IN THE HIGH COURT OF AUSTRALIA

ALDERTON AND ANOTHER

V.

ALDERTON

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Thursday, 13th December 1951.

H. E. Daw, Gov. Print., Melb.

C.12280/45

ALDERTON & ANOR. v. ALDERTON

ORDER

Appeal allowed. Order of the Supreme Court discharged. In lieu thereof order that the infant Norma Jean Alderton be retained in the custody of the appellants. If the respondent so desires reserve to the respondent liberty to apply to the Supreme Court for an order for access in accordance with the views expressed in the reasons for judgment and remit the cause to the Supreme Court for the purpose of making such an order and taking an appropriate undertaking from the respondent.

ALDERTON & ANOR.

v.

ALDERTON

JUDGMENT.

DIXON J.
McTIERNAN J.
FULLAGAR J.

ALDERTON & ANOR.

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JUDGMENT.

DIXON J.
McTIERNAN J.
FULLAGAR J.

This is an appeal by special leave from an order of Clancy J. in the Supreme Court of New South Wales relating to the custody of an infant. The infant is a girl named Norma Jean Alderton who was born on 16th April 1940 and is therefore now in her twelfth year. She is the only child of a marriage between Norman George Alderton, the respondent, and his late wife Jean Emily, whose maiden name was Crisp. Her mother died on 31st August 1941. Her father remarried on 21st December 1944. The contest for the custody of the child has been between the father, the respondent, in whose custody Clancy J. placed her, and his parents,by whom she has been brought up since the death of her mother. His parents are the appellants. Curiously enough in this contest between the father of the child and his own parents he is supported by the parents of his deceased wife, Mr. and Mrs. Crisp. Indeed, it was suggested by the appellants that Mr. and Mrs. Crisp are more responsible than the respondent for the proceedings to take the child out of the custody of the paternal grandparents,though the respondent denies this suggestion. The appellants, the paternal grandparents, reside at Gol Gol in New South Wales near Mildura. The grandfather appears now to be 52 years of age and the grandmother 48 years of age. They were married in November 1919 and there were six children of the marriage, all of whom are now married. Apparently the respondent, the father of the child, is the eldest of these children. His marriage with the child's mother took place at Mildura in 1938. They lived together at Gol Gol. There is some discrepancy upon the point in the evidence but it would seem that they had a house of their own which they sold only a few weeks before the mother's illness which ended in her death. After selling the house they

took up their residence with the grandparents. The child was then sixteen months old. For a year after the mother's death the father of the child lived with his parents, but during that period he drank heavily. At the end of about a year he left his parents' home and took up his residence nearby, having acquired some business. The grandparents brought up the child from that time and had the almost uninterrupted care and custody of the child until January 1949. There is some dispute as to the amount of interest the father displayed in the child, but while on the one hand he undoubtedly kept in touch with her, on the other hand it is clear that he by no means bestowed such care and attention upon the child as would give him a place of importance in her daily life. When he remarried in December 1944 he took up his residence at a place called Buronga, said to be about a mile and a half from his parents' residence at Gol Gol. There he lived for about four years. During that period the child spent four weeks in January 1946 with her father on a holiday to Southport in Queensland and a week in December 1947 on a holiday to Mittyack in Victoria. About half a dozen times between the beginning of 1945 and January 1949 she spent weekends with her father at Buronga.

The child attended the Gol Gol public school, where she seems to have been regarded as a bright pupil. She made friends with the schoolmaster's children and apparently with other girls. She seems to have grown up happily and have become very deeply attached to her grandmother and also to have been attached to her grandfather. In January 1949 the respondent, the child's father, visited his parents and told his mother that he wanted to take the child for a holiday to Queensland and that the child would be away a month. He said he had no intention of keeping her and would send her back at the end of the month. He had three children by his second marriage and on 20th January 1949 the child in question with her father and his wife and their three children

left Gol Gol for Tweed Heads and Coolangatta. He did not in fact return the child as he had said he would but kept her. In June 1949 the two grandparents went from Gol Gol to Tweed Heads, where they found the child living with the father and his wife and family. It appears that on first going to Coolangatta or Tweed Heads the respondent met a difficulty in finding accommodation. From January to March he and his family resided with Mr. and Mrs. Crisp, his deceased wife's parents. He then obtained a converted Army hut with a small skillion attached, and in that he established himself and his wife and children. He was living in this manner when the appellants, his parents, arrived from Gol Gol. They made attempts to obtain the custody of the child, and whether as a result of these attempts or for other reasons,the respondent and his family took the child away from Tweed Heads without disclosing the destination or whereabouts of himself and his family. Through the police it was ascertained that they were at Tenterfield. Subsequently they returned to Tweed Heads, where the child informed her grandparents, the appellants, that she had been taken to Tenterfield to prevent her seeing them. In July 1949 the respondent obtained a somewhat better place of residence at Coolangatta. His parents, the appellants, after discussions with the Sergeant of Police and a solicitor, and after having had the child examined by a doctor, took the matter into their own hands and left with the child for Gol Gol. That was on 21st August 1949. On 5th October 1949 the respondent obtained the order nisi out of which this appeal arises, calling upon the appellants the grandparents to show cause why a writ of habeas corpus should not issue to them to bring the child before the court. While this proceeding was pending, however, the respondent visited Gol Gol. On 8th December 1949 he went to his parents' home, told his mother that he had come back to fix up some land which he had bought, and said that he wished to take his daughter to the pictures that evening. There was some discussion about the inadvisability of this and he gave up the idea. He came next

day and said that he wished to take the child to the Mildura cemetery to visit her mother's grave. The child showed a marked disinclination to go, saying that she was scared that her father might take her away. The respondent, however, said that he would return her to her grandparents that evening. In point of fact he had booked a passage in a false name for himself and for his daughter upon the aeroplane leaving Mildura that day for Sydney. He took the child to the plane and, not without resistance on her part, got her aboard and flew to Sydney and thence to Brisbane, where he proceeded by car to Coolangatta. On the following day, 10th December, the two appellants went by air in pursuit of the respondent and the child. They reached Coolangatta and on 11th December saw the child in the street with an aunt, that is a sister of her deceased mother. The child ran to them and cried. They took her in a car to Lismore and thence to Sydney, whence they returned to Gol Gol. She has remained in their custody ever since.

The respondent left Coolangatta and took up his residence at Kogan, a township about 26 miles from Dalby, Queensland. He there occupies about 1300 acres, where he is hauling timber and running some cattle. He has a three bedroom house, with a kitchen and bathroom, near the main Condamine Highway. His nearest neighbour is about 300 yards away. There is a school at Kogan. If he obtains the custody of the child she will live with him and his wife and his three children there. His children consist of a boy of 6, another boy of 5 and a girl aged 3 years.

In the controversy which has arisen between the parties since the middle of 1949 some bitterness has been displayed, as might be expected. The respondent's father, the male appellant, wrote him a letter in which he used terms quite improper in a father towards his son. The son on his side has discovered in his father the demerit of being interested in dog racing. It is difficult to assess the part which Mr. and Mrs. Crisp, the deceased

mother's parents, play in the matter. They are interested in a body described as Christian Fellowship, their home being the main meeting place of the Christian Fellowship of the South Coast of Queensland. The respondent's present wife is apparently also interested in this body and it is suggested that there is some desire on their part that the child should be brought up according to the religious principles or faith of this body. The respondent disputes this suggestion. The child has been brought up by the appellants to attend the Church of England, and she has gone to the Church of England Sunday School at Gol Gol.

These being the leading circumstances of the case, Clancy J. decided that the child should be given into the custody of her father. His reasons show that his Honour was under one or two misapprehensions. It is perhaps not a very important matter, but his Honour seems to have been under the impression that the father had resided with his parents until he remarried in December 1944. In fact he had ceased to reside with them in August 1942. His Honour seems also to have regarded the purpose of the father's visit to Mildura as being to settle the matter rather than to abduct the child. The evidence suggests strongly that the fears of the child, frequently expressed, that she would be taken away by her father were real and spontaneous, but there is some indication that his Honour may have been disposed to treat them as due to the improper influence of the grandmother. His Honour's reasons give great weight to the circumstances that the grandparents are middle-aged, that the child is without a father's influence, that her father's second wife could be depended upon to bring her up properly and that she would have the company of the other children. He saw the child, who, it appears, expressed a very definite desire to stay with her grandparents. His Honour was also very much influenced by the letter which the grandfather addressed to his son and by a view which he entertained that the appellants behaved improperly in seeking the help of the police to find the whereabouts of their son and the child when he and his

family disappeared from Coolangatta.

In an application of this description the sole question is the interest of the child. Not only in a contest between mother and father, but in all other cases, the first and paramount consideration is the welfare of the infant: see Re Collins, 1951 Ch. 498 at pp. 504-5. The reasons given by Clancy J. do not appear to us to provide satisfactory grounds for taking the child from the home in which she has been brought up and from her grandparents' care to place her in the respondent's custody. Apart altogether from the misapprehensions we have mentioned, his Honour's reasons do not seem to us to give sufficient weight to most important considerations. The child is over 11 years of age. She has been brought up by her grandmother from the earliest years that she can remember. She had not lived with her father until she was taken away in January 1949 at all during any period that she could be expected to remember. At the end of 1942, when her father left his parents' home where she lived, she was two years and eight months old. In any case he was drinking to excess throughout that period. The child is now eleven years of age, lives in a happy and satisfactory environment, has formed deep attachments, friendships among other children and definite interests. It is clear that she is very happy at school and in her friends and in her surroundings and that she is deeply attached to her grandmother, who is devoted to her. She is being brought up well and in a manner to which no objection can be taken. There seems to be no doubt that she is being brought up in a proper moral atmosphere. The suggestion that her grandfather is interested in dog racing has no doubt some foundation but the evidence shows that the child is not mixed up in the pursuit and apparently it is not now a dominant interest with her grandfather. To uproot her would involve a crisis in the child's life. She is very much averse to it; she is frightened lest it should take place, and the affidavit evidence of the doctor and the schoolmaster and of others shows that the possibility of its happening and her past experiences have had an adverse psychological effect upon her.

On the other side are only doubtful and speculative advantages. She would certainly be brought up with her step-brothers and sister, but the disparity of her age with theirs means that, except for any possible interest "mothering" them might give, to be brought up with them could be of little benefit to her. Indeed she might find that they formed a domestic responsibility rather than a source of companionship. The conditions at Kogan seem to be very much less satisfactory for the upbringing of a girl than those at Gol Gol. The respondent, the child's father, has not throughout the years manifested sufficient interest in and care and anxiety over the upbringing of his child to hold out any prospect of his influence in later years being of greater help to the girl than that of her grandmother. There is indeed no solid ground whatever for supposing that the welfare of the child will be promoted by the change, and there is every possible ground for supposing that her immediate welfare will be prejudiced and her future welfare placed in doubt if she is taken from the custody of her grandparents and her present surroundings. In our opinion the order ought not to have been made. On the contrary, an order should be made that the child remain in the custody of the grandparents, the appellants. No doubt the father should have access to the child, but the distances by which the parties are separated make the working out of a proper order for access difficult. There would be no objection to the father having the child at Kogan for school holidays if he so desired provided that her return to Mildura could be ensured. If he is willing to give an undertaking to the Supreme Court of New South Wales that on every occasion that he obtains the custody of the child he will return her in due course to the custody of the grandparents at Gol Gol at the end of the period which the order for access allows, upon that undertaking an order may be made that at his expense the child may be sent from Gol Gol to Kogan, he paying the expense of her due return

to Gol Gol. If he failed to comply with the undertaking he would be liable to attachment for contempt. Of course, if he wishes to visit the child at Gol Gol an order for access to the child there whilst she is in the custody of her grandparents should be made.

The appeal should be allowed, the order of Clancy J. should be discharged and an order that the child be retained in the custody of the grandmother should be made, subject to a proper order for access if the respondent wishes one, he giving the undertaking specified. There should be no order as to costs.