

Doyle and Doyle; Family Court Awards Custody to Homosexual Father

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The case of Doyle and Doyle involved a custody dispute in which the custody of the two children of the marriage, boys aged 9 and 13 respectively, was awarded to their homosexual father. Although the case attracted some adverse publicity,¹ analysis of the case reveals that it was a decision made on the basis of the welfare of the children and is entirely in accordance with earlier Family Court decisions dealing with the issue of homosexuality in custody and access cases.

Facts

The husband and wife were aged 42 and 34 years respectively and had been married since 1979. In 1983 the husband had commenced a homosexual relationship with A.L. The wife became aware of the relationship early in 1984. Thereafter, the parties began to move apart with the husband spending more and more time with A.L. although for some time the pretence of a matrimonial relationship was maintained with A.L. participating in family events and at times staying at the matrimonial home with the parties. In August 1988 the husband and A.L. moved to Perth, Western Australia.

In December 1988 the children travelled to Perth and stayed with their father for some weeks. The following year they again travelled to Perth to spend their summer holidays with their father. On this occasion, the elder child L. decided that he wanted to stay with his father and remained in Perth with the agreement of the mother. In December 1990, the younger child J. went to Perth for the summer holidays and decided that he also wanted to stay with his father. The mother opposed this proposal and commenced proceedings in the Family Court in February 1991 for the custody of J. The husband opposed the wife's application and brought a cross-application seeking the custody of J. as well as the elder child of the marriage, L. In her Reply, the wife consented to an order that the husband have the custody of L. Consequently, the principal issue before the court was the custody of the younger child J.

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1 See for example *The Mercury*, 10 Jan and 11 Jan. 1992.

In the time between the institution of these proceedings and the hearing of the matter, both children resided in Perth with the husband and A.L. who were living in rented accommodation. Neither the husband nor A.L. were in employment. The husband was in receipt of supporting parent's benefit. Both children were attending the local school. The wife continued to reside in the former matrimonial home and was living in a de facto relationship.

The case was heard by Justice Hannon of the Family Court. His honour identified the central issue in these proceedings as the husband's homosexuality and his consequent relationship with A.L. In examining the relevant legal principles, he referred to the 'per se' approach in which a parent's homosexuality creates an irrebuttable presumption that the parent is unfit to have the custody of the child. His honour made it clear however, that the approach that homosexuality per se disqualifies a parent from having custody of a child has never been accepted in the determination of custody applications under the *Family Law Act*, 1975 (Cth). He stated that:

In determining the issue of custody it is the function of the Court to address the specific circumstances of the case to the particular welfare of the child who is the subject of the application. The morality and the sexual orientation of the parents are but two of the important factors to be considered but they are limited in their effect to what relevancy they have, directly or indirectly on the welfare of the child. The parent's lifestyle is of no relevance without a consideration of its consequences on the child's well-being. Homosexuality is relevant only if it affects the parenting abilities or the welfare of the child, and for that reason the fact of that homosexuality does require that the Court, even taking the most liberal view, scrutinise the parent's way of life.

Justice Hannon referred to the case of *L and L*,² widely regarded as the leading authority in this area for its exposition of relevant matters to be considered in cases where a homosexual parent is seeking custody or access. In that case, Justice Baker had listed eight matters derived from earlier authorities, which a court should take into account in arriving at its decision. Whilst noting that this list was not intended to be exhaustive, Hannon J. described it as an extremely handy check-list and proceeded to consider these factors in the context of the evidence of the case before him.

- (1) The first issue to be addressed was whether children raised by their homosexual parent may themselves become homosexual, or whether such an event was unlikely. Justice Hannon referred to empirical studies which suggest that children raised by homosexual parents do not differ appreciably from children raised in more conventional family settings and are not likely to exhibit homosexual leanings or inclinations. On the basis of the evidence before the court there was nothing to suggest that

the boys would be likely to become homosexual if allowed to remain with their father.

- (2) His honour went on to consider the possibility that children of a homosexual parent may be subject to stigma, taunts and ostracism by their peers, particularly in circumstances where the parent is known in the community as a homosexual. Whilst acknowledging the significance of this factor, his honour stated that care must be taken not to over-emphasise the consequences of negative community attitudes. He was in no doubt that the children would be the subject of cruel taunts but was satisfied that the father and his male companion were aware of this possibility and had taken a responsible attitude in this regard; they were discrete in the conduct of their relationship and would be able to provide the support necessary to enable the children to cope with the difficulties they would inevitably encounter. His honour also referred to the fact that the presence of A.L. as the husband's companion had been part of the children's lives for so long that they accept and understand the relationship and would therefore be more able to withstand any negative community comment.
- (3) The third matter considered was whether the father would be able to show the same love and responsibility as a heterosexual parent. Justice Hannon noted that on the basis of empirical evidence there is no evidence to suggest that homosexual parents are less capable than a heterosexual parent to adequately care for and love their children. On the facts, he found that the husband had always had a loving and caring relationship with the children and this was not in dispute in the proceedings.
- (4) With regard to the fourth matter for consideration, namely whether a homosexual parent will give the children a balanced sex education and take a balanced approach to sexual matters, Justice Hannon found that there was no evidence to suggest that the husband and his companion would give other than a balanced sex education to the children, and certainly there was no suggestion that the children would become encouraged to become homosexual.
- (5) The fifth relevant matter identified in *L and L* was whether or not children should be aware of their parent's sexual preferences. Justice Hannon noted that both children had for some time been aware of the husband's sexual orientation and that they were not discomfited by this knowledge.
- (6&7) Consideration was also given to whether children need a parent of the same sex to model upon and whether children need both a male and female parent figure. Adopting the statements of Baker J. in *L and L*, Justice Hannon acknowledged that in a perfect society children would be reared in a

household comprised of heterosexual parents living in a harmonious and stable household. He went on to say that since we do not live in a perfect society this was not always possible, and on occasion cases will arise in which the court has to determine a custody dispute involving a homosexual parent which must be determined on the basis of the best interests of the child.

- (8) The final matter noted in *L and L* concerning the homosexual parent's attitude to religion was held not to be a relevant matter in the proceedings before the court.

It was apparent from the wife's evidence that she did not think that the husband's homosexuality and his relationship with A.L. were per se objectionable, but disapproved of her husband's 'values' which she claimed were related to his homosexuality. In particular she alleged that the husband was deceitful and had shown contempt for her and women in general and she voiced concern that these values would rub off on the child J. However Justice Hannon found that none of the attributes of the husband of which the wife complained were made out in the present case. In assessing the wife claims, his honour thought it relevant to compare the husband's 'values' with those of the wife's de facto husband M, whom she agreed would be in an position to exert influence on J. if she were to have custody of the child. Although the wife had suggested to the court that M. was a person of good values whom she would have no hesitation in permitting to exercise influence over J. the court found M. to be a person of 'unbridled arrogance' who had in the past shown a flagrant disrespect for the law. Justice Hannon also found that he was a person of strong personality who would seek to exert dominance over those close to him. There was evidence before the court that M. had already sought to exercise an inappropriate degree of influence and discipline over both children, particularly J, outside the scope of any authority to which he may have been entitled as a result of his relationship with the wife. His honour was satisfied that this influence would increase if J. was to live in the household with the wife and M. and that such influence would not promote the well-being of the child.

Essentially the wife's case was that the effect of the husband's lifestyle and values would be detrimental to J. in that he would be placed in moral danger from which she wanted to protect him. However, doubt was cast on the credibility of the wife's case on the grounds that her contention that J. was in moral danger was inconsistent with her decision not to seek an order for the custody of the elder child L. The court found that her inaction to pursue the return of the child L. was inconsistent with any fear that L.'s welfare was at risk and there was no reason for the wife to differentiate between the two children, suggesting that J. but not L. would be at risk if allowed to remain under the influence of their father. In any

event, the court found that even if the wife genuinely believed that J. was in danger if he remained with his father, there was no foundation for that belief and there was nothing in the lifestyle of the husband which of itself was detrimental to J.'s welfare.

A significant factor in this case was the strongly expressed wish of the child J. to remain with his father in Perth, set out in a Welfare Report that was admitted in evidence before the court.. It had been argued by the wife that J, being only 9 years of age, was not old enough to make the decision as he was not sufficiently mature to know what was in his best interests. In accordance with established Family Court authority, it was stated that;

if the court is satisfied that the wishes expressed by the child are soundly based and founded upon proper consideration as well thought through as the ability and state of maturity of the child will allow, it is appropriate to have regard to those wishes and to give such weight to them as may be proper in the circumstances.

The court accepted that as J. was only 9 years of age his desire to remain with his father had to be weighed in balance with the valid comments made by his mother, but the court was satisfied that J.'s wishes were a reflection of his state of mind arrived at without the undue influence of others. Justice Hannon was of the view that on the facts, there was little to choose between the competing proposals of either parent for J.'s welfare and therefore the genuine wishes of the child take on a particular significance in determining the issue of custody. Moreover, his honour noted that J. was content in the environment in which he was presently residing and took the view that to move him was neither necessary nor desirable for his long-term welfare. The court was satisfied that if the child was forced to return to reside with his mother against his strongly manifested wishes, there would be a risk to his emotional well-being.

Another factor which was clearly influential in the court's decision to grant custody of J. to the father was the fact that an order in favour of the wife would have the effect of separating J. from his elder brother. Referring to the well accepted principle to be applied in custody cases that save in special or exceptional circumstances, children ought not to be separated from each other, Justice Hannon found that there was no justification for separating the children. It was accordingly ordered that the husband have the sole custody of both children.

Commentary

The media reaction to this decision was somewhat sensationalised, with front page headlines that a homosexual father was awarded sons in a custody battle and an account from the mother to the effect that 'this decision downgrades the role of a natural mother and says homosexuality is all right- even preferable.' However comments of this nature fail to take into account the facts

and circumstances of the case the carefully considered reasons behind Justice Hannon's decision.

It is certainly true to say the decision is unusual in so far that custody was awarded to a homosexual father. Whilst there have been previous decisions of the Family Court in which custody was awarded to a homosexual parent these have almost invariably involved homosexual mothers.³ That custody was awarded in this case to a homosexual *father* is therefore of special relevance, particularly in light of frequent allegations that the Family Court discriminates against fathers in contested custody cases.⁴ Although the Family Court has repeatedly stated that there is no principle or presumption in favour of mothers in contested custody cases⁵ the suspicion has remained, at least in some circles, that a preference does in fact operate in favour of mothers.⁶ The decision in *Doyle and Doyle* clearly helps to dispel any such suspicion, demonstrating that the Family Court is not influenced by any presumptions in favour of the mother and will award custody to a homosexual father in circumstances where that best promotes the welfare of the child. In this respect it is quite a strong decision in favour of the father especially in light of the fact that he and his companion were living in Perth which would inevitably mean that the children would not have a great deal of contact with their mother who was residing in Hobart. The case is also significant in that it clearly demonstrates, through both the reasoning of the judge and the actual decision of the court, that there is no presumption that a parent's homosexuality per se renders a parent unfit as the custodian of the child.

However the case does not set a precedent for homosexual parents. Rather, it should be understood as a decision based on its particular facts and circumstances. The mother's claims about the detrimental consequences on the child J. if he was allowed to remain with his father were simply not supported by the evidence. Moreover, there was strong evidence that J. wished to remain with his father and that to forcibly return J. to his mother would be at the risk of his emotional well-being. The court was accordingly satisfied that it would be in the child's best interests if he remained in the care of his father. In reaching this result, the case followed established

3 See for example *In the Marriage of O'Reilly* [1977] F.L.C. 90-300, *In the Marriage of Cartwright* [1977] F.L.C. 90-302, *In the Marriage of O'Reilly* [1977] F.L.C. 90-300, *In the Marriage of Brook* [1977] F.L.C. 90-325, *In the Marriage of Schmidt* [1979] F.L.C. 90-685, *In the Marriage of L* [1983] F.L.C. 91-353. For one of the few reported cases in which a homosexual father was granted custody, see *In the Marriage of Sheperd* [1979] F.L.C. 90-729.

4 See for example the *Mercury* 30 March 1992.

5 *In the Marriage of Raby* (1976) 27 F.L.R. 412, *In the Marriage of Hobbs and Ludlow* (formerly Hobbs) (1976) 29 F.L.R. 101 and the High Court in *Gronow and Gronow* (1979) 144 C.L.R. 513.

6 See n. 5 above.

Family Court authority dealing with contested custody and access cases involving a homosexual parent, in particular, the case of *L and L* as well as generally reinforcing the importance of the welfare of the child principle.

One matter of particular interest was the court's approach to the issue of community attitudes and the possibility that children of a homosexual parent might be subject to stigma, cruel taunts and social ostracism by their peers. As Justice Hannon noted, this issue has taken on great significance in the reported cases.⁷ Whilst acknowledging the relevance of this factor in so far as it pertains to the welfare of the child, his honour adopted a realistic approach suggesting that care must be taken not to over-emphasise the consequences of negative community attitudes. In his view, just as important as the consideration that the children will be subject to stigma and taunts is the consideration of whether the homosexual parent and his partner realise that this will occur and how they propose to assist the children in coping with it. Thus his honour preferred a constructive approach, focussing on the actual facts and circumstances of the case in order to assess the likely implications of taunts and stigma on the child and the degree of support that the child would receive from the father and his companion in coping with this difficulty. His honour's approach is to be commended in that it avoids the risk that parents who do not belong to the dominant social culture would inevitably be at a disadvantage in a contest with a parent who is part of that dominant culture simply because they may be subject to stigma and spiteful comments.⁸ This approach is also entirely consistent with the requirement under the *Family Law Act 1975* (Cth) that custody decisions are made on the basis of the welfare of the child, having regard to the particular facts and circumstances of the case, rather than relying on questionable assumptions which presuppose that one environment is inherently superior to an alternative environment.⁹

Another noteworthy aspect of the decision is that unlike quite a number of the earlier cases in which custody or access was awarded to a homosexual parent,¹⁰ no undertakings were required by the court aimed at restraining the behaviour of the father and his

7 F.L.C.; [1992] F.L.C. 92-286

8 See also Goodman, E., 'Homosexuality of a Parent: A New Issue in Custody Disputes' (1979) 5 *Monash University Law Review* 305 at 312-313.

9 Id. 312.

10 See for example, *In the Marriage of Spry* (1977) 3 Fam.L.R. 11, 330 (mother granted access subject to the condition that she and her lover undertake that there would be no display of sexual affection between them in the presence of the children) and in *In the Marriage of O'Reilly* [1977] F.L.C. 90-300 (mother granted custody subject to the undertaking that she would refrain from any act which would reasonably be calculated to suggest to any of the children that she or any friend of hers was a lesbian)

companion. On the facts of *Doyle and Doyle* this can be explained on the grounds that the court was satisfied that the father and his companion do not flaunt their homosexuality or their relationship and although they shared a bed, there are no unreasonable signs of affection in the presence of the two children. In these circumstances, an undertaking requiring for example, that there be no overt displays of their sexual relationship in the presence of the children or in public was clearly unnecessary. In any event, doubt has been cast on the value and appropriateness of such undertakings which appear to assume that exposure to such displays will adversely effect the child in question. One commentator has forcefully argued that it is preferable for a court not to impose undertakings with respect to sexual behaviour since they can be discriminatory, are in any event not enforceable and would tend to encourage on-going litigation in the event of a breach of the undertaking.¹¹

In conclusion, whilst the facts and circumstances of the case and its outcome may justifiably be characterised as unusual, the decision of Justice Hannon in *Doyle and Doyle* granting custody of two boys to their homosexual father is a very sound and carefully reasoned decision, entirely consistent with the provisions of the *Family Law Act 1975* (Cth) and established Family Court authority in this area.

11 Goodman, at 135.