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In the Grand Court of the Cayman Islands
Holden at George Town, Grand Cayman
on the 26th April 1985

Before the Hon. Chief Justice, Sir John Summerfield, C.B.E., Q.C.

Causes 448 and 449 of 1984

In the Matter of The Adoption of Children Law (Revised)

And

In the Matter of an application by Robert and Berna Murphy for an Order to adopt children named Katherine Marie Hargest and Edward Lawrence Hargest

Mr. David Ritch for applicants

Mr. George Giglioli for respondent

JUDGMENT

This is an application by a husband and wife for the adoption of the two children of the wife's former marriage. The wife married her former husband in August 1971. A daughter (Katherine Marie) and a son (Edward Lawrence) were born to them on the 8th March 1976 and 29th October 1977 respectively. That marriage broke up in July 1980 and was dissolved in October 1982. Custody of the two children was given to the wife with reasonable access to the former husband. Nominal maintenance orders were made as the wife comes from a well off family and was in much the better position to care for herself and the two children. The former husband is a United States citizen. The wife is Caymanian by birth. During that marriage the couple lived in the Cayman Islands, but, shortly after the dissolution, the former husband, who had no entrenched

rights to live and work here, left these Islands and, according to him, had to start and build a new career in Florida where he now lives.

The wife married her present husband in August 1982. They both work in a family business and are comfortably off with a spacious, well furnished home. A young child has been born to this marriage. The two earlier children call their stepfather "Dad" and in every respect he is and acts as their father figure. They all love each other dearly. It is a well intigrated family and everything would appear to point in favour of making an adoption order in favour of the mother and the step-father and completing the family except for the fact that the natural father, the former husband, refuses to give his consent to the adoption.

The issue before me is whether his consent should be dispensed with pursuant to section 11 (1) of the Adoption Law.

The natural father has never, since the break up of the marriage, contributed to the maintenance, schooling or welfare of his two children. He was not required to by the Court order for ancillary relief; he has not been asked to do so by the wife who is well able to meet these commitments from her own resources. He claims that he has suffered straitened financial circumstances while building a new career and is only just beginning to find his feet with increasing disposable income which he could use to enjoy his access rights. He has in fact seen very little of either child since the break up of the marriage. He blames this on his wife's non-co-operation and actual obstruction of the order for access and there is evidence to support this. He has made unsuccessful attempts to see the two children but has not pressed the matter with any vigour when thwarted. He has made no attempt to enforce his rights through the Court or even to press them by a letter from an attorney. He has done virtually nothing about giving presents to the two children or to communicate with them by letter or telephone. He believes that any attempt to do so would be intercepted and unsuccessful.

It is not surprising in the circumstances that the two children have distanced themselves from their natural father and refer to him as "our father". Both children appeared eager to have their name changed to that of the stepfather which is what they understood the proceedings to be all about.

There is no reason to doubt the natural father's claim to love his two children, to be interested in their welfare and his wish to enforce his rights of access. He stated that a major impediment to enforcing those rights over the great distance they live apart and, if necessary, taking legal steps to enforce them has been his straitened financial circumstances. It would have been preferable had he given a detailed account of his assets and income in support of this contention but there is no reason to doubt his assertion in this regard. It was not challenged. He claims that in the foreseeable future he will be in a financial position to make more and more visits to the children and, within two years, to see them as much as once a month.

He was certainly sufficiently concerned about opposing the making of the adoption orders to visit these Islands and brief counsel for that purpose.

There are two advantages which would accrue to the two children if the adoption orders are made. They would rank equally with the other child of the present family in the event of the stepfather dying intestate. That can be remedied by the stepfather making a will. Against that, of course, they would lose all rights in their natural father's estate in the event that he died intestate. Secondly, all the members of the de facto family unit would bear the same surname and that might make them all feel more comfortable and unified as a family. Against that, the filial link with the natural father would be severed. In this regard the observation of Sir George Baker P in Re D (minors) 1973 3 All E. R. 1001 at 1007is pertinent:

> "I am at a loss to see how the court could be satisfied that these adoption orders would be for the welfare of the infants, when the expressed object was to give them the mother's new surname. In her evidence she said she 'explained to the headmaster I had just remarried and could they be called [the same name] as me ... I thought this was best'. All too

> "often this is the course taken by the mother to disguise from her new neighbours on remarriage that she has been involved in a failed marriage; it cannot by itself be a legitimate ground for adoption, or generally in the interest of the children.".

It must, however, be said in favour of the mother that the change of name is not the sole object.

With that background in mind the underlying principles can be examined. And it is as well to begin with the principles that apply in access cases, because the overall effect of the adoption orders would be the frustration of the access rights.

On this aspect the line of authorities is fairly clear. Some refer to the basic right of the parent to have access to his child (as in B v B 1971 3 All E.R. 682). Others emphasise the basic right of the child. In M v M (child : access) 1973 2 All E. R. 81 it was held, inter alia, that no court should deprive a child of access to either parent unless it was wholly satisfied that it was in the interest of that child that access should cease, and that was a conclusion at which the court should be extremely slow to arrive. Access was to be regarded as a basic right of the child rather than a basic right of the parent. Save in exceptional circumstances to deprive a parent of access was to deprive a child of an important contribution to his emotional and material growing up in the long term. There was no distinction to be drawn between the natural parent and an adoptive one.

At p 85 Wrangham J said:

> "It seems to me that the only way which one can reconcile S v S and P with the cases that followed, C v C and still more B v B, is to say that what Wilmer LJ meant was that the companionship of a parent was in any ordinary circumstances of such immense value to the child that there is a basic right in him to such companionship. I for my part would prefer to call it a basic right in the child rather than a basic right in the parent. That only means this, that no court should deprive a child of access to either parent unless it is wholly satisfied that it is in the interest of the child that access should cease, and that is a conclusion at which a court should be extremely slow to arrive. It is not without significance that Edmund Davies LJ in B v R said:
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> 'For a court to deprive a good parent completely of

> 'access to his child is to make a dreadful order. That is what has been done here, and the impact on both parent and child must have lifelong consequences. Very seldom can the court bring itself to make so Draconian an order, and rarely is it necessary.'".

And at p 88 Latey J observed:

> "When a court has to consider whether the parent not having the care of the child should have access to the child, should there be any difference in principle? I cannot for the life of me see any reason at all why there should be any such difference, and I do not believe that there is. Where one finds, as one does for example in S v S and P, a reference to the basic right of a parent to access to the child, I do not accept that the meaning conveyed is that a parent should have access to the child although such access is contrary to the child's interests, and when one reads S v S and P in conjunction with the more recent decisions of the Court of Appeal, to which Wrangham J has referred, I agree entirely, and as emphatically as I can, that what is meant is this: where the parents have separated and one has the care of the child access by the other often results in some upset in the child. Those upsets are usually minor and superficial. They are heavily outweighed by the long term advantages to the child of keeping in touch with the parent concerned so that they do not become strangers, so that the child later in life does not resent the deprivation and turn against the parent who the child thinks, rightly or wrongly, has deprived him, and so that the deprived parent loses interest in the child and therefore does not make the material and emotional contribution to the child's development which that parent by its companionship and otherwise would make.
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> So viewed the cases which speak of the basic right to access of the non-custodian parent are to my mind, as Wrangham J has said, reconcilable and make sense. I do not believe that in modern times they were meant to convey any other meaning. They mean and are meant to mean not that a parent has any proprietorial right to access but that save in exceptional circumstances to deprive a parent of access is to deprive a child of an important contribution to his emotional and material growing up in the long term.".

Again, in Re K (a minor) (access order : breach) 1977 2 All E. R. 737 Latey J observed at p 740

> "I would only add this: save in comparatively rare and exceptional cases, where a marriage has broken down it really is of the first importance in the interests of the children that they should have, and know that they have, the love and support of both parents; and they can only know that, especially if they are very young, if they have real regular contact with the non-custodial parent.".

These are important principles to keep in mind in relation

to the welfare and well-being of the children. The children themselves, at their age, are unlikely to understand or appreciate them. While the natural father has not been particularly zealous in making the contribution he could or should have done in the light of these principles he has given an explanation for his shortcomings. One cannot really blame him in the circumstances. It is not a case of having abandoned the children or neglected them through wilful default. He certainly wishes to preserve the natural tie with his children and I do not doubt his wish to make the contribution he should given the ability and co-operation necessary to do so.

It was probably these principles that influenced the philosophy behind section 10 (3) of the English Children Act 1975. We do not have the exact equivalent of section 42 (1) of the English Matrimonial Causes Act 1973 to which section 10 (3) refers, but the same effect can be achieved in a different way under section 23 (read with section 21) of the Matrimonial Causes Law. In that way the stepfather and mother could obtain joint custody of the two children without prejudice to the father's rights of access.

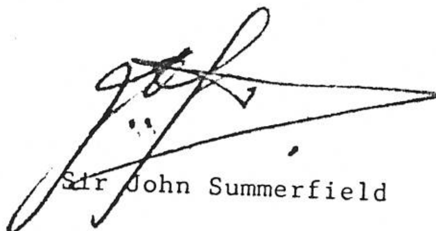
In Re S (infants) (adoption by parent) 1977 3 All E. R. 671 the circumstances had much in common with this one save that in that case the natural father had given his consent to the adoption. Nevertheless, the learned Judge at first instance refused to make the adoption order. In doing so, he had regard to section 10 (3) of the Children Act 1975 which had been enacted but had not yet been brought into force. The view he took was upheld on appeal. In the same way I am entitled to take account of any principles which I conceive to be in the best interests of the children concerned. Whether those principles have been enacted in the law of some other country is irrelevant. The test is whether the welfare of the children will be advanced by adopting those principles. That is why I have earlier reviewed the attitude of the courts to access rights.

One cannot say of a man who loves his children and who wishes to retain his tie with them (although defeated in furthering that objective by misfortune and the absence of co-operation) that he is unreasonably withholding his consent to their adoption by a stepfather. As the biological father his relationship with them is permanent and unassailable unless his behaviour or circumstances make it appear that that natural bond should, in the interests of the children themselves, be served in favour of another.

I can well understand why the mother would want her present husband to supplant the natural father and take on the role of legal father in addition to his role of de facto father. It would be a nice tidying up operation which would have much to commend it from her point of view. I can understand, too, why, from the history of this case, she would bare some resentment towards the natural father. But the interests of the the children remain paramount.

In the long term their interests are likely to be better served by maintaining the natural link with their biological father provided that he lives up to his role by fostering their emotional and physical well-being at a level contemplated by the principles reviewed earlier. In refusing to make the adoption orders sought I should, perhaps, add that that is not necessarily the end of the matter. If the natural father fails to live up to his promise to play the proper, if limited, role he should play in the emotional and physical development of his children, now that, as he claims, he is in a financial position to undertake the duties of that role, he should not complain if, on a renewed application for adoption, a court takes a different view of where the interests of the children best lie.

Accordingly, I decline to make the adoption orders and the applications are dismissed. There will be no order as to costs.



Sir John Summerfield

8th May, 1985.