Muller v Muller

Privy Council
Appeal Case 1/1986

21 April 1986

Custody of children - principles applicable
Civil Law Act - application of Guardianship of Minors Act 1971 of England

The parties were married in 1978, the husband being a German national aged 47, and the wife a Tongan national aged 17. There were two children of the marriage, both boys, one aged 6 and the other aged 5 at the time of the hearing of an application by the husband for custody of the boys and for leave to take them to Germany where he had his home, after the parties separated.
The Supreme Court granted custody of the two boys to the wife and ordered the husband to pay maintenance for them. The husband appealed to the Privy Council.

HELD:
Dismissing the appeal.

(1) The Supreme Court had jurisdiction under the Guardianship of Minors Act 1971, England, which was applicable to Tonga, to make orders for custody and maintenance;
(2) The Supreme Court had correctly applied the principles for the award of custody of children described in J v C [1969] 1 All ER 788

Statutes considered
Guardianship of Minors Act 1971, England

Cases considered
J v C [1969] 1 All ER 788
In re Thain, Thain v Taylor [1962] All ER 384

Counsel for Appellant : Mr Niu

Privy Council

Judgment

This is an appeal against the decision of Tupou J. in a case where the Appellant sought orders for custody of the two children of his marriage to the Respondent, and for leave to take them to West Germany where he lives. After a two day hearing the Trial Judge granted custody to the Respondent, with reasonable access reserved, and ordered the Appellant to pay $30 per week as children's maintenance.

A detailed consideration of the facts of the case is not called for as the judgment under review contains an admirable summary of them. Any challenge to the Trial Judge's findings of fact will be dealt with in our consideration of the specific grounds of appeal, although this is really a case where the challenge is to the inferences and conclusions drawn by the Trial Judge from undisputed facts.

The parties were married in Hamburg on the 20th July 1978, the Respondent then being a Tongan national. The Appellant was then 47 and the Respondent 17. The two children are Michael (6) and Peter (5).

In the course of his judgement Tupou J. referred to a number of decided cases bearing on the duty of a Judge when considering the vexed question of custody. Mr Niu submitted that the Learned Judge erred in his application of those cases, but that submission demonstrated a basic misconception of the use that may be made of precedent. For example, Tupou J. referred to In re Thain, Thain v Taylor [1926] All ER Rep 384 as deciding that a minor's welfare was the paramount but not the sole consideration, and that the wishes of an unimpeachable parent were a factor to be taken into account. Mr Niu argued that what Thain decided was that access to the love of her father was in the best interests of the child in that case, so that custody was given to the father. Each case must be decided on its own facts and the Court's decision in one is of no help whatsoever in another on different facts. Reference to decided cases is resorted to for the sole purpose of extracting from them general principles of universal application.

No fault can be found with Tupou J's approach to the law. He relied on the judgment of Lord MacDermott in the well known case of J v C [1969] 1 All ER 788, which is generally accepted as expressing the current state of the law on this aspect of the jurisdiction relating to children. At page 820 Lord MacDermott said:

> "The second question of construction is as to the scope and meaning of the words "shall regard the welfare of the infant as the first and paramount consideration". Reading these words in their ordinary sense, and relating them to the various classes of proceedings which the section has already mentioned, it seems to me that they must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules on or determines the course to be followed."

Tupou J. then went on to consider, in Lord MacDermott's words, "the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances" as they had emerged from the evidence in the instant case. These were the factors

which convinced him that the children's best interests lay with their mother:

1. They had spent most of their young lives with their mother.
2. For three years from 1982 to 1985, while the children were alone with their mother in Tonga the Appellant provided no support, financial or otherwise, which hardly demonstrated that the Appellant, was a caring and loving parent.
3. That their living accommodation in Tonga was adequate.
4. That there was little to choose between the educational opportunities available in West Germany and Tonga.
5. That if the father was given custody the children would go to Hamburg, and there was no evidence as to what accommodation was available, nor as to plans for their care.
6. That there was a great bond between the children and their mother. We might note that all the authorities agree that that is an important feature in cases such as this.
7. That there would be "continuity of care" which was described by Ormrod L.J. in S v S [1977] 1 All ER 656 at p. 663 as "one of the most important single factors in deciding what is in the best interests of young children".

Mr Niu's remaining submissions and the grounds of appeal dealt with the weight to be attached to these factors. Ground 4(b) reads:-

> 4.(b) The Learned Judge concedes that success of this custody order to the mother depends upon payment of maintenance by the father. But that further depends on two things:
>
> (i) that the father will pay the maintenance ordered; and more importantly,
>
> (ii) that the mother will apply the maintenance properly for the welfare of the children.
>
> The evidence was that the father refused to pay or give the mother any money because she would spend it on things other than the children and in the Tongan way of life, the mother is expected to share anything including money that she receives, amongst those with whom she and the children live. The evidence of Matangisinga Halaeua also stated that the mother almost always went out dancing on Friday nights with friends. No doubt part of the maintenance monies would be spent in this fashion."

Nowhere in the judgment can we find any such concession by the Judge. The ground has an element of blackmail about it, and rather suggests that the Appellant is only interested in the wellbeing of the children if he can have them on his own terms. There is much to be said for the Tongan sharing way of life, and we see nothing too alarming about a 24 year old girl going dancing on a Friday night.

We are prepared to accept that the living accommodation and education facilities available in Hamburg may be superior to that available in Tonga, but the other factors in the Respondent's favour outweigh those advantages.

It was submitted that the Appellant could provide love and care and money. That may be so, although he has not been too free with their provision in the past.

Because of his financial position the Appellant could provide annual trips to Tonga for the children if the Court ordered such a condition, said Mr Niu. Such a condition would be unenforceable, and we are not all that confident that it would be met.

Mr Niu's final submission was that the Trial Judge erred in ordering the Appellant to pay maintenance for the children, because the Court had no jurisdiction to make such

an order; and in any event there had been no enquiry into the financial circumstances of the parties.

The Trial Judge relied on the English Guardianship of Minors Act 1971 as providing jurisdiction for his hearing of the case and that Act contains provision for the awarding of maintenance. As for the means of the respective parties, the Appellant has been presented as a man of substance while the Respondent has no assured income. Nothing more need be said.

We are satisfied that this appeal must be dismissed but before parting with it we
150 make two observations. First, we had the advantage of seeing these children when they appeared with their parents at the hearing. Our assessment of them could only be superficial but they gave the appearance of being the product of creditable parental care. Secondly, we see a very real danger that if these children go to West Germany they will grow up without knowing a mother. The Appellant would have nothing to gain by maintaining contact and the Respondent has not the financial means to ensure it. On the other hand the Appellant has the means to maintain contact with his sons should he wish to do so.

The appeal is dismissed with costs to the Respondent of $250.