IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU

APPEAL CASE NO. 1 OF 1991

CIVIL JURISDICTION

MR. JUSTICE MORLING
MR. JUSTICE WARD
MR. JUSTICE MARTIN

BETWEEN: TERENCE JOSEPH FISHER

(Appellant)

AND: PUSHPA LATA FISHER

(Respondent)

Counsel for the Appellant : Mrs. P. Antonov

Counsel for the Respondent : Mrs. S. Bothman-Barlow

Heard : 5th September 1991

Judgement : 6th September 1991

JUDGEMENT

1/ Custody

The first part of this appeal concerns the custody of Craig Vajay Fisher, born 8th October 1983 and now aged nearly 8. His parents Terence Joseph Fisher ("the father") and Pushpa Lata Fisher ("the mother") lived together for some time and married on 1st February 1985. They separated in May 1989. On 22nd December 1989 an interim order was made that the child should stay with each parent in alternate weeks.

The hearing was spread over 4 days. Although the father made certain complaints, the evidence did not seriously suggest that either parent is unsuitable to have custody. The respective arguments may be summarised by saying that the father offers greater financial security and material and other benefits, while the mother offers a family unit consisting of herself and Mr. Nangard, and Mr. Nangard's two sons, one of whom is the same age as Craig. Basically the father wanted to continue the arrangements indefinitely, whereby the child divided his time evenly between them with custody being granted to him to preserve the benefits available under his contract - health protection, travel, and education.

On 3rd December 1990, the father was granted a decree nisi on the grounds of the mother's adultery with Mr. R.Y. Nangard; and an order was made granting custody to the mother.

On 7th December 1990 the Court made an order for access to the father on alternate weekends from 1.30 pm Friday until Tuesday morning.

The father appeals against the order for custody. That decision was one which required the judge to exercise a judicial discretion. As with most cases of this nature, the decision was difficult to make, and it is necessary to set out the approach which an appellate court must take in these circumstances.

Section 26(2) of the Courts Act (Cap 122) states that:
"...the appellate court shall not interfere with the exercise by the court appealed from of a discretion conferred by any written law unless the same was manifestly wrong."

Whether a decision was "manifestly wrong" within the meaning of this subsection should be determined in accordance with common law principles.

In Blunt v Blunt [1943] A.C. 517, at p.526 Viscount Simon LC set out those principles as follows:

"This brings me to a consideration of the circumstances in which an appeal may be successfully brought against the exercise of the divorce court's discretion.

If it can be shown that the court acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take into account matters that are relevant, there would, in my opinion, be ground for an appeal. In such a case the exercise of discretion might be impeached, because the court's discretion will have been exercised on wrong or inadequate materials, but, as was recently pointed out in this House in another connection in *Charles Osenton v Johnston* [1942] A.C. 130, 138: '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, had been given to relevant considerations ....then the reversal of the order on appeal may be justified.'"

To the same effect is the decision of the High Court of Australia in Gronow v Gronow [1979] 144 C.L.R. 513. That was a case in which it was sought to disturb the decision of a trial judge in a matter concerning the custody of a child. At p. 519, Stephen J said:

"The constant emphasis of the cases is that before reversal an appellate court must be well satisfied that the primary judge was

plainly wrong, his decision being no proper exercise of his judicial discretion. While authority teaches that error in the proper weight to be given to particular matters may justify reversal on appeal, it is also well established that it is never enough that an appellate court, left to itself, would have arrived at a different conclusion. When no error of law or mistake of fact is present, to arrive at a different conclusion which does not of itself justify reversal can be due to little else but a difference of view as to weight; it follows that disagreement only on matters of weight by no means necessarily justifies a reversal of the trial judge. Because of this and because the assessment of weight is particularly liable to be affected by seeing and hearing the parties, which only the trial judge can do, an appellate court should be slow to overturn a primary judge's discretionary decision on grounds which only involve conflicting assessments of matters of weight."

The father is a well qualified accountant who has had a series of overseas aid posts financed by the UK. The benefits which he offers depend upon his continuing to obtain similar contracts. The mother and Mr. Nangard have opened a restaurant business which may or may not prove financially successful; and Mr. Nangard hopes to resume his former building business. It is possible that the father's financial prospects are better than those of the mother, but it is by no means certain and it cannot be said that either parent offers guaranteed financial security.

What the future holds for both parents is unclear. But we are

concerned with the circumstances of the parties today and if those circumstances should change so that the arrangements made now should become inappropriate the arrangements can be reconsidered.

Mrs. Antonov for the father pointed to a number of matters which she says that the judge either failed to take into account when he should have done, or took into account when he should not have done. With one exception, we are satisfied that these complaints are not justified either solely when taken cumulatively. They are only matters upon which opinions may differ about the weight to be given to them, and even if we would have come to different conclusions that would not justify reversal of the original decision.

The matter which has caused us concern is that the court did not have the benefit of a report from a welfare officer or guardian ad litem; and did not interview the child. As a result, although the judge was able to form a view about the respective adults concerned, he was not able to ascertain what sort of child he was dealing with nor (to the limited extent to which they are relevant) the expressed wishes of the child.

We were told that no facilities exist to provide reports. In the absence of trained experts, we query whether it would be possible to appoint the Solicitor General or some other suitable person as guardian ad litem; but that is a matter for the future. In this case, despite the well recognised problems involved in interviewing

a young child, we think that the judge would have been better placed to make a decision if he had seen him.

However we have read the views of the parents, and have had the benefit of the observation of Counsel, both of whom have met the child. We have also seen the comments of the judge following the hearing on 7th December 1990 when the child attended. We therefore have a fairly clear idea of the child's character, and we do not think it right to put him through the ordeal of being interviewed either by us or by the Supreme Court.

Having regard to the matters taken into account by the judge, we are satisfied that even if he had seen the child he would have reached the same decision.

We accept entirely that while the parents may differ as to what is best for their son, they are both motivated by what they perceive to be best for his welfare. We see the force in the arguments put on behalf of each parent. But in the end the judge was required to perform a difficult balancing exercise. We are satisfied that he took all relevant matters into account, and we cannot say that his decision on the issue of custody was "manifestly wrong." The appeal against that order is therefore dismissed.

This decision is made in the light of present circumstances. We think it important that the child's future should be reconsidered if it should be proposed that he leave Vanuatu. We therefore order

that the child be not removed by either parent from the jurisdiction of this Court without the consent of the other parent (which we would expect to be given for short holidays) or the consent of the Court.

We were invited to reconsider the matter of access, but in the present circumstances the arrangements seem reasonable. They do not prevent the parents agreeing to access at other times and we would expect them to do so during the school holidays. However defining access can cause as many problems as it solves and we make no further order at this stage.

2/ Matrimonial Property

In the Supreme Court the value of the majority of the matrimonial property was agreed and each party was awarded half. The judge was asked to include in that property the value of a house in England which the husband had bought long before the marriage, in 1970. When the parties started living together there was a mortgage of about £10,000, and in 1986 the husband paid off the mortgage with a lump sum payment of about £6,000. This sum was part of his payment for a report which he prepared for the Asian Development Bank, for which the wife provided secretarial assistance. The house is now worth £70,000. The judge refused to take its value into account because it had never been the family home.

Even if she does not earn money, a wife looking after the home and children and contributes substantially to the family well-being. Over the years she acquires an increasing large interest in the family property, which can include property acquired by either party before marriage. A non-working wife who brings nothing in to a marriage acquire very little in the first few years of marriage, but for a marriage lasting several years the starting point for assessing her share is one third (Wachtel v Wachtel [1973] 1 All ER 829). That case has been much distinguished and criticised, but in the interests of consistency courts need a common starting point and nobody has yet suggested anything better. We therefore accept the same approach.

Although this was a relatively short marriage, in our view the value of the house should have been taken into account at least to the extent that it has increased in value during the marriage. We do not know its value at the date of the marriage, nor the amount then owed on the mortgage. But we do know that the mortgage was discharged by a payment of £6,000.

In the Supreme Court the judge was faced with a very high claim. The wife demanded up to 50% of the full value of the house. We are not surprised that he rejected that claim. A much more modest and realistic claim has been argued before us, and had the matter been put in that way before the judge his conclusion may well have been different.

Quite apart from repayment of the mortgage, the house will have increased in value since the marriage. However, we think it undesirable to send this issue back to the Supreme Court for further evidence to be taken, and that justice will be substantialy done if the husband pays to the wife one half of the sum paid to discharge the mortgage - £3,000 - We so order.

3/ The Class F Land Charge

On advice, the wife registered a class F land charge against the husband's house. That was improper. Such a charge may be registered under the Matrimonial Houses Act 1967 to protect a right of occupation. The wife here never claimed any such right - the house was never contemplated as a matrimonial home. The registration should never have been made.

We are told that, to facilitate the sale of the house, the class F charge has now been removed on the husband's undertaking to deposit a proportion of the sale proceeds pending this decision. That too was improper. The charge should not have been registered and the husband was entitled as of right to have it removed.

We are also told that because of the registration the bank has charged the husband a higher rate of interest to finance the purchase of another house, and he seeks to have that taken into account. We have no evidence to support this claim, and in any

event we think that loss, even if proved, is too remote to take into account.

Costs:

This being a domestic matter, we make no order for costs.

Summary:

1. The husband's appeal against the order for custody and access are dismissed.

2. The wife's cross appeal against the financial orders is allowed and the husband is ordered to pay her a further £3,000.

3. There will be no order as to costs.

Dated at Port Vila this 6th day of September, 1991.

MR. JUSTICE MORLING MR. JUSTICE WARD MR. JUSTICE MARTIN

COURT OF APPEAL JUDGES