support the proposition that the child was exposed to any danger or allowed to suffer in any way. I have seen the child. There is no apprehension about her and her whole appearance suggests that she has been excellently cared for. Next it is suggested that the wife is financially feckless. May be she was at one stage but I see nothing to suggest that she is so now.

Lastly she is attacked because of her association with a married man who is estranged from his wife, the man in question being resident here and his wife on the mainland. The Respondent has been both unwise and indiscreet in fostering that relationship. A situation was allowed to develop over several months where they went to many functions in effect as a couple. He visited the Respondent frequently at night for periods of several hours. He secured the tenancy of a flat for her for a brief period at no cost. Apparently they made no attempt to conceal their affection for one another. There is evidence to suggest that the relationship was adulterous. That evidence I reject. It was sufficient to arouse the suspicions of the Applicant; most things are, but it is completely valueless.

Whatever the Respondent's merits and de-merits, it seems idle to dispute that she is an affectionate and devoted mother. It is also the fact that she comported herself with dignity and restraint in the face of groundless attacks.

Should the wife secure custody of the child, her intention is to return to New South Wales and take up residence with her parents. The husband, the Respondent's father, is in his late fifties, a retired Engineer, and both grand-parents are said to be devoted to the child. The house and grounds are large and quite suitable. It would be necessary for the Respondent to take employment. That she intends to do, so that the care of the child would fall on the grandmother during most of the child's waking hours. Such at least would be the case until the child attained pre-school kindergarten age. In those arrangements there are disadvantages but it is practicable.

The husband, if successful, would take the child to Tampa. For the time being he would reside with his sister who has children of her own. Thereafter he would build a house and instal a governess to care for the child until such time as he disembarrassed himself of his present wife and acquired another who would be given the care of the child. That proposal poses such a multitude of difficulties that it would be pointless to enumerate them.

The child is two years and five months old. She is a girl. The only consistent tie she has developed is with her mother, whose right to physical custody of the child has never been disputed until January of this year. To force a break between mother and child would seem to me in this particular case the deepest cruelty to the child. To expose the child thereafter to the uncertainties and

bewilderment inherent in the Applicant's plans for her would be a grave responsibility. Moreover, the wife has much the more stable temperament. Indeed, I gravely doubt the Applicant's ability to cope with the many problems attendant on rearing a girl child in the absence of her mother.

Put another way, it seems to me that the welfare of the child imperatively demands that she remain with her mother, unless principle compels me to order otherwise.

I have been bound to have regard to the rights of both parents. It is not to be disputed that the Applicant has a deep affection for his child. It is not to be disputed either that he would strive very earnestly for her, that his income-earning capacity is greater than the Respondent's, and that he would doubtless provide to his utmost for the child. But none of those matters give him a greater right than has the wife. The Applicant does not face his problems realistically, and I doubt whether he has even the faintest conception of the tremendous difficulties that he would face in seeking to assume sole control of the child. It seems to me an academic factor that he would be prepared to offer the wife access to the child in the United States at such time as finance and opportunity would permit. It is not a question of financing and arranging trips between suburbs but between distant continents.

Next a submission was made in supposed reliance on the principle of Ex parte Stanley; Re Smith, 55 Weekly Notes, p. 35, but that case turns upon the consideration that one whose custody of a child is wrongful cannot better his own position by reason of that wrongful physical custody. That is not this case.

Lastly I must have regard to the conduct of the parties. For that reason I have set out at some length the evidentiary matters touching on that conduct and my findings. I cannot see anything - let alone anything conclusive - in the wife's conduct which should weaken her position, still less fatally weaken it. To some degree the conduct of each party in relation to the other has been erratic and unpredictable. Sufficient has been said of the Appellant in that regard. The Respondent has her weak flank, too. She has at times sacrificed restraint, at times shown an unjustifiable unwillingness to make concessions to the Applicant. It was submitted on the wife's behalf that the husband's present Application was made rather for the sake

of hurting her than out of a genuine desire to secure custody. I do not agree. At the same time the impression is left on my mind that there is a devious element in his approach, to this extent - that he feels that if he is in a position to take the child to the United States, the wife will feel constrained to follow, in which event his chances of repairing the marriage may be greater. This is consistent with past performances, since it is not difficult to find evidence supporting the proposition that where he thinks or knows that he faces opposition from his wife, he does not bring matters to issue with her directly, but either seeks outside assistance from psychiatrists, marriage counsellors or the legal fraternity, or resorts to deceit or exercises some strong indirect pressure. This may be a form of indirect pressure on his part. For all his repeated assertions that he wants a divorce or wants to re-marry, I doubt whether that is his real desire. His aim to mend the marriage, if it exists, is to his credit, but the child's life cannot be put into a state of suspended animation to await the outcome of a series of manoeuvrings for position.

In my opinion the Application should be dismissed. Order that the wife have custody of the child. Liberty to apply on the questions of custody and costs.

A/J.

9.30 a.m. 24/5/60.