IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU

Matrimonial Case No 10/96

BETWEEN ELIZABETH MERMER

APPELLANT

AND GILBERT MERMER

RESPONDENT

Counsel -

Baxter-Wright for Appellant
No appearance of Respondent

Date of Hearing 16 August 1996

REASONS FOR JUDGMENT OF THORP ACJ

This was an appeal against the making by the Magistrates Court at Port Vila of ex parte orders effectively giving custody of the three infant children of the parties, Caroline, aged 15, Kaltoi aged 10, and Karina aged 1, to their father the Respondent with access rights to the Appellant on unusual and vague terms, and restricting the movement of the Appellant.

The background facts appearing from the limited material before the Court are that on Friday 9 August 1996 the Appellant and the Respondent, who had been married some 12 years, separated following domestic disputes in which the husband accused his wife of infidelity. The Appellant at that time removed some of her belongings from the matrimonial home, and wanted to take her 1 year- old daughter with her to her parents' house at Erakor, where she proposed to stay. The respondent would not agree to her doing so.

The following Monday, 12 August 1996, he applied to the Magistrates Court at Vila by an ex parte "Notice of Motion" for orders -

1. That the Appellant be restrained from removing the children from the matrimonial home until further order of the Court:

2. That the Appellant have the right to visit her children "so long as such visits are not used to further disturb the applicant and the children": and

3. That the Appellant remain on the Island of Efate "until such time as this matter is resolved by the Courts."

The application advised that it had been taken out by the husband in person. It gave as his "address for service" -

"c/- The Prime Minister's Office,"

which was at best an inappropriate definition of a place where papers in matrimonial dispute proceedings could be served.

Orders were made forthwith, generally in the terms of the application, with a direction that they be served on the Appellant's parents, but without any obligation to serve the Appellant.

The Appellant was present at the hearing of her appeal. The Court was advised that since 12 August she had visited the children and believed that the youngest in particular was distressed and in need of her support and company, and that the 10 year old was also affected by their separation. She was less worried about the 15 year old, but sought this Court's assistance in obtaining care and control of the younger children until custodial arrangements are agreed or determined by Court order. She was willing to give their father reasonable access rights.

Mr Baxter-Wright argued that the orders made by the Magistrates Court were outside the jurisdiction of that court, that no sufficient urgency had been shown to justify making orders of such importance on an ex parte basis, and that the order restricting the Appellant's movements was in breach her fundamental right to freedom of movement.

I believe there is merit in all three arguments.

On the first point Mr Baxter-Wright's principal argument was that custody issues are specifically removed from the Magistrates' jurisdiction and should have been referred to this Court, either as relief ancillary to divorce proceedings, or possibly by way of wardship and guardianship proceedings. He called in aid s.2 of the Magistrates Court (Civil Jurisdiction) Act Cap. 130, and the provisions of the Matrimonial Causes Act Cap. 132. The former certainly supports him, and while the combined effect of ss. 15 and 18(2) of Cap. 132 at least suggests that magistrates have power to make custody orders as relief ancillary to divorce proceedings, there were no such proceedings in the present instance, nor even any undertaking to bring them.

On the second point, and even assuming in the Respondent's favour for the purpose of argument that the Magistrate's Court were somehow able to consider the issues raised by the "Notice of Motion" put before it, it should not have granted any such relief against a mother of a young infant on an ex parte basis unless grounds had been shown which would justify proceeding on an ex parte basis: as eg that the mother's whereabouts were unknown and there was an urgent need for some other person to be given custodial authority. No such grounds were put forward, nor indeed any ground which showed any need for the orders sought, let alone any urgent need, the respondent simply stating that he suspected his wife of infidelity and wished to keep the children together with him in the matrimonial home. In particular there was no evidence before the Court of any deficiency in the wife's observance of her maternal responsibilities. It follows that, irrespective of the question of jurisdiction, the orders made in the Magistrates Court could not stand.

I asked Mr Baxter-Wright what were the Appellant's intentions if the orders were vacated and no more. Apart from confirming that his client would then seek to recover physical custody of at least the youngest child, he had no proposal how that would be achieved, and indeed doubted that the respondent would agree to his wife having primary custody of that child unless the Court so ordered.

This Court being a court of general jurisdiction I have no doubt that its inherent jurisdiction must include a "parens patriae" function, the duty to act to protect those who by reason by reason of their infancy cannot protect themselves, which has long been recognised as a function of such Courts.

In the present case both the age and the sex of the youngest child speak strongly against removing her from the care of her mother in the absence of any evidence that such action is necessary in the child's interest.

If the Court does not use its powers to make arrangements for that child which recognise those factors it seems to me that the inevitable result will be further disturbance of the child because of its parents' inability to reach sensible arrangements by consent.

On the other hand no sufficient case was made out for disturbing the present custodial arrangements of the older children.

However these proceedings were brought on late on Friday, and the Respondent, who had only been served with the papers earlier that day, was not represented and did not attend in person. I accordingly

did not have the benefit of argument the other way. Further, while the appeal was not technically ex parte, the notice given to the Respondent was so brief that no adverse inference can be taken from his non-appearance. It follows, in my view, that the Court should avoid making any findings or taking any action at this time save that which is necessary in the interests of the children, and then only on the basis that any party aggrieved is given an early opportunity to have the situation reviewed by a competent tribunal.

Having regard to the onset of the week-end, and the fact that the one remaining sitting day before I leave the jurisdiction is already fully committed, I decided that the best (if unusual) solution to the problem was -

(i) To quash the orders made ex parte on 12 August 1996: and

(ii) In the interests of all the children, to exercise the Court's wardship jurisdiction by making all three children wards of the Court, giving the primary care and control of the two elder children to the Respondent, and of the youngest child to the Appellant, in each case as agent of the Court, on the condition that each have reasonable access to the children in the other's care.

Orders were made accordingly, and on the further condition that the Appellant file and serve on the Respondent not later than Wednesday next 21 August 1996 an application to this Court to determine appropriate custodial arrangements.

At the same time the parties were advised that reasons would be provided by the following Monday: as is now done.

If the parties are able to agree terms of access they should advise the Court of their proposals. Failing prior agreement the Appellant should file and serve her affidavits in support of her claims by not later than 30 August 1996 and the Respondent his affidavits by 6 September 1996, any affidavits in reply to be filed by 13 September 1996. The parties should then confer and advise the Court of their estimate of the time required to hear the application.

The costs of this appeal are reserved. The Appellant's counsel is asked to serve a copy of these Reasons for Judgment on the Respondent with the new application required by this judgment.

19 August, 1996