[HIGH COURT OF AUSTRALIA.]

SHAW . . . . . APPELLANT;
APPLICANT,

AND

IPATOFF. . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1957.

MELBOURNE, *Feb.* 15, 18; *May* 20.

Dixon C.J., McTiernan, Webb, Kitto and Taylor JJ.

Infants—Custody—Illegitimate child—Death of natural mother—Wishes of mother and blood relatives of child—Weight to be given to—Contest between blood relative and stranger in whose care for reward the child had been placed—Discretion of primary judge—Principles governing appeal from—Infants—Adoption—Whether Victorian statutory provision for, extends to child not domiciled in Victoria—Supreme Court Act 1928 (*No.* 3783) (*Vict.*), *s.* 62 (5)—*Marriage Act* 1928 (*No.* 3726) (*Vict.*), *s.* 36—*Adoption of Children Act* 1928 (*No.* 3605) (*Vict.*).

There is no principle of law which gives a person even a prima facie right to the custody of an illegitimate child simply because the deceased mother, while living, expressed a wish that the child should go to that person.

Nor in the case of such a child whose mother has died is there a prima facie right in the mother's relatives to decide the custody of the child, though, if they wish to have the custody themselves the trial judge must naturally give particular weight to that claim in determining what is most conducive to the welfare of the child.

So *held* by *Dixon* C.J., *Kitto* and *Taylor* JJ.

The weight to be given to the wishes of the deceased mother or of her relatives, discussed.

Quaere whether the *Adoption of Children Acts* (Vict.) are to be construed as applying only to infants domiciled in the State of Victoria.

In a contest for the custody of an illegitimate child between a sister of the child's deceased mother and a stranger in whose care she had placed the child and whom she had paid for the upkeep of the child,

Held by *Dixon* C.J., *Kitto* and *Taylor* JJ., *McTiernan* and *Webb* JJ. dissenting, that in the circumstances the order of the trial judge granting custody to the stranger should be upheld.

Decision of the Supreme Court of Victoria (Full Court), reversed.

APPEAL from the Supreme Court of Victoria.

On 16th December 1955 Mary Pearson Shaw applied to the Supreme Court of Victoria for orders granting to her the custody of an infant Rose Marie Ipatoff, and authorising her to adopt the said infant and for certain other orders. The respondent to the application for custody was Galia Ipatoff who by summons dated 14th February 1956 also applied for custody of the infant.

The applications were heard before *Hudson* J. who in a written judgment delivered on 25th May 1956 held that the applicant was entitled to the orders sought.

From this decision the respondent applied to the Full Court of the Supreme Court of Victoria constituted by *Herring* C.J., *Gavan Duffy* and *O'Bryan* JJ. which court in a written judgment delivered on 4th October 1956 held that the decision of *Hudson* J. should be reversed and that the respondent should have custody of the infant.

From this decision, pursuant to special leave, the applicant appealed to the High Court.

M. J. Ashkanasy Q.C., and *Leo. Lazarus*, for the appellant.

O. J. Gillard Q.C., and *H. Woolf*, for the respondent.

[In the course of argument counsel referred to the following authorities: *McKee* v. *McKee* (1); *Reg.* v. *Nash* (2); *Barnardo* v. *McHugh* (3); *In re Carroll* (4); *In re B.'s Settlement* (5); *Storie* v. *Storie* (6); *Lovell* v. *Lovell* (7); *Mace* v. *Murray* (8); *In re Dellar* (9).]

Cur. adv. vult.

May 20.

The following written judgments were delivered:—

DIXON C.J., KITTO AND TAYLOR JJ. This is an appeal by special leave from an order of the Full Court of the Supreme Court of Victoria, by which appeals were upheld against three orders made by *Hudson* J. in respect of the custody and adoption of a female infant.

The infant, who is illegitimate, was born on 8th September 1949. Her mother is dead and the identity of her father does not appear from the evidence. At the time of the hearing before *Hudson* J., that is to say in May 1956, she was nearly seven years of age, and had been in the custody of the appellant, to whom she is a stranger

(1) (1951) A.C. 352.
(2) (1883) 10 Q.B.D. 454.
(3) (1891) A.C. 388.
(4) (1931) 1 K.B. 317.
(5) (1940) Ch. 54.
(6) (1945) 80 C.L.R. 597.
(7) (1950) 81 C.L.R. 513.
(8) (1955) 92 C.L.R. 370.
(9) (1884) 28 Sol. Jo. 816.

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in blood, for two years and three months. She was originally placed in that custody by the respondent, who was her mother's sister. *Hudson* J. made an order in favour of the appellant on an application by her for custody, an order dismissing a cross-application by the respondent for custody, and an order authorising the appellant to adopt the infant. On appeal, the Full Court set aside all three orders and gave custody of the infant to the respondent. The appellant seeks from this Court a reversal of the Full Court's decision and a restoration of the orders of *Hudson* J.

It will be convenient to discuss first the competing applications for custody. Both by the principles of equity made applicable by s. 62 (5) of the *Supreme Court Act* 1928 (Vict.), and by the specific provision in s. 136 of the *Marriage Act* 1928 (Vict.) as substituted by the *Statute Law Revision Act* 1929 (Vict.), the court was required, in deciding the question of custody, to regard the welfare of the child as the first and paramount consideration.

The case was of more than ordinary difficulty. The infant's mother was the youngest of three daughters who at one time had lived with their parents in Shanghai. The father died in 1944. The eldest daughter (who is the present respondent) left Shanghai in 1946 and did not return. The mother and the second daughter left Shanghai in 1949, apparently a short while before the birth of the infant; and then went, first to the Phillipines, and subsequently to the United States where they have lived ever since. The infant's mother suffered from tuberculosis. There being no member of her family still in Shanghai when her child was born, she left the infant in a hospital for a year, and in an orphanage for another year. She wrote to her sister the respondent, about March 1951, asking her to take care of the child, as she was too ill to do so herself. After some months the respondent commenced negotiations with the Immigration Department in Sydney, and as a result the child was brought to Sydney in January 1952, the respondent's purpose being to proceed with her to the United States as soon as the permits or visas required by the United States immigration laws should become available for them both. The respondent was unable, because of her employment, to care herself for the child for more than a few months, or perhaps a year. She then put her into a foundling home near Sydney. The child was unhappy there, and after another year had elapsed the appellant, who knew the respondent as a children's nurse formerly employed by the appellant's brother, offered to take the child into her own home at Kew near Melbourne, and to look after her until the visas should come through. The respondent agreed, and took the child to the appellant's home.

This was in February 1954, when the child was nearly four and a half years old. The appellant has had the sole care of her ever since.

In 1952, the year in which the child was brought to Australia, her mother, ailing as she was, found it possible to enter the United States and there join her mother and second sister. Between the three of them and the respondent it was then arranged, if it had not already been arranged, that the respondent should take the infant to the United States as soon as she could, so that they might all be together. On 16th February 1953 the infant's mother, believing that she could not expect to live out the year, executed a formal document in which she purported to appoint the respondent as guardian of the person and estate of the infant upon her death, and consented to the respondent's adopting the infant as soon as might be permitted by the laws of California or any other State wherein they might reside. Towards the end of 1953, however, she wrote the respondent a letter, dated 25th November 1953, giving some news which she described as good and which she apparently expected would make the respondent happy. The news was that a married lady, who had already adopted a girl six years old, wanted to adopt the infant. The mother asked the respondent to tell her what else there was to do. The lady referred to was a Mrs. Hansen, of Pomona, California. What reply the respondent made does not appear, but apparently she approved of the proposal. On 6th January 1954 the child's mother made an affidavit expressing her belief that the adoption would be in the best interests of the child, and giving her consent to it. The affidavit stated as the mother's understanding that the consent could not be withdrawn and that the child could not be reclaimed by her; and by it she released all "right of custody services and earnings of said child". The document purported to be executed " pursuant to the provisions of Section 5 (a) of the *Refugee Act of* 1953 (Public Law 203) so that a visa may be issued to (the infant) as an orphan under said *Refugee Act of* 1953 to be adopted in the United States by Ouida Hansen and Andy Hansen . . . ". A letter written by the American Vice-Consul in Sydney, which is in evidence, indicates that the Act referred to provides for non-quota immigration visas to eligible orphans under ten years of age whom United States citizens intend to adopt.

It was in January 1954 that the appellant made to the respondent her offer to take charge of the infant. The arrangement they made contemplated a period of four to six months as being likely to elapse before the visas should be obtained, and there was no intention or understanding on either side that it should be permanent. The visas, however, did not arrive, and the respondent took no steps

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to bring the arrangement to an end. She paid the appellant monthly sums of £5 to £8 each as board for the child, and provided some of her clothes. She did not, however, accept a suggestion which the appellant made that she might come to reside together with the infant in the appellant's home, in order that the move to the United States, when it occurred, should not cause a complete break in the child's life. From time to time, commencing about six weeks after the infant came to her, the appellant asked the respondent to allow her to adopt the infant; but the respondent had told her of the arrangement with the Hansens and (it is to be inferred) showed no weakening in her intention to carry that arrangement into effect when the opportunity should arise.

Still, time went on and the child grew more and more attached to the appellant and to the appellant's home. She made friends in the vicinity and went to a local school. At first a nervous unstable child, thin and pale, whose early experiences of disturbance and insecurity had left their mark in a strained expression and an excitable and apprehensive demeanour, she benefited to an extent which was apparent to outsiders from the affectionate care which the appellant constantly gave her and the secure conditions of her new home life. By the time the applications for custody came to be decided by the primary judge she had become, as his Honour found, "a normal, happy and healthy youngster who has settled down into an environment and habits of life in which she has found security and happiness for the first time". She was then nearly seven, and had lived with the appellant for two years and three months. The appellant, who had been growing increasingly anxious as to the psychological effects likely to ensue if the child should suddenly find herself transferred to a foreign country and in the home of total strangers, had written a letter to the Hansens asking whether, if they felt they must go on with the adoption, one of them could come and receive her in person, to meet her friends and associates and enable themselves to share at least some of her background. She even offered to try to help towards paying the fare. She added, referring to the infant as Rosemary and to the respondent as Galia: "When I originally invited Rosemary to stay it was with the intention of keeping her till such time as she was able to go with Galia to her own people. I did not know that plans were being made for her adoption till after her arrival and never dreamed that they would even consider having her adopted. Please help me. I am feeling terribly unhappy over the whole situation."

To this letter there was no reply.

The applications to the court were decided by *Hudson* J. in May 1956. By then the respondent had received an official assurance that she and the child would be allowed to enter the United States in the following October. A cardinal feature of the situation which confronted the learned judge was that which was underlined by the paragraphs above quoted from the appellant's letter to the Hansen's, namely that if the necessary visas should in fact be received the respondent's intention was to take the infant to California, not so that she might there be brought up by the respondent herself or by her mother or sister, but so that she might be adopted by the Hansens. The evidence did not show what is the legal result of adoption according to the law of California, but it is clear that the respondent's purpose was to give the child to the Hansens in order that for all practical purposes, at least, she should become their child. The primary judge was satisfied that as their adopted child she would have a home and maintenance and education according to reasonable standards. Moreover she would probably be in constant touch with her grandmother, and possibly with the respondent; for at the time of the hearing, the grandmother was living in the Hansens' home, and there was some talk of the respondent's obtaining employment in Mr. Hansen's business. The child's other aunt, the respondent's sister, was living about sixty miles away.

Mr. and Mrs. Hansen made an affidavit asserting their ability and anxiety to care for, maintain, support and educate the infant, and to treat her in all respects as their own child. There is nothing in the case to suggest any reason for doubt that in their home she would be well looked after and satisfactorily brought up. It is a circumstance of the case, however, that by reason of distance they were unable to give evidence personally, so that the judge had no opportunity of forming an opinion of his own about them and they could not be cross-examined. Moreover, they had never seen the child, and their impressions of her could only be such as photographs and the respondent's letters had been able to convey.

The appellant, on the other hand, was called as a witness, and she impressed the judge as a woman of gentle disposition and excellent character and of intelligence and understanding well above average. She was unmarried and forty-nine years of age. She was a trained nurse holding a certificate as an Infant Welfare Sister, and had had many years experience in the latter capacity. His Honour thought that so far as it was possible for a single woman to fill the role of mother to the infant, the appellant had all the qualifications enabling her to do so. He formed the opinion, despite criticisms

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of her that were pressed upon him, that her applications to the court were dictated, not by selfish considerations, but by what she considered to be in the best interests of the child having regard to the situation that had developed and the alternatives that were open. She was probably not as well-to-do as the Hansens, but she was not without means. She owned the house (subject to mortgages) in which she and the infant lived, and the furniture and effects therein. She had a life interest in the estate of her late father, producing about £9 a week. Her professional qualifications would enable her to supplement this income. Over assets of her father's estate valued at £10,000 she had a testamentary power of appointment, and she had made a will exercising this power in favour of the infant and leaving her the whole of her own estate. His Honour was satisfied that if the infant were left with the appellant she would be provided with a comfortable home and maintained and educated according to reasonable standards. He was satisfied, too, that between the infant and the appellant there was a strong bond of affection which was likely to grow stronger as the years passed, and that the appellant would almost certainly make a success of the upbringing of the infant in a manner which would ensure her a happy childhood and fit her to cope with the problems that would confront her as she grew towards womanhood.

The learned judge, after reviewing the features of the case which tended in favour of the appellant's applications, took due account of some considerations of the opposite tendency. Left with the appellant the infant would have no one whom she could regard as a father and no family unit in the full sense. She could not very well take her foster parent's name. The appellant, as they both grew older, might find her a burden and might have less affection for her, less consciousness of her responsibilities towards her and less capacity to shoulder them. If the appellant should die, the infant would have no connexions left in this country. On the other hand if she went to the Hansens she would have both foster parents and a sister; she could take the name of Hansen; and she would have not only the support of the Hansens but the benefit of the interest and protection of her mother's relatives, to whom she could turn if her adoption by the Hansens did not take place or turned out unsatisfactorily, and whose blood relationship to her might be relied upon to provide a bond that would bear the stresses and strains that might occur during her early life. As against these considerations his Honour took into consideration that neither the Hansens nor the respondent's mother or sister had ever seen the infant. They might or might not find themselves attracted to her,

and her reaction to them and to her new environment could not be foreseen. There was an undoubted attachment between the infant and the respondent, but the respondent might marry and have children of her own.

The learned judge reached a conclusion which he expressed, referring to the present appellant as the applicant, in these words: " Having considered and taken into account the various advantages and disadvantages involved in each of the alternatives, I have come to the conclusion that the welfare of the infant will be best served by leaving her in the custody of the applicant. Whilst recognising that the situation in which the infant will be placed is far from ideal, its advantages are many, and in my opinion I would not be justified in putting them aside in favour of a course which, though it might in certain events lead to a situation more beneficial to the infant in some respects, is fraught with risks and uncertainties which leave me in serious doubt as to whether such a situation would be attained."

The orders which his Honour made in accordance with this conclusion were reversed by the Full Court on appeal. As regards the welfare of the infant, the learned judges who formed the Full Court thought that *Hudson* J. should have given greater weight to two matters: first, that his order would "make the whole future of the infant dependent upon one person and one person only and upon the continued good health and continued affection for her of that one person, a person moreover who never knew her mother "; and, secondly, that if the adoption by the Hansens should break down, not only would there be courts in California to watch over the welfare of infants, but the child would have relatives to whom she could turn for help. But in addition their Honours thought that in the special circumstances of the case two considerations should have been given decisive weight, even considered as apart from the welfare of the child. One was that it had been the wish of the infant's mother that the infant should be adopted by the Hansens, and the other was that the infant had come within the jursidiction in the course of a journey to California which had been fortuitously interrupted and the resumption of which, in all the circumstances, the court ought not to prevent.

So far as " the first and paramount consideration ", the welfare of the child, is concerned, what has already been said in summarising the reasons of *Hudson* J. will have made it clear that both the matters which the Full Court thought had received insufficient weight were in fact among the considerations to which his Honour specifically adverted as favouring the case for the respondent. They

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were matters which no one, who recognised them as factors for consideration at all, could fail to treat as weighty; and on a careful reading of his Honour's judgment it seems clear that he so regarded them. They were matters upon which, together with every other relevant consideration, the primary judge had to form a discretionary judgment on the question of the infant's welfare, and the judgment he formed on that question was not open to review on appeal, except in accordance with the principles which have been explained by the House of Lords in *Blunt* v. *Blunt* (1) and by this Court in such cases as *Storie* v. *Storie* (2); *Lovell* v. *Lovell* (3); *Paterson* v. *Paterson* (4) and *Pearlow* v. *Pearlow* (5). The learned judge evidently gave to all those considerations most careful and anxious thought. He was fully alive to the difficulty of his task. It is not at all inconceivable that other judges, if they had been in his position, might have felt that the two matters which struck the Full Court so forcibly ought to weigh down the scales in favour of the respondent. But in order that a reversal of his Honour's conclusion should be justified on the ground that matters which he certainly had not altogether overlooked had received insufficient weight in his deliberations, it was not enough that the judges who sat on the appeal should have felt that if they had been in his place those matters would have pressed upon them more heavily than it might be inferred that they had pressed upon him. It was necessary for them to be satisfied that his conclusion was enough in itself to show that he had failed to give proper weight to one or both of those matters. And it was really not possible in this case to go so far.

Accordingly the primary judge's conclusion, on a balance of considerations, that it was better for the child that she should remain with the appellant than go to the respondent should be accepted. The matters to which the learned judges of the Full Court referred in dealing with that question, however, are not unrelated to the question to which they ultimately turned, namely whether the primary judge was right in treating his conclusion as to the welfare of the child as decisive of the case. It is, of course, well established that other considerations must be allowed in these cases the weight which equity would always have accorded them, for s. 136 of the *Marriage Act* merely confirms and extends to all jurisdictions the equitable principle that the infant's welfare is the first and paramount, not the only, consideration to be weighed:

(1) (1943) A.C. 517.
(2) (1945) 80 C.L.R. 597.
(3) (1950) 81 C.L.R. 513.
(4) (1953) 89 C.L.R. 212, at pp. 218-224.
(5) (1953) 90 C.L.R. 70, at pp. 76, 77.

McKee v. *McKee* (1); *Storie* v. *Storie* (2); *Lovell* v. *Lovell* (3). There is no reason to suppose that the learned primary judge thought otherwise; but he treated the case before him as one in which, on the facts, there was no consideration other than the welfare of the child to be attended to. The Full Court thought that there he erred, and that the wish expressed by the child's mother in her lifetime and the circumstances in which the child came to be with the appellant were features of the case which required a decision in favour of the respondent, whatever view might be taken as to the welfare of the child.

Considered by itself, the wish of the mother can hardly be regarded, in this case, as of much materiality. No doubt in some cases an indication of the mother's wishes may be of assistance on the question of the infant's welfare; but it is not easy to see any other bearing it can have in deciding as to the custody of an illegitimate child. There is no principle of law which gives a person even a prima facie right to the custody of such a child simply because the deceased mother, while living, expressed a wish that the child should go to that person. See *In re Connor* (4), where *Ronan* L.J. remarked that no case had been produced in which it was alleged that there was any prima facie right in persons designated by a deceased mother of an illegitimate child, or any prima facie obligation on the court to obey her wishes (5). In the circumstances of the present case the mother's wish is not even of persuasive value. It does not appear that the mother knew the Hansens well enough to make an informed judgment about her child's prospects of well-being as their adopted child. She was obviously anxious that the child should have a home, and was glad that one was offered. That is all that can well be gathered from the evidence. But what is more important is that the mother knew nothing either of the appellant or of the situation which was to develop by the time the choice had to be made between leaving the child with the appellant and sending her to the Hansens. *Hudson* J. had a problem to solve which was radically different from that to which the mother was addressing herself, and he was right in not treating the mother's approval of the proposed adoption as a feature of the case worthy of being set against the welfare of the child.

It is convenient here to add that in the argument in this Court the contention that a decision in favour of the respondent would have the merit of conforming with the expressed wish of the mother

(1) (1951) A.C. 352, at p. 366.
(2) (1945) 80 C.L.R., at p. 611.
(3) (1950) 81 C.L.R., at pp. 520 et seq.
(4) (1919) 1 I.R. 361.
(5) (1919) 1 I.R., at pp. 389, 390.

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was coupled with another and more far-reaching submission. It was said that, in a case as to the custody of an illegitimate child whose mother has died, there is a prima facie right in the mother's relatives to have or decide the custody of the child. Reference was made to a passage in the judgment of *Jessel* M.R. in *Reg.* v. *Nash* (1): "The Court is now governed by equitable rules, and in equity regard was always had to the mother, the putative father, and the relations on the mother's side. Natural relationship was thus looked to with a view to the benefit of the child. There is in such a case a sort of blood relationship, which, though not legal, gives the natural relations a right to the custody of the child" (2). This passage was referred to with approval by Lord *Halsbury* and Lord *Herschell* in *Barnardo* v. *McHugh* (3). When it was quoted to the Court of Appeal in Ireland in *In re Connor* (4), the Lord Chancellor of Ireland said that there was no case that he had been able to find in which, after the death of the mother, regard was ever had to the wishes of her relations. "They are under no obligation or duty to maintain her illegitimate child", he said, "and the principle, upon which *Barnardo* v. *McHugh* (5) and *Humphrys* v. *Polak* (6) were decided can have no application to them; *cessante ratione cessat lex*" (7). But *Jessel* M.R., when he spoke of the relations having a "right" to the custody, seems to have been referring, not to any right to insist that the question of custody be decided otherwise than by reference to the child's well-being, but only to the peculiar strength which blood relationship gives to a claim by members of the mother's family to have the care and upbringing of a child towards whom it is according to nature that they, more than any stranger, should have a tender sympathy and an enduring devotion. It is a strength which tells against competing claims in a conflict as to what is most conducive to the welfare of the child. *Hudson* J. in the present case took into his consideration the favourable results which might be expected to enure to the child from her being brought within reach of the affectionate attention, and, if she should need it, the care, of her grandmother and her aunts; but he acted in full accordance with the principles affirmed in *Reg.* v. *Nash* (1) and *Barnardo* v. *McHugh* (5) when he treated these matters as factors in the problem as to what would be likely to turn out best for the child, and not as considerations competing for supremacy against the welfare of the child.

(1) (1883) 10 Q.B.D. 454.
(2) (1883) 10 Q.B.D., at p. 456.
(3) (1891) A.C. 388, at pp. 394, 398.
(4) (1919) 1 I.R. 361.
(5) (1891) A.C. 388.
(6) (1901) 2 K.B. 385.
(7) (1919) 1 I.R., at pp. 376, 377.

There remains the question whether the case should not have been treated as concluded in favour of the respondent by a due consideration of the circumstances in which the child had come to be in this country and in the appellant's custody. The respondent had had her brought here with a view to their proceeding together to California when an opportunity should arise. It may be accepted that from first to last the respondent has acted from motives of family loyalty and genuine concern for the child, her sole purpose being to carry out the plan which the child's dead mother had sanctioned for the settling, the reunion as it was called in the respondent's argument on the appeal, of the grandmother, the two aunts and the child in California. She had made it clear when she first gave the child into the appellant's care that the arrangement was simply a means of bridging the gap in time which would end with the receipt of the visas. Clearly no injustice would be done to the appellant if the child were taken from her now, and indeed she has never put the case as one in which her own interests should be considered. The problem is whether the decision of *Hudson* J., if it stands, will mean an injustice to the respondent and her mother and sister which was not justified even by the view taken by his Honour as to the welfare of the child.

For the respondent it was said that surely this was so. She had had the child brought to Australia in furtherance of a family plan, and she should be allowed to go on her way with her to the consummation of that plan. If she had made a less happy arrangement for the temporary care of the child, she would have incurred no opposition to the fulfilment of her purpose. It cannot be right, her argument proceeded, that because the arrangement she made has worked out well the claims of the family to the realisation of their hopes should be set aside upon nothing more than a judicial opinion that it is probably better for the child to leave her where she is. Such a result may be justified in some circumstances, but not, it was contended, where the judicial opinion depends upon speculation as to what the future may hold for the child in this event and in that, instead of giving effect, as a matter of strong presumption, at least, to the natural claims of blood relationship.

So, in effect, the argument went. In many cases it would be a powerful argument. Even in this case, no court could fail to consider most anxiously whether legitimate family ambitions would be unjustly defeated, and the value of natural ties too easily discounted, by looking only to the assessed probabilities concerning the future welfare of the child.

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But the crucial feature of the case is the very one which becomes obscured when the family's plans are described as plans for the reunion of the infant with her grandmother and her aunts. There is no intention that the child shall live with any of her relatives. It is possible that when the child reaches California, if she does, the grandmother will be in the Hansens' house in some capacity, but how long she will remain there is necessarily uncertain. Where the respondent will be from time to time is still more uncertain. And the other aunt is the least likely of the three to be able to have any substantial association with the child.

The difficulty is not to be got rid of by accepting a suggestion which was offered to us that the proposal for the adoption of the infant by the Hansens should be regarded as little more than a means of gaining entry for the infant into the United States. What view we ought to take of a colourable expedient to evade the immigration laws of another country we need not stay to consider, for there is no reason to regard the adoption proposal in this case as such an expedient. The Hansens are not proposing to emulate Pharoah's daughter. The manner of presentation of the respondent's case to *Hudson* J. led his Honour to say: " The principal advantage which it was contended would be offered by an order in favour of the respondent is that the infant will be taken into the Hansen family and become a member thereof, receiving their name and acquiring not only a father and mother but also a sister of similar age." It was on that basis, and not on the basis of a proposed taking of the infant into the care of her mother's relations, that *Hudson* J. had necessarily to consider the case. Indeed it is obvious that the members of the family cannot, and fully recognise that they cannot, attend to the bringing-up of the child themselves. So far as the grandmother and the respondent's sister are concerned, the degree of attachment they would be likely to form for a girl seven years old whom they have never seen cannot be confidently foretold; but even assuming that, given the opportunity, they would develop as warm an affection for her as the respondent possesses, the fact remains that the very plan which, it is said, cannot be frustrated without injustice to them is one which destines the child for membership of another family, and must necessarily result in the members of her natural family losing all contact with her except in so far as the adoptive parents see fit to allow it. If she should be unhappy in the Hansens' family circle, the mother's relatives could do nothing about it. True, if the Hansens were to die, or to become unable or unwilling to keep her, she would have the relatives to turn to. But it is the respondent's own case that the Hansens are only in or

approaching middle age and are likely to continue able, and certainly to continue willing, to bring the child up in reasonable comfort, and the evidence is all to that effect.

This being the situation, the notion of a planned family reunion cannot be accepted as having a real application to the facts of this case. What the respondent complains of as an injustice is really the disappointment of, first, her loyal desire to fulfil what she regards as a trust reposed in her by her dead sister, and, secondly, her hopes and those of her mother and sister that they will not be precluded by distance from seeing something of the child as she grows up. That desire and those hopes are perfectly natural, and they are entitled to respect; but to hold that they should have been regarded by *Hudson* J. as considerations which might possibly outweigh the welfare of the child herself would be wrong in principle. In *Re A (an infant)* (1) the Court of Appeal held that the wishes even of the mother of an illegitimate child regarding the person who is to bring up her child, if she does not wish to do so herself, are not entitled to prevail simply because they are her wishes. It cannot be that the wishes of the mother's relatives, if she is dead and they do not wish to bring up the child themselves, should prevail over the child's well-being. The learned judges in the Full Court based their conclusion on this aspect of the case largely upon what was said by *Page-Wood* V.-C. in *Nugent* v. *Vetzera* (2). They cast no doubt upon the jurisdiction of the Victorian courts to decide questions as to the custody in Victoria of a child who is resident there. But they said that the infant in this case was " not in any real sense a Victorian infant "; that her presence in Victoria had come about fortuitously and for no other purpose than to enable her to enter the State of California; and that in such circumstances one would expect the court to demand weighty reasons before intervening to prevent the child's aunt, to whom the mother had entrusted her, from escorting the child on the last leg of her journey to the country which, it seemed fair to assume, was the country of her domicile. The learned judges read the judgment of the Privy Council in *McKee* v. *McKee* (3) as an authority for keeping always in the foreground the circumstances in which the child happened to be in Victoria; and they considered that the reasons contained in the judgment in *Nugent* v. *Vetzera* (2) applied with equal if not greater force to the facts of the present case. The judgment of *Morton* J. in *In re B.'s Settlement* (4) they regarded as supporting a different view in a case where it would be " most detrimental " to the health

(1) (1955) 2 All E.R. 202.
(2) (1866) L.R. 2 Eq. 704.
(3) (1951) A.C. 352.
(4) (1940) Ch. 54.

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and well-being of a child to allow him to proceed to the country of his original destination, but they considered that the present was not such a case. Their Honours thought that *Hudson* J. had not taken into account as a matter to be weighed in the scales the fact that the child was here in Australia "merely *in transitu*", and had not considered whether there was any sufficient reason why the child's journey should not be continued. He had directed his attention to what he called the two alternatives—whether it would be better for the child's welfare that she should continue to reside with the appellant or be adopted by the Hansens—and had given no weight or no sufficient weight to other considerations. Accordingly their Honours thought that his exercise of discretion could not stand, and, proceeding to exercise the discretion themselves, they acted upon the view that no sufficient reason had been shown for preventing the child from proceeding with the respondent to the United States.

The proposition which *Nugent* v. *Vetzera* (1) laid down, as stated in the headnote, is that the court will not from any supposed benefit to infant subjects of a foreign country, who have been sent to this country for the purposes of education interfere with the discretion of the guardian who has been appointed by a foreign court of competent jurisdiction, when he wishes to remove them from England in order to complete their education in their own country. It was in the following passage in the judgment that the learned judges of the Full Court found the principle upon which they thought that the present case should be decided: "It would be fraught with consequences of very serious difficulty, and contrary to all principles of right and justice, if this Court were to hold that when a parent or guardian (for a guardian stands exactly in the same position as a parent) in a foreign country avails himself of the opportunity for education afforded by this country, and sends his children over here, he must do it at the risk of never being able to recall them, because this Court might be of opinion that an English course of education is better than that adopted in the country to which they belong" (2).

It is important to bear in mind that the children concerned in *Nugent* v. *Vetzera* (1) had been sent to England for a specific temporary purpose, and that their recall from England was sought by a person who had been appointed as their guardian by the courts of their own country, and whom, therefore, there was strong prima facie reason for regarding as the proper person to have their custody. Considerations of comity between countries were given great weight.

(1) (1866) L.R. 2 Eq. 704.

(2) (1866) L.R. 2 Eq., at p. 712.

But the present case is of a different kind. No guardian of the infant having been appointed by the courts of any country, there is no question of comity involved. It appears from the evidence of a Californian attorney that according to the law of California an indication of the wishes of a deceased parent of a minor gives a right to preference with respect to guardianship amongst persons equally entitled in other respects. Presumably this was the effect of the purported appointment of the respondent as guardian in the mother's affidavit of 16th February 1953; but her subsequent affidavit relating to the proposed adoption by the Hansens was regarded by the attorney as giving the right to preference to the Hansens. No guardian, however, has been appointed. The respondent occupies no special legal position in relation to custody of the child, nor do the Hansens.

Nugent v. *Vetzera* (1) does not require that in a case such as the present any other question than the welfare of the child be treated as governing the right to custody. The factual considerations to which the Full Court referred have been dealt with earlier in this judgment and nothing more need be said about them here. For the reasons given the orders made by *Hudson* J. as to custody ought not to have been disturbed and should now be restored.

On the appellant's application for authority to adopt the infant an objection to the jurisdiction of the Victorian Court was taken before *Hudson* J., the objection being that the infant was not domiciled in Victoria and that the *Adoption of Children Acts* should be construed as applying only to infants domiciled in that State: cf. *Barcelo* v. *Electrolytic Zinc Co. of Australasia Ltd.* (2). After discussing the point at length, his Honour held that jurisdiction to make an order existed. On the merits of the application he said, without giving any reasons beyond those which he had already stated in dealing with the custody application, that he was satisfied that the adoption application should be granted; and he made an order accordingly. The Full Court, coming to the opposite conclusion as to custody, thought it obvious that the adoption order could not stand, and expressed no opinion on the objection to jurisdiction. Assuming that *Hudson* J. was right in overruling that objection, it remains a matter for consideration whether a decision in favour of the appellant on the question of custody is enough to entitle her to succeed as to adoption also. Section 5 (*b*) of the *Adoption of Children Acts* (the *Adoption of Children Act* 1928 as amended) provides that the court, before making an adoption order, shall

(1) (1866) L.R. 2 Eq. 704.

(2) (1932) 48 C.L.R. 391, at pp. 424, 425.

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be satisfied that the order if made will be for the welfare of the infant. The consequences of an order for adoption are, of course, much more enduring than those of an order for custody, and they affect more aspects of a child's life. There are many considerations which are relevant to both, but it is quite possible to be satisfied that the custody of a child should be given to a person while not being satisfied that it would be for the child's welfare to make an adoption order in favour of that person.

In the present case, though the views of *Hudson* J. on the considerations relating to custody be accepted in their entirety it is not easy to see any positive advantage which an adoption order would confer on the infant, and possibilities of disadvantage suggest themselves readily. In view of the testamentary arrangements which the appellant has already made, there is no discernible property benefit which adoption would be likely to bring. The appellant no doubt desires an adoption order for the sake of the degree of permanence it would give to her position in relation to custody; but in the particular circumstances of this case there is something to be said for not introducing that element into the situation. A point which is not unimportant is that when the infant is a few years older she may have views of her own on the question of adoption, and if an application is then made to the court her wishes will be a matter for consideration by virtue of the express provision on the point in s. 5 (*b*). Not only is it difficult to see grounds for the satisfaction which the statute makes a condition of the power to make an adoption order, but there is a consideration against adoption in the fact that such an order would pointlessly aggravate the sense of loss which the grandmother and the aunts are likely to feel by reason of the disappointment of their plans to have the child taken to California. For these reasons the Full Court's reversal of the order made on the adoption application should be allowed to stand.

An error appears to have occurred in the drawing up of the formal order of the Full Court, the adoption order made by *Hudson* J. being described as an order appointing a guardian. The best course seems to be to allow the appeal, to set aside the order of the Full Court *in toto*, and in lieu thereof to make an order dismissing the appeals from the two several orders of *Hudson* J. as to the custody of the infant, allowing the appeal from the order of *Hudson* J. as to adoption, and substituting for the last-mentioned order an order dismissing the appellant's application for authority to adopt the infant.

Before *Hudson* J. no order for costs was sought and none was made. In all the circumstances it seems right that there should be no order as to costs, either here or below.

McTIERNAN J. The appellant and the respondent made contending applications for the custody of Rose Marie Ipatoff, a child of tender years, and the appellant made an application for authority to adopt her. These applications were entered in the Supreme Court of Victoria and were heard together. *Hudson* J., the trial judge, dealt with the applications by granting the custody of the child to the appellant with leave to adopt her. On appeal, *Herring* C.J., *Gavan Duffy* and *O'Bryan* JJ. reversed the decision of *Hudson* J. on the issue of custody and further decided that the order of adoption ought not to stand.

The child is illegitimate. She was born on 8th September 1949 in Shanghai and when these proceedings began she was six years and three months of age. Her mother, Zina Ipatoff, died in California on 5th August 1954, and the putative father, who was an American marine, has not been heard of since before the child was born. Zina Ipatoff was a White Russian, and was never in Australia. In August 1952 she entered the United States of America as a refugee from Communist rule in Shanghai, and lived, until she went to hospital, with her mother in California. When China fell under Communist rule, Zina, her mother, Mrs. Ipatoff, a widow, and Zina's sister, Nina, were living together in Shanghai. Mrs. Ipatoff and Nina fled as refugees to the Phillipines and in 1950 entered the United States on permanent visas. Zina was not able to accompany them and, when Rose Marie was born, nobody related to her was living in Shanghai. It seems that Zina, Mrs. Ipatoff and Nina hoped that Zina would leave China after her child was born and that they would all meet in the United States. Zina was suffering from tuberculosis and because of serious illness was never able personally to care for Rose Marie. Nor could she take charge of her on a journey from Shanghai to the United States. In January 1950, the respondent, who is Zina's elder sister, arrived in Australia in order to carry on duties, on which she had been engaged since 1946, as governess in the home of an Australian official who had been serving abroad. Zina wrote to the respondent to ask her to take care of the child in Sydney. Zina did this as a preliminary step to her departure for California. The respondent obtained permission from the authorities in China and Australia for the child to be brought to Sydney. She sent money to Zina to help her in her need. When Zina wrote to the respondent Zina and the child were in hospital in Shanghai. Pending the making of arrangements for the conveyance of the child to Sydney, Zina placed her in an orphanage in Shanghai conducted by French nuns. At length Zina arranged with a Russian woman to take Rose Marie

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with her to Sydney, and on 14th January 1952, this woman handed over the child to the respondent, who paid her £40 for her services.

In anticipation of the arrival of the child in Sydney, the respondent applied for visas permitting the entry of the respondent and of the child into California. The respondent acted as foster-mother to the child after her arrival in Sydney but after twelve months she found it impossible personally to care for the child and at the same time to earn her livelihood. She was maintaining the child as well as herself. Delays were encountered in obtaining visas for their entry into California. Under stress of these circumstances, the respondent placed the child in an infants' home conducted in Sydney by nuns. The official who had employed the respondent as a governess is a brother of the appellant. The appellant became aware that the visas had not yet been issued and that the respondent was compelled to place Rose Marie in the infants' home. The appellant is a single woman residing in Melbourne. She is a trained nurse and infant welfare sister. She was living alone in Melbourne and had room in her home for the child. The age of the appellant at the time was about forty-six years. She made an offer to the respondent to care for the child in her home until the visas were forthcoming. The respondent accepted this offer and on 9th February 1954 the appellant took charge of the child. The visas were not forthcoming for about two years. In the meantime the child lived in the appellant's home and the respondent travelled to Melbourne from time to time to see her. The respondent contributed regularly to the support of the child and sent her articles of clothing. There is no doubt that the respondent has love and affection for the child and that the child is fond of her. According to the evidence adduced for the appellant, the child benefited in mind and body from being under the care of the appellant and she and the child have affection for one another. When it became apparent that the visas were about to be issued, the respondent wrote to the appellant about formal details connected with Rose Marie's visa and thereupon, without notice to the respondent, the appellant entered her applications for orders for custody and adoption in the Supreme Court of Victoria and obtained an interim injunction restraining the respondent from removing the child from the appellant's de facto control. Then the respondent entered her cross-application for the custody of the child.

It is necessary to refer to documents which came from California and were received in evidence. There is in evidence an affidavit sworn by Zina Ipatoff in California on 16th February 1953. This document is as follows: "I am the mother of Mary Rose Ipatoff

a minor of the age of three years ; that I am unmarried and that I am entitled to the sole custody of said minor. Said minor now resides with Miss Galia Alexandra Ipatoff, a single woman at 65 Reynolds Street, Cremorne, Sydney, Australia, and the said Galia Alexandra Ipatoff and the minor child intend to emigrate to the United States of America in the immediate future. I am at present suffering from tuberculosis of the lungs and do not expect to live out the year. In the event of my death it is my desire, and I do hereby appoint said Galia Alexandra Ipatoff, my sister, as Guardian of the person and estate of my daughter Mary Rose Ipatoff said appointment of guardianship to be acted upon and to take effect as soon as practicable after my demise ; and it is my desire, and I do hereby consent to the adoption of my daughter Mary Rose Ipatoff by the said Galia Alexandra Ipatoff as soon as may be permitted by the Laws of the State of California or any other state wherein they may reside."

This document was superseded by an affidavit made on 16th January 1954. This affidavit is as follows : " Zina Ipatoff being first duly sworn, deposes and says : That she is the mother of Mary Rose Ipatoff, who was born in Shanghai, China on September 8, 1949 and is now residing in Sydney Australia ; that affiant was never married to the father of said Mary Rose Ipatoff. That at the present time affiant is a patient at the City of Hope Hospital, Duarte, California, suffering from tuberculosis ; that she is physically and financially incapable of providing care for her said daughter ; that Ouida Hansen and Andy Hansen who are now residing at 612 Verde Vista, Pomona, California, have assured affiant of their willingness and desire to adopt said Mary Rose Ipatoff and affiant believes such adoption would be in the best interests of said child. That affiant, having the sole custody of said minor child, does hereby irrevocably give her full and free consent to the adoption of said Mary Rose Ipatoff by said Mr. and Mrs. Andy Hansen ; that affiant fully understands that her consent may not be withdrawn, that she releases all her right of custody, services and earnings of said child and understands that said child cannot be reclaimed by her. That this affidavit is executed pursuant to the provisions of s. 5 (a) of the *Refugee Act* of 1953 (Public Law 203) so that a visa may be issued to said Mary Rose Ipatoff as an orphan under said *Refugee Act* of 1953 to be adopted in the United States by Ouida Hansen and Andy Hansen whom affiant is informed and believes are citizens of the United States."

It would appear that Zina, her mother, Mrs. Ipatoff, and Nina came to the conclusion that, because the respondent is a single

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woman, it would be better for the welfare of Rose Marie that Mr. and Mrs. Hansen should be her guardians and adoptive parents, since their domestic circumstances were more suitable for the responsibility than Zina's, she being a single woman. Zina communicated her wishes to the respondent in a letter dated 25th November 1953. The respondent translated this letter into English for the purposes of this case. It was written in the Russian language. The respondent's translation is as follows:— "My dear Galia: I would like to make you happy. I just had a visit from Nina and mother and they brought me good news. I hope to God you will soon be able to pack up and come to America. A lady wants to adopt Zizinky (a pet name for Rose Marie). She already has a girl six years old also adopted and she is ready to pay for your voyage money. She is a Catholic, Galia, and to give her where she will have a mother a father school and music she will be happy. My heart will be at peace and you will all know where she will be and how she is. She will have a home like other children and you cannot give her all this. You see these people will get her as their own. I am so happy that you can come and my daughter will not be left behind. Galia I pray God to guide us so He will let us know and so it is he sends us a person. I rely on God. He will not leave her (meaning Rose Marie). Nina went to this lady to her house to talk it over and I hope to God that everything will turn out alright. Pray Galia and everything will be alright. This lady says she will herself like to do everything for the children and it is very important. With God Zizinky will get happiness which I was hoping to give her but which I cannot. Wealth is not happiness. To have happiness in life you cannot buy it. Nothing yet has been decided and nobody knows how it will end and how the American Consul will act. Nina thought I would refuse. Tell me what else there is to do. Year go by and the child is growing and I cannot demand anything from you. Galia please write to me about Zizi. Now it is left to Nina to make arrangements. Stay with God. With Kisses, Yours Zina." The respondent opposed the appellant's applications for the custody of the child and for leave to adopt her and made a cross-application for custody for the purpose of serving the fulfilment of Zina's wishes expressed in this letter.

Expert evidence was given by affidavit as to the effect of Zina's affidavit in regard to the wishes of Mr. and Mrs. Hansen to be the guardians of the child. The evidence is if they applied for the guardianship they would be entitled to priority because Zina had indicated her wishes that Rose Marie should be brought up by them.

Mr. and Mrs. Hansen and two American officials made affidavits, which were received in evidence, proving that Mr. and Mrs. Hansen are ready and willing to adopt Rose Marie upon her arrival in California; that they are sponsoring the entry of the respondent into the United States of America; that they are fit and proper persons to be the guardians and adoptive parents of Rose Marie; and that their home is a desirable one in which to bring her up. After the death of Zina her mother went to live in Pomona with Mr. and Mrs. Hansen. It appears that they have a drug store in that town and that they would employ the respondent in their business after she arrived in the United States of America. The evidence about Nina is that she lives in a town sixty miles from Pomona.

The purpose of the respondent's cross-application was to enable her to resume personal control of Rose Marie in order to bring her to California and place her with Mr. and Mrs. Hansen. In short, she made the application for the purpose of carrying out the wishes of her sister Zina with respect to the custody and upbringing of Rose Marie. Those wishes are clearly and fervently expressed in the letter dated 25th November 1953 which has been quoted.

The first question which was argued in the present appeal is whether *Hudson* J. was right or not in granting the custody of the child to the appellant and in rejecting the cross-application of the respondent. It is plain that what *Hudson* J. ordered respecting the child is contrary to the wishes of her mother, her grandmother and her aunts, Nina and the respondent.

The learned judge said in regard to these contending applications for the custody of the child he had to determine "what is best for her welfare". The rule, however, which he should have applied is that the welfare of the child is "the first and paramount consideration". The decision of the learned judge was based solely on findings which he made as to the advantages and disadvantages which would result to the child from the granting of either application for her custody. It is apparent that in reaching his decision he took nothing into account but these advantages and disadvantages and that the decision is based solely upon the view that the greater balance of advantages could be found on the side of the appellant. In my opinion it was erroneous not to have regard to the wishes of the child's mother and her other blood relations. The rule that the welfare of the child is the first and paramount consideration did not make it right to disregard their wishes.

The circumstances in which the child was staying in Australia and in which the respondent placed her with the appellant are

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material to the issue of custody. The rule which has been mentioned did not prevent either of these matters from being a relevant consideration. In my opinion they were both relevant considerations, although the leading consideration was the welfare of the child.

However, if the proper order to make merely depends upon the question which of the contending proposals has the most benefit for the infant, I think that the only reasonable conclusion which could be drawn from the facts would be in favour of the respondent. I think the case should not be decided on speculations whether it would be detrimental to the child to grant the respondent's application. With respect to the learned judge, some of his findings as to advantages and disadvantages from the point of view of the infant's welfare could not be reached without considerable speculation. But this cannot be said as to some of the disadvantages to the child which would be involved in granting the appellant's application. That there would be disadvantages arising from the domestic circumstances of the appellant is an inference clearly raised by the evidence ; and these are not disadvantages for which her personal worth could adequately compensate. It is my view that these disadvantages raise substantial doubts as to whether it would be " best for the welfare " of the child that the appellant should be her guardian and adoptive parent. I think there is nothing in the case that satisfactorily disposes of those doubts. On the other hand, the substantial disadvantages which *Hudson* J. stated would be involved in placing the child with Mr. and Mrs. Hansen are, in my opinion, doubtful assumptions, having regard to all the very satisfactory particulars about those two people and their home deposed to in their affidavit and in the affidavits of the American officials supporting the proposal that the Hansens be the adoptive parents.

The appellant gave evidence that she made an arrangement with a husband and wife, who are living in Melbourne, who have no children, to take care of Rose Marie in the event of the appellant's sickness or death. *Hudson* J. does not appear to have regarded this arrangement as satisfactory. The respondent is the only relative of the child in Australia and she is obviously anxious to join her mother and sister, Nina, in California. It is surely a matter touching the equity and justice of the order granting the custody of the child to the appellant, that its effect upon the respondent is to place her in the dilemma of choosing between separating herself either from the child or from her mother and sister in California. In my opinion *Hudson* J. paid too little attention to the

fact that it is important to the interests of this child that she should live with Mr. and Mrs. Hansen at Pomona if only because while living with them she would be near her grandmother, her aunt, Nina, and the respondent and would enjoy the benefits of intercourse with them. Life in Australia with the appellant offers no such benefits to the child. The evidence shows no ground for apprehension that her material and spiritual welfare will suffer if she is brought to California by the respondent, and is adopted by Mr. and Mrs. Hansen, as would appear certain. Nor would there appear to be any danger to her welfare if she were not adopted by the Hansens but came instead under the protection and care of her grandmother and aunts. It has to be borne in mind that the child arrived in Australia as a refugee in transit from Shanghai, where she was born, to the United States of America, which the child's mother wished to be her homeland. Clearly, this is a material circumstance in the case. *Hudson* J. does not appear to have given due weight to it. That he ought to have taken it into account is shown by the decisions on the same sort of point cited by *Herring* C.J., *Gavan Duffy* and *O'Bryan* JJ. It is not a circumstance which excludes the jurisdiction of the court to deal with the question of custody ; nor does it render inapplicable the rule that the welfare of the child is the first and paramount consideration. But having regard to the circumstance mentioned it is wrong to make an order causing the child to be detained in Victoria until she can choose for herself whether to live there or in California unless her welfare imperatively demands that she stay with the appellant. The facts of the case do not justify the conclusion that it is necessary in the child's interest that she should remain in the appellant's care. Besides the evidence of the benefits which the child would gain by living in California in the home of Mr. and Mrs. Hansen, there is the fact that the visas which the respondent was awaiting were eventually forthcoming, and this appears to indicate that the proposal of Mr. and Mrs. Hansen to adopt Rose Marie has been examined and passed by the appropriate departments of the Government of the United States. This surely is a matter of great weight in deciding the issue of welfare and custody.

The appellant urges that the child would be emotionally upset if she were removed from her custody to that of the respondent. If such a consideration is sufficient to support the appellant's claim for the custody of the child, a novel and mischievous ground would be provided upon which a parent's right to the custody of his child might be destroyed. But it is a mere assumption that

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the well-being of Rose Marie would be seriously or permanently impaired by restoring her to the custody of the respondent. Having regard to the circumstances of the case I think it is an unwarranted assumption. It would not, in any sense, be an uprooting of the child for the respondent to resume custody of her, any more than if the child had been in boarding school or nursery conducted by the appellant and the respondent took the child away to be cared for elsewhere. The primary consideration is the welfare of the child, but this does not mean that the court must disregard the feelings and affection of the respondent for the child, nor those of the respondent's mother and sister Nina; nor should the court disregard the fact that the child's mother really placed the respondent in *loco parentis* to the child. The evidence shows that the child is fond of the respondent, but even if the child were upset upon being restored to the respondent's custody, it is mere assumption to say that this would prove to be detrimental to the welfare of the child; for, as *Eve* J. said, in *In re Thain* (1), the feelings of young children are fortunately transitory.

Suppose that before the mother of the child died she had come to Australia in order to bring her to California and place her with Mr. and Mrs. Hansen. It is obvious that a court would not have made an order against the mother such as was made by *Hudson* J., in this case, against the respondent. It is true that the court would have decided the issue of custody raised between the appellant and the mother upon the principle that the welfare of the child is the first and paramount consideration, but it would not have decided that issue without due regard to the wishes of the mother. Clearly, it would not have put the wishes of the appellant upon any equality with those of the mother. Lord *Herschell* said, in *Barnardo* v. *McHugh* (2) in regard to *Reg.* v. *Nash* (3): "I think this case determines (and I concur in the decision) that the desire of the mother of an illegitimate child as to its custody is primarily to be considered. Of course, if it can be shown that it would be detrimental to the interest of the child that it should be delivered to the custody of the mother or of any person in whose custody she desires it to be, the Court, exercising its jurisdiction, as it always does in such a case, with a view to the benefit of the child, would not feel bound to accede to the wishes of the mother" (4). *Lindley* L.J., in the case of *Reg.* v. *Barnardo* (5) made some observations as to the prima facie right which a mother has to the custody of her

(1) (1926) Ch. 676, at p. 684.
(2) (1891) A.C. 388.
(3) (1883) 10 Q.B.D. 454.
(4) (1891) A.C., at p. 399.
(5) (1891) 1 Q.B. 194, at p. 211.

illegitimate child, which are based upon the authority of *Reg.* v. *Nash* (1). Lord *Esher* M.R., in the case of *Reg.* v. *Gyngall* (2) said: "The Court must, of course, be very cautious in regard to the circumstances under which they will interfere with the parental right. As *Knight Bruce* V.C. said in *In re Fynn* (3), the Court must not act as if it were a private person acting with regard to his child. It must act judicially in the exercise of its power" (4). *Scrutton* L.J. said in *In re Carroll* (5): "The passage in Lord *Esher's* judgment in *Reg.* v. *Gyngall* (2) shows that the matter which entitles the Court to disregard the parent's wishes on the ground that they are 'detrimental' must not be merely one which the Court thinks better than the proposal of the parent, but a matter of essential importance" (6). Even if the appellant in the present case had been placed in *loco parentis* to Rose Marie, that fact would not have put her on an equal footing with the mother of the child. *Holmes* L.J. said in the case, *In re O'Hara* (7): "I am not aware that it has been ever held that the single fact of a parent placing another in *loco parentis* to his child precludes him from claiming the child if he changes his mind or circumstances alter" (8). It must be borne in mind that the respondent placed the child temporarily in the care of the appellant. It was only a temporary arrangement to be terminated when the respondent was in a position to take the child with her to California.

A supposition which is being considered is that the issue of custody is raised between the appellant and the child's mother. In that event, such cases as *Reg.* v. *Nash* (1); *Barnardo* v. *McHugh* (9); *In re O'Hara* (7); *In re Carroll* (5) and *Reg.* v. *New* (10) would apply. The mother would obtain the custody of the child because the evidence before the Court would not justify disregarding the mother's wishes for the reasons that to effectuate them would involve detriment to the interest of the child. Do the wishes of the mother of an illegitimate child cease to be of importance after her death? An illegitimate child is not "*filius nullius*". The judicial recognition of the wishes of the mother of an illegitimate child depend upon her natural right. She is guardian for nurture while the child is of tender years. It would follow that her wishes ought to be worthy of judicial recognition even though she is dead. Lord *Skerrington* in *Walter* v. *Culbertson* (11) after pointing out

(1) (1883) 10 Q.B.D. 454.
(2) (1893) 2 Q.B. 232.
(3) (1848) 2 DeG. & S. 457.
(4) (1893) 2 Q.B., at p. 242.
(5) (1931) 1 K.B. 317.
(6) (1931) 1 K.B., at p. 336.
(7) (1900) 2 I.R. 232.
(8) (1900) 2 I.R., at p. 253.
(9) (1891) A.C. 388.
(10) (1904) 20 T.L.R. 515.
(11) (1921) S.C. 490.

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some differences between the "family rights" of the father or mother of a legitimate child and those of the mother of an illegitimate child, said: "but this legal inferiority is more apparent than real because her 'testamentary nominee' will on proper cause shown obtain the authority of the Court to give effect to her expressed wishes in regard to her child's custody and education after her death" (1). *Barry* L.J. said in *In re Kerr an Infant* (2): "Though the mother of an illegitimate child has, perhaps, no right to appoint a guardian for it, still I guard myself against laying down any general rule that would prevent our sustaining such a guardianship under special circumstances" (3). An example of such circumstances was then given. I do not refer to these two statements because I think I ought to decide this case upon the basis that Zina Ipatoff appointed a testamentary guardian, but because they support the principle that the wishes of the mother of an illegitimate child as to its custody and upbringing ought to be a strong factor in deciding the questions at issue here. The evidence provides no ground for impugning either the conduct or the character of the deceased mother or for holding that her wishes in regard to the custody of her child were not very reasonable. Her wishes are plainly and earnestly expressed in her letter and affidavit quoted above. It is not expressly said in *Reg.* v. *Nash* (4) or *Barnardo* v. *McHugh* (5) that the principle of having regard to the wishes of the mother as to the custody of her child, who is illegitimate, does not apply after the mother's death. The proposal of the respondent regarding the custody and adoption of the child embodies the wishes of her mother and it should be dealt with upon the basis that her wishes are of great importance and that the court should not depart from them unless they are shown to be detrimental to the interests of the child in a matter of essential importance. I am of opinion that the evidence does not prove that the fulfilment of Zina Ipatoff's wishes would be "detrimental" to the welfare of her child, Rose Marie.

For all these reasons, I think that the judgment of *Hudson* J. cannot be supported as a proper exercise of his discretion and that the Full Court of the Supreme Court of Victoria were correct in substituting for the order of *Hudson* J. an order that the present respondent have the custody of the child. It follows as a practical corollary that the adoption order made by *Hudson* J. should not stand and that the Full Court was right in setting it aside. I should

(1) (1921) S.C., at p. 499.
(2) (1889) 24 L.R.—I. 59.
(3) (1889) 24 L.R.—I., at p. 63.
(4) (1883) 10 Q.B.D. 454.
(5) (1891) A.C. 388.

add that, without the adoption order, the order of custody would not afford any security to the child living as she would be under it in this country isolated from her relatives, and accordingly it seems to me that if the adoption order is not upheld, the order of custody should not stand. But as the order of custody should, in my opinion, be set aside for the reasons which I have given, it is not necessary to decide whether the circumstances in which Rose Marie Ipatoff was brought to Victoria place her beyond the scope of the *Adoption of Children Acts* of the State or whether for any other reason it is not right to give leave to the appellant to adopt her.

For these reasons the appeal should be dismissed with costs.

WEBB J. I would dismiss this appeal for the reason that I think, with great respect to the learned primary judge, his Honour did not give sufficient weight to the wishes of the blood relatives of the child.

It is true that we are not at liberty to exercise the discretion confided to the primary judge by the Victorian *Marriage Act* 1928, s. 136, unless we are clearly satisfied that he erred in its exercise, and it does not follow that he did err because we think we would have reached a different conclusion on the whole case. Where, as here, his Honour was not under any misapprehension as to the law we can find that he erred only if it is clear that he failed to give any weight or to give sufficient weight to particular facts: see *Charles Osenton & Co.* v. *Johnston* (1); *Blunt* v. *Blunt* (2) and *Storie* v. *Storie* (3); per *Latham* C.J. (4); per *Rich* J. (5) and per *Williams* J. (6). The weight of evidence depends on rules of common sense: *Lord Advocate* v. *Lord Blantyre* (7), per Lord *Blackburn* (8). But it does not follow that because he mentioned a fact in his narrative of the facts he must be taken to have considered it and given it sufficient consideration.

The strength and effect of the blood relationship is illustrated in *Reg.* v. *Nash* (9); *Barnardo* v. *McHugh* (10) and in *In re J. M. Carroll* (11). It may be for the welfare or in the paramount interests of a child to take it from a comfortable home and hand it over to an institution with a view to its eventual adoption because the mother so wishes. It is true that in those cases the religion of the mother played a part; but the emphasis in all three cases was on

(1) (1942) A.C. 130, at p. 138.
(2) (1943) A.C. 517, at p. 526.
(3) (1945) 80 C.L.R. 597.
(4) (1945) 80 C.L.R., at p. 599.
(5) (1945) 80 C.L.R., at p. 604.
(6) (1945) 80 C.L.R., at p. 624.
(7) (1879) 4 A.C. 770.
(8) (1879) 4 A.C., at p. 792.
(9) (1883) 10 Q.B.D. 454.
(10) (1891) A.C. 388.
(11) (1931) 1 K.B. 317.

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the blood relationship and the rights accruing from it. Here, as counsel for the respondent concedes, there is no question of religion, although it appears that the child had been in two institutions before it reached the appellant and that both were Catholic institutions, and although it further appears that the mother of the child in her letter to her sister Galia, the respondent, of 25th November 1953 stated that the proposed adoptive mother, Mrs. Hansen, was a Catholic. However, we must take it that this was mentioned by the child's mother as a fact but not as a factor in her approval of the Hansens. But whatever be the religion of the child the wishes of its mother in other matters which she had an equal right to control were made plain in her affidavit and letters, and they were in the course of being given effect to by her sister, Galia, the respondent, when the appellant, who had the child in her home for a pecuniary consideration pending its departure to the United States, as she admits, decided that she would apply for an order for its custody and adoption. Now the mother's wishes were that the child should be taken to the United States of America there to join her mother and her other blood relatives. The mother succeeded in entering the United States in August 1952, where her mother and her sister, Nina, had preceded her; but owing to delay in obtaining visas for the child and herself the respondent and the child were still in Australia when the child's mother died in August 1954. Before her death she had an opportunity of learning about the proposed adoptive parents, Mr. and Mrs. Hansen. In her letter of 25th November 1953, about nine months before her death, she referred to the fact that her sister Nina and her mother, who were also in the United States, had told her that the Hansens wanted to adopt this child. She said that they already had adopted a six years old girl. She went on to observe that her daughter would then have a mother " and a father ". She realised that the Hansens would get the child as their own and no doubt that the child would take the name Hansen. It is clear then that the mother gave approval to the adoption of her daughter by the Hansens and that she was in a position to know whether they were worthy of her confidence. They also had the approval of the United States' authorities. She would have known too that her mother was living with the Hansens and would continue to do so, and that her sister the respondent, when she took the child to the United States, would be employed by the Hansens in their drug store. But it is said that after all the mother of the child did not know the appellant or what the appellant had done for the child and was prepared to do for her.

That is true. However I cannot see how it can fairly be assumed that if the mother had this additional information then, in the face of the fact that her daughter would not have an adoptive father and would remain in Australia whilst all her blood relatives were in the United States, she would have decided in favour of the appellant against the Hansens, knowing that if the appellant should die or become incapacitated while the child was still young the child might be left without friends, after having lost the opportunity of getting two adoptive parents and of living among her blood relatives. It is much easier to assume that the mother of the child would still have favoured the Hansens.

The respondent has at all times proved her affection for the child, who was brought to Australia at her expense and was looked after by her, to the best of her ability. At the time that the appellant applied for the order for adoption and custody the respondent was paying her up to £8 a month to look after the child and was supplying it with clothes. The appellant admits the affection that exists between the respondent and the child. Actually, as I see it, the only case that can be made for the appellant is based on the possibly detrimental effect on the child which would result if she were now parted from the appellant. No doubt the appellant is very good to the child and the child is very fond of her and a further break in the child's life might prove detrimental. But as said by *Eve* J. in *In re Thain* (1) : " at her tender age, one knows from experience how mercifully transient are the effects of partings and other sorrows, and how soon the novelty of fresh surroundings and new associations effaces the recollection of former days and kind friends " (2). If the learned primary judge had been at liberty to act on the evidence of Mrs. Edwards he might well have found that parting from the appellant would have a detrimental effect on the child for an indefinite period and therefore that the child should remain in the appellant's custody. However, the respondent was not given the opportunity to call expert evidence in reply and so Mrs. Edwards' evidence should be disregarded. Although his Honour quoted her evidence in his judgment he said he did not act on it, and that this was his reason for not acceding to the respondent's application to call expert evidence.

So far I have not mentioned the appellant's undertaking to provide generously for the child in her will. But the undesirable situation of the child to which I have referred as a possibility might well arise long before the child could receive any benefit under the will.

(1) (1926) Ch. 676.

(2) (1926) Ch., at p. 684.

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Appeal allowed. Order of the Full Court of the Supreme Court of Victoria dated 4th October 1956 set aside. In lieu thereof order as follows—(1) that the respondent's appeals to that Court from the two orders of Hudson J. as to the custody of the infant Rose Marie Ipatoff be dismissed and that the said orders of Hudson J. be affirmed: and (2) that the respondent's appeal to the said Full Court from the order of Hudson J. on the appellant's application for authority to adopt the said infant be allowed, the last-mentioned order of Hudson J. be set aside and the said application be dismissed. No order as to costs here or below.

Solicitor for the appellant, *L. S. Lazarus.*
Solicitors for the respondent, *D. Bruce Tunnoch & Clarke.*

R. D. B.