IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

1-08-90

CICA NO. 26 OF 1989

B E T W E E N

GARSTON TODD GRANT
and
HEDY NADINE GRANT
and
GARSTON GILBERT GRANT

Respondents/Plaintiffs

AND

ANN ELAINE WATSON-MORGAN

Appellant/Defendant

Appearances are:

N. Hill Q.C., Mrs. Maierhoff with him
for the Appellants
Mrs. C. Bridges for the Respondent

J U D G M E N T

Georges, J.A.:

On 29 October, 1985 the appellant Anne Elaine Watson-Morgan (Andalyn) gave birth to a daughter Monique Watson (Monique). She was then aged 22. She had given birth to a son - Quincy - some time before when she was 17. At one time (presumably during her pregnancy) she thought that Quincy's father was the father of the child she was about to bear. After Monique was born she was certain that the respondent Garston Todd Grant (Todd) was the father and she so informed him. He did not accept responsibility.

Andalyn's financial and domestic circumstances were such that she felt unable properly to take care of Monique. A few weeks

after her birth she began to leave her for part of the day with the respondent Hedy Nadine Grant (Mrs. Grant) who is Todd's mother and who lived with her husband Todd's father, the third respondent, Garston Gilbert Grant (Mr. Grant). All the parties lived on Cayman Brac where Monique was born.

Gradually the periods Monique remained with Mr. and Mrs. Grant increased until by the age of three months she remained with them continuously and Andalyn visited her there from time to time.

Andalyn had herself been raised by her grandparents and had called her mother by her name. Her background was not completely normal. She has an uncle whom she describes as mentally retarded. She was charged and pleaded guilty to having caused him grievous bodily harm. She explained that she had struck him with a machete in circumstances in which she believed that that was the only way to prevent him from attacking her aged grandmother and her mother. The sentence imposed on her - a suspended sentence and a period of probation - supports the inference that her account of the incident was accepted.

Monique remained with Mr. and Mrs. Grant until 17 June, 1989. On that date Andalyn took her on what was expected to be a routine weekend visit and did not return her. This precipitated an application by Todd and Mr. and Mrs. Grant for an order that custody of Monique be granted to them.

In his original affidavit dated 14 September, 1989, in support of the application Todd, while not denying that Monique was his child, did not unequivocally admit that she was. He asserted that no blood tests to establish paternity had ever been carried out. In a further affidavit dated 2 October, 1989, he stated that he was prepared to admit that he was the father of Monique with the result that he would have locus to make the application under the Guardianship and Custody of Children Law (The Act).

No objection appears on the record to the standing of any of the applicants to make the application. The lack of such standing was not made a ground of appeal. In the course of the hearing before

this court the issue was mentioned. There was no application for leave to amend by adding a ground raising it. At the conclusion of the hearing judgment was reserved. During that period it was realised that in two cases - Finlayson v Matthews (1971) 12 J.L.R. 637 and Clarke v Carey (1971) 12 J.L.R. 637 the Jamaica Court of Appeal had held construing similar legislation that there was no power in the Supreme Court to hear an application by the father of an illegitimate child for custody of that child under the Guardianship and Custody of Children Law 1969 (Jamaica). The Court was as a consequence reconvened to hear argument on the issue.

At the crux of the problem is the approach to be taken to the interpretation of the words "child", "father" and "mother" in the Act.

The historical inheritance is undisputed. In Galloway v Galloway [1956] A.C. 299 at p.310 Viscount Simmonds stated:-

> "It was in 1857 (as it is today) a cardinal rule applicable to all written instruments, wills, deeds or Acts of Parliament, that "child" prima facie means lawful child and 'parent' lawful parent. The common law of England did not contemplate illegitimacy and shutting its eyes to the facts of life, described an illegitimate child as filius nullius. This prima facie meaning may in certain circumstances be displaced and a wider meaning given to the words..."

This formulation can reasonably be said to imply that the circumstances do not easily arise.

This approach is adopted by Wooding C.J. speaking for the Court of Appeal of Trinidad and Tobago in the interpretaiton of the words "mother" and "father" in White v Springle (1966) 10 W.I.R. 152 at page 155 where he states:-

> "But since the titles 'mother' and 'father' belong prima facie only to those who have become so in the manner known to and approved by the law and the consequent meanings of those terms when used in a statute are not to be

> departed from unless a compelling reason for so doing can be found in the statute itself, that ordinance like its English counterparts...) must be construed as referring to lawful parents only."

Although the prima facie meaning of the words "child", "mother" and "father" has always been held to refer to those who fell within the category ligitimate, there has always been much disagreement as to the weight to be given to that prima facie meaning.

In Woolwich Union v Fulham Union [1906] 2 K.B. 240 at pp.246 - 247 Vaughan-Williams L.J. propounded the following test:-

> "It is, of course, true that it is only prima facie the meaning to be given to the word, and that a wider meaning may, in the case of some statutes, be given to it, so as to include an illegitimate child or illegitimate children where that meaning is more consonant with the object of the statute."

In Galloway v Galloway (supra) at p.318 Lord Tucker took:-

> "leave to doubt whether the test which meaning is more consonant with the subject of the statute' is in all respects a satisfactory guide to decision for I think it a very vague one. But, on the other hand, it seems to me uncontroversial to say that the primary meaning will be displaced if the context in which the word 'child' appears evidently requires to embrace a wider category than that of legitimate children."

Lord Tucker was perhaps even more restrictive. He stated at p.323:-

> "Prima facie the word 'child' or 'children' in an Act of Parliament mean a legitimate child or legitimate children, and that illegitimate children can only be included by express words or necessary implication from the context."

Lord Oaksey on the other hand stated at p.316:-

> "It is true that the word 'children' has acquired the prima facie meaning legitimate children in statutes wills and deeds because it has been considered that the legislature, testators and settlors usually intend in using the simple word "children' to refer to legitimate children. But circumstances can displace this rule ..."

Thereafter he quoted with apparent approval the test propounded by Vaughan-Villiams L.J. which Lord Tucker had ventured to doubt.

It is thus apparent that the formulation of a test for determining the weight to be given to the prima facie meaning of the words "child", "father" and "mother" could not be said to have been well settled in 1956.

The subject was authoritatively reviewed in Minister of Home Affairs v Fisher [1980] A.C. 319 - a judgment of the Privy Council on appeal from Bermuda. While it is true that the narrow base of the decision could be said to be confined to the interpretation of Constitutions the judgment did discuss the proper approach to be used in interpreting such words in any statute.

The diverging approaches of Vaughan-Williams L.J. and Lord Tucker were specifically cited and their Lordships were invited to settle the uncertainty. They did so, stating at pp. 327 - 8:-

> "Their Lordships approach this line of argument in two stages. In the first place they consider that it involves too great a degree of rigidity to place all Acts of Parliament in one single class or upon the same level. Acts of Parliament, particularly those involving the use of the word 'child' or 'children', differ greatly in their nature and subject matter. Leaving aside those Acts which use the word 'child' or 'children' apart from any relationship to anyone (in which cases 'child' means simply a young person) there is a great difference between Acts concerned with succession to property, with settlement for the purposes of the Poor Law, with nationality, or with family matters, such as custody of children."

After noting that Viscount Simmonds may to some extent (having regard

to the cases concerning the administration of the Poor Law) gone too far in describing the common law of England as not contemplating illegitimacy and shutting its eyes to the facts of life, the judgment continues:

> "Matrimonial law in England has increasingly diminished the separation of illegitimate from legitimate children by adoption of the concept 'child of the family'. Indeed the Matrimonial Causes Act 1974, as well as recognizing the 'child of the family' contains a definition of 'child', in relation to one or both of the parties to a marriage, as including 'an illegitimate or adopted child of that party or, as the case may be, of both parties': section 1(1). This is, it is true, by way of express statutory enactment, but the fact that the separation is, for many purposes, less sharp than it was in the last century enables and requires the courts to consider, in each context in which the distinction between legitimate and illegitimate is sought to be made, whether, in that context, policy requires its recognition."
>
> (emphasis supplied)

In an area such as succession the policy of maintaining the distinction is firmly rooted in the common law and clear indications will be needed to displace it, though as Lord Wilberforce has pointed out there is a movement even in that context to a biological interpretation.

The trend towards the broader interpretation in family matters is evident outside of Great Britain and is aptly illustrated by a decision of the Supreme Court of Alberta in White v Barnett [1973] 3 W.W.R. 293. The enactment under consideration in that case provided that the Supreme Court or the Surrogate Court of the county or district in which the infant resides, upon the application of the father or the mother of an infant, who may apply by a next friend, may make such order as the court sees fit regarding the custody of the infant and the right of access thereto of either parent, having regard to the welfare of the infant and the conduct of the parents and to the wishes as well of the mother as of the father.

Mr. Dermid J.A. stated at p 298:-

> "While the fact of being the natural father may prove to be of much importance in deciding on the merits of an application for access by the father as to whether or not such access will be granted, it is not, in our opinion an answer to the making of the application and to the right of the natural father to have his application heard upon the merits."

The rule which requires that the words "child", "father" and "mother" should bear the prima facie meaning of a legitimate relationship is a rule of common law and as has happened in many other areas it has over time been adapted by the courts to deal with changing social circumstances.

The cases cited in argument do not, in my view, debar this Court from applying the approach adumbrated in Fisher v Minister of Home Affairs (supra) to the interpretation of the Act. The decision of Roxburgh J. in Re C.J. (an infant) [1956] 3 All E.R. 500, though deserving of great respect, is clearly rooted in the older approach. The case was decided shortly after that of Galloway v Galloway (supra) and he relied particularly on the judgment of Viscount Simmonds who dissented.

The case of Re C.T. (an infant) (supra) was much relied on in Finlayson v Matthews (supra). At p.403 Henriques P. (who was a dissentient) cited the passage of Viscount Simmonds stating that the common law of England did not contemplate illegitimacy, precisely the passage which Lord Wilberforce had noted went too far in that it did not pay regard to the administration of the Poor Law. Fox J.A. relied on the decision of Roxburgh J. in coming to the decision of the majority. Clarke v Carey (supra) in effect followed Finlayson v Matthew (supra).

In White v Springle (supra) Wooding C.J. also used the restrictive formulation that "a compelling reason" had to be found to justify departure from the prima facie presumption of legitimate relationships. This approach did not find favour in Minister of Home Affairs v Fisher (supra).

None of these decisions are binding on this Court. They are clearly persuasive authority and merit great respect. Their force is in my opinion diminished by the developments in the common law rule of interpretation which I have attempted to describe. Had there been authority binding on this Court as to the interpretation of the Act there would have been no option but to follow such authority leaving it to some higher court to apply, if it so wished, the more recent formulation of the rule of interpretation. In the absence of such authority it appears that this Court is free to approach the interpretation of the Act applying principles approved by the Privy Council.

Considering the context of the Act I can see nothing which requires a distinction to be made between legitimate children and children born out of wedlock. In Finlayson v Matthews (supra) and Clarke v Carey (supra) the Court of Appeal in Jamaica has already held that a similar act permits a mother to make an application for custody of her illegitimate child. In his dissenting judgment in Clarke v Carey (supra) Graham-Perkins J.A. develops in detail and with logical rigour the difficulties created by the attempt to endow the mother of the illegitimate child with rights under the Jamaica Act while denying such rights to the father. He pointed out at p.648:-

> "If, 'father' means, as I too hold, the father of a legitimate child, then it would appear to do extreme violence to language to hold that when s.7(1) [the same section in the Act] speaks of 'the mother or father of a child' it is possible to attribute to 'mother' an unrestricted meaning. The subsection, in unmistakably clear terms, envisages either the one or the other of two parents of a child. Is it possible that a child can be the legitimate child of its father, and at the same time the illegitimate child of its mother? Again, if the prima facie meaning of 'child' is not to be taken to be displaced, must it not inevitably follow that 'mother' can have no sensible meaning other than that of mother of a legitimate child. Or again when s.7(2) [the same section in the Act]

> says 'notwithstanding that the mother of 'the child' is then residing with the father of the child', is it not very obviously treating with the mother and the father of the same child? If this is so, and if 'father' means the father of a legitimate child then it would seem quite impossible, in my respectful view, to argue against the obvious that that legitimate child cannot have as its mother a women who is not the lawful wife of the father."

While the result is, in my view, unacceptable, the logic appears compelling. The difficulties are resolved by holding that in the context of the Act policy does not require the recognition of the distinction between legitimate and illegitimate children. Once that distinction disappears there is no need to differentiate between parents of such children. An illegitimate child is no longer "filius nullius" - the child of no one.

In the course of argument there was reference to the problems which may arise in identifying the father of a child born out of wedlock. This is purely an issue of fact arising independently of the interpretation of the Act. It does not frequently, if at all, happen in the Caribbean that there are claims by men to paternity of children which are disputed by the mothers of the children. Where the person said to be the father disputes paternity he will not be making any claims under the Act.

Where paternity has been established by court order or admitted, the capacity of the father to file an application under the Act is of benefit to the child since it provides an additional channel by which the Court can be apprised of the need to inquire into the desirability of intervention in the interest of the welfare of the child. The interpretation should be viewed as conferring benefits on the child rather than as conferring rights on the father. The privileges of custody or access will not in any event be granted to him unless the Court so orders.

Not unnaturally much emphasis was laid on the ascertainment intention of the legislature as the object of interpretation and

was
it/urged that a drafts person using the word "child" or "father" or "mother" should be taken to mean a legitimate child since the state of the law then would have justified such a conclusion. I have sought to show that the law was even then by no means free of difficulty. The fact is that the language of the Act (in the Jamaican original) has led to sharp controversy as to whether or not a mother has the right to apply. Intention can only be gleaned from the language of the Act read in the context of the Act as a whole and applying the rules of interpretation derived from the latest authorities available at the date the decision is to be made.

Accordingly I conclude that Monique's father, Todd, does have standing to make this application. The grandparents, Mr. and Mrs. Todd, have no standing. Only fathers and mothers may apply under section 7(1) of the Act.

After having filed the affidavit dated 2 October, 1989 the respondents applied for an order for interim custody pending the final determination of the summons. This was heard on a date which cannot accurately be fixed from a perusal of the record but was quite likely in the week commencing 25 September, 1989. Andalyn had not yet filed affidavits. She appeared and gave evidence. She was at that time married to a Jamaican, Adolphus Morgan, who had then lived in Cayman Brac for 2 years. They lived in a rented house with 2 bedrooms, living room, dining room, kitchen and bathroom. The dining room had been converted into a third bedroom. Andalyn's son Quincy lived with them. Andalyn worked for $1,100 per month.

The trial judge ordered that Monique remain with Andalyn until the issues were finally decided. Access by Todd and the Grants was suspended. It was the judge's view that further disturbing Monique pending the hearing would have been undesirable.

The basis of the application by Todd and Mr. and Mrs. Grant was that Andalyn had abandoned Monique at the age of 3 months. In her affidavit Mrs. Grant alleged that she had a bad temper as evidenced by her conviction for grievous bodily harm. There were also

allegations that Quincy, Andalyn's son, was extremely disturbed and had on one occasion molested Monique.

The trial judge correctly held that Andalyn had not "abandoned" Monique in the sense in which that word had been used in section 14 of the Act. No question, therefore, arose of the Court refusing to make an order for delivery of the child to her unless satisfied that having regard to the welfare of the child she was a fit person to have custody. In any event Monique was already in her care and custody at the date of the hearing of the application.

The judge commented on Andalyn's background - the fact that her father was unknown, that there were mental problems in her family and that she had had her first illegitimate child at 17. He concluded that the lenient sentence imposed on her for the conviction for grievous bodily harm did indicate that her explanation of the incident had been accepted but nonetheless it was evidence of a troubled family background.

There were allegations in an affidavit filed by Mrs. Grant on 3 October, 1989 of sexual abuse. She stated that while she was showering and shampooing Monique after a swim, Monique had told her out of the blue "Andalyn touches me there" pointing to her private parts. To this Mrs. Grant had replied "Don't you mean Andalyn washes you there?" Monique's answer had been "No. She touches here with her finger she loves to do that". A week later in reply to a question from Mrs. Grant Monique had repeated the statement and had added "Andalyn told me not to talk anything about the house".

There was no specific denial in Andalyn's affidavit filed on 20 October, 1989 that she had ever played with Monique's private parts. Mr. Hill stated that his instructions were that this affidavit had never been served on Andalyn's attorneys. Mrs. Bridges was positive that it had been served though she was unable to produce an acknowledgement of service.

In his judgment the trial judge stated:-

"I can make no finding as to

> what gave rise to Monique's remarks to Mrs. Grant which she has recorded in her affidavit dated 3rd October, 1989. I do, however, accept her evidence of what those remarks were as being truthful."

Having made that finding the trial judge continued:-

> "On all the evidence, I have concluded that in awarding custody of Monique to Andalyn I would be exposing her not only to a continuance of the emotional trauma associated with the sudden disruption of her existing emotional relationships which has taken place, but also to an appreciable element of risk in the longer term."

He then ordered that custody of Monique be granted to Todd jointly with Mr. and Mrs. Grant, fixed the date on which she was to be collected, ordered that she remain in her present school until the end of the current term, school placement thereafter to be at her father's discretion and provided that "reasonable non-residential access" be afforded to her mother.

The finding that awarding the custody of Monique to Andalyn would be exposing her to a continuance of emotional trauma associated with the sudden disruption of her existing emotional relationships was based on reports filed by two psychiatrists - Dr. Charles Hasselback and Dr. F. LaHee and a social report prepared by a Social Worker Maureen Jervis-Brooks. The psychiatrists did not agree and neither attended to be cross-examined.

Dr. Hasselbach's report dated 25 October, 1989 noted that he had interviewed Monique, Mr. and Mr. Grant, Todd and Andalyn. He then stated:-

> "In a professional interview, it was apparent that Monique is unhappy and troubled. Neither natural parent has shown until recently (approx. 6 months) an emotional commitment as a parent to Monique.

> The importance of Monique's emotional attachment to Hedy and Garston Grant, who in every important aspect, have been her parents, cannot be over-estimated. To disrupt this stable loving relationship by separating her from the Grants, whom she considers her parents, will result in incalculable emotional suffering and damage to Monique."

The report of the social worker is dated 19 October, 1989. She had an opportunity of observing Monique at Andalyn's home in the family relationship existing there. She reported:-

> "Monique has been observed with her mother (whom she calls Mommy) on several occasions and there was no evidence of unhappiness or dissatisfaction. Mother reports that on some occasions when she returns from weekend visits to the Grants, she cries and will not eat. Andalyn says she usually calms her by reading stories for her. Andalyn has expressed concern that Monique is being given negative impressions of her (Andalyn) by the Grants."

Among the persons she interviewed was Monique's school teacher. She reported on that interview:-

> "It was understood that Monique had no problems in adjusting to school life and there were definitely no indications that she was an unhappy child. She said, however, that Monique sometimes behaves in extremes, one minute hugging another child and the next minute hitting. She believed that this could be due to her not being accustomed to playing with other children or to her adjustment to the recent changes in her life."

Dr. LaHee who reported on 5 November, 1989 stated:-

> "During the interview Monique appeared quite relaxed and friendly. In both settings she appeared comfortable but warmer to her grandfather and her father

> whom she had not seen for some time. In both situations both of her parents did not put restraints on her behaviour and their admonitions and pleadings did not help."

In his summary he stated:-

> "Despite her separation experiences Monique did not appear anxious or unhappy and showed no overt evidence of emotional disability. In the presence of her father and grandfather she was more active and attention seeking in behaviour. With her mother and stepfather she appeared to be in control of herself and occupied herself by drawing etc. Both parents were unable to control her behaviour."

There was thus conflicting evidence as to Monique's emotional condition among observers who would have seen her over the period 19 October to 5 November, 1989. The trial judge does not seem to have resolved this issue. He concentrated on the apparent difference between the psychiatrists as to the effect of separation on the emotional stability of young children.

The fact was that the Social Worker and Dr. LaHee had carried out their observations at a period when Monique had been separated from Mr. and Mrs. Grant and they were concluding that she showed no signs of having suffered as a result. Of particular significance was the fact that Monique's behaviour at school had given no indications of unhappiness.

The trial judge correctly concluded that the essence of Andalyn's case was that whatever might have been the troubles and turmoils of her past she was now as the result of her marriage able to put all that behind her and offer a stable and loving home to Monique in the environment of a normal family. In arriving at his conclusion as to what would best serve the welfare of Monique the trial judge concentrated on the difficulties which had existed rather than on the situation as it then existed in Andalyn's household and Monique's observed reactions to that environment.

He stated:-

> "Moreover, Monique would be going, if she were to remain with her mother, into a family whose problems I have already described. It is greatly to be hoped that Andalyn will be able to put these problems behind her, but there must be risk that she may not. I cannot justify exposing Monique to such a risk when the secure home in which she has been living remains available for her."

He finally concluded:-

> "On all the evidence, I have concluded that in awarding custody of Monique to Andalyn I would be exposing her not only to a continuance of the emotional trauma associated with the sudden disruption of her existing emotional relationships which had taken place, but also to an appreciable element of risk in the longer term. That is far from saying that I have concluded Andalyn is an unfit mother, and I must emphasise my view that it is in Monique's best interest that she should be allowed to remain in contact with her."

This finding placed insufficient weight on the evidence cited above which supported the view that Monique had not suffered "emotional trauma" as a result of her separation from the Grants and had behaved normally at school.

Further the trial judge has not identified the risks to which he finds that Monique may be exposed. Andalyn no longer lived in a home with problematic relatives. Even though she might have been giddy-headed and had shown a preference for leaving her child with grandparents to free herself for fun, that had changed. She was now married and had set up house. She held a steady job.

It is not unreasonable to conclude, having regard to the tenor of the judgment and the nature of allegations made in the course of evidence, that the trial judge feared that Monique might well be in future the victim of abuse. There was her complaint to Mrs. Grant

that Andalyn had played with her private parts. On none of these matters, however, had the evidence amounted to a prima facie case requiring answer. The trial judge quite correctly made no finding on them, and it is difficult to identify any other possible fears in the testimony.

It is significant that the trial judge specifically ordered that Andalyn should have only non-residential access to Monique. The child had been in Andalyn's care and control since 19 June 1989. An interim order had been made on or about 23 October, 1989 allowing her to stay there. Reports from the Social Worker who had observed Monique in that environment and from Dr. LaHee indicated that the child had suffered no overt maladjustment. The order seems to reflect the trial judge's assessment of the appreciable element of risk in the longer term to Monique - a risk which was not identified.

There has been no real dispute as to the principles of law applicable in this case. Section 14 of the Act makes the welfare of the child the paramount consideration.

It is also common ground that the principle on which an appellate tribunal will interfere with a discretion exercised by the court below are authoritatively expressed by Viscount Simon L.C. in Charles Osenton & Co. v Johnstone [1942] A.C. 130 at pp.138, 139 as quoted by Brown L.J. in In re R. (Wardship Appeal [1976] Fam. 238 at p.256:-

> "The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well established and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has

> been a wrongful exercise of discretion in that no weight or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified..."

In G v G [1985] 2 All E.R. 225 at p.229 Lord Fraser of Tullybelton expressed the principle thus:-

> "Certaintly it would not be useful to inquire whether different shades of meaning are intended to be conveyed by words such as 'blatant error' used by Sir John Arnold P. in the present case, and words such as 'clearly wrong', 'plainly wrong' or simply "wrong" used by other judges in order to emphasise the point that the appellate tribunal should only interfere when it considers that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a generous disagreement is possible."

I am satisfied that this is a proper case for interference. The case was decided essentially on written evidence and nothing appears to turn on any assessment which may have been made on the basis of the demeanour of the parties. An appellate tribunal is thus in as good a position as was the trial judge in the area of its evaluation.

The trial judge did not place sufficient weight on the report of the Social Worker who had seen Monique in the environment of her mother's home and had assessments of her behaviour at school. This indicated that she had settled reasonably well. Dr. LaHee's report tended to confirm that. Dr. Hasselbach's report on the other hand was brief. It stressed the broad proposition that disturbing stable and loving relationships could be harmful to a child but there was no detail as to its effect in this case - apart from the statement that it was apparent that Monique was unhappy and troubled. The Social Worker and Dr. LaHee did not find this to be the case in their assessments made about the same time.

The trial judge in assessing the relevant factors stressed Andalyn's troubled history rather than her then existing circumstances which had greatly changed. He contrasted her troubled past with the Grant's history of continuous stability. This was not the proper comparison. The comparison should have been between Andalyn's home as it now appeared to be and the Grant's home as it was.

He appeared to give no importance to the fact that in her mother's home Monique would be growing up with an elder brother, Quincy who in the words of the Social Worker "always looks out for Monique and is somewhat protective of her". The Social Worker had had an opportunity of observing them unofficially at school and at swimming classes held by the school.

In arriving at his decision the trial judge appeared to be very much concerned with "risks" involved in placing Monique in the care and control of her mother - risks which he did not identify and which cannot be reasonably deduced from the evidence placed before him.

In concluding his report Dr. LaHee stated:-

> "I think mother should keep in touch with the social worker to learn what is acceptable behaviour and also to receive help to deal effectively with her adjustment reaction. Mother needs to spend more quality (sic) time with Monique to further foster the bonding and attachment between them."

The trial judge appears to have treated this as an indication of inadequacy on the mother's part. I do not think it was so intended. He had earlier said that both parents had not been able to control her behaviour and their admonitions and pleadings did not help. He then concluded:-

> "It was abundantly clear that they needed to know what was and what was not acceptable behaviour."

There was in effect nothing to choose between the parents on that issue and advice was tendered to the mother to whose custody Dr. LaHee re-

commended that she be given.

In my view the trial judge misdirected himself in assessing the reports of the experts and failed to give due weight to the type of home which Andalyn since her marriage could and did provide for Monique. He did not give sufficient weight to the evidence of Monique's reasonable adjustment during her period at Andalyn's home.

Additionally by treating Mr. and Mrs. Grant as parties in whose favour an order for custody could have been made, he did not give due weight to the likelihood of Todd getting married. He might then have moved from his parents house, taking Monique with him - an action the parents could not resist. The advantages of the historically stable Grant household would then have disappeared and the new environment would be wholly unpredictable. Dr. Hasselbach's report had stressed Monique's emotional attachment to Mr. and Mrs. Grant - whom she regarded as her parents - not Todd who had not, until recently, shown any emotional commitment as a parent. In the circumstances of this case this was a real risk - with consequences potentially more serious than a breakdown of Andalyn's marriage since she was regularly employed and likely to be able to maintain a household in any event.

Accordingly, in my view, on a consideration of the facts the order of Harre, J. should be set aside, and the appeal allowed in terms of the order made by the President at the close of the further argument on jurisdiction.

DATED this 1st day of August 1990.

P. Telford Georges,
J.A.