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IN THE MATTER OF AN APPLICATION FOR AN ORDER NISI FOR A WRIT OF CERTIORARI DIRECTED TO THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA (PAWLEY, SIMPSON AND STRAUSS JJ.) AND TO CONNOR J.

EX PARTE M.J.G.S.

JUDGMENT WILSON J.

IN THE MATTER OF AN APPLICATION FOR AN ORDER NISI FOR A WRIT OF CERTIORARI DIRECTED TO THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA (PAWLEY, SIMPSON AND STRAUSS JJ.) AND TO CONNOR J.

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This is an application for an order nisi for a writ of certiorari in respect of decisions of the Family Court of Western Australia (Connor J., given on 23 September 1983) and on appeal of the Full Court of the Family Court of Australia (Pawley, Simpson and Strauss JJ., given on 22 March 1984). The applicant appeared in person. The decisions relate primarily to the custody of his son M.

No specific grounds were set out in support of the application. It must be borne in mind that an applicant who in these circumstances seeks a writ of certiorari independently of a writ either of mandamus or prohibition faces the problem of the jurisdiction of this Court to entertain the application: see In re Waterside Workers Federation; Ex parte Federated Clerks Union, unreported, High Court of Australia, delivered 15 May 1984. However, having regard to the fact that the applicant has been without legal assistance I have thought it proper to give him the fullest opportunity to explain his criticisms of the decisions in

question. It was possible that that explanation might tend to show that the decision of Connor J. was so infected with error as to amount to a failure to exercise jurisdiction and thereby raise for consideration the question of an order nisi for a writ of mandamus.

Having listened to the applicant at some length on 30 April 1984 and again on 31 May 1984 and having read the judgments which are under review and some of the very considerable volume of material that has been tendered by the applicant I am now in a position to evaluate the merits of the applicant's intense desire to have those judgments reviewed in this Court whether by way of prerogative writ or appeal.

It should be noted that Connor J. was dealing with the question of custody of two children. One, M., born in 1977, is a child of the marriage. In respect of M. his Honour was exercising federal jurisdiction invested in the Family Court of Western Australia by the Family Law Act 1975 (Cth), as amended. The second child is C., born to the wife in 1973. She is not the daughter of the applicant and consequently when dealing with the application for her custody, Connor J. was exercising State jurisdiction.

It is also to be noted that the applicant is also aggrieved by an order of Connor J. restraining him until further order of the Court from instituting or prosecuting any application in relation to the custody of or access to M. without leave of the Court.

The gravamen of the applicant's complaint is that in the exercise of his discretion Connor J. failed to give adequate consideration to his criticisms of the wife and other persons associated with her. These criticisms included her associations with other men, her misleading of the Court at an earlier custody hearing with respect to her relationship with one Mr. C. and in other respects, her obstruction of his access to the children, her refusal to attend counselling and the behaviour of her legal advisers.

I must say, with all respect, that I am impressed with the careful and balanced way in which Connor J. dealt with the wide range of matters that were in dispute between the parties and which unhappily have generated such extra-ordinary personal hostility between them. He did not spare the wife in his judgment of her conduct; indeed, he found there was substance in the allegations made by the

applicant. At the same time, he acknowledged the problems and difficulties that had been occasioned by the mutual hostility between them and the obsessive attitudes of the applicant which had produced so much litigation in the Family Court since 1979. His Honour further acknowledged the applicant's failure to engage in employment since 1979, attributing that fact substantially to his pre-occupation with litigation, with its deleterious effect on relationships generally and on the welfare of the children in particular. I am informed by the applicant that since 1979 there have been four successive applications for custody, followed in each case by an appeal to the Full Court and some forty or fifty interlocutory applications.

Connor J. rightly recognized that the matter of primary concern in the proceedings before him was the welfare of the children. Notwithstanding his criticism of the wife's conduct in the respects I have mentioned, he found that she is a capable and caring mother where the children are concerned. He found also that they had a stable home background, the wife having remarried and her new husband giving no reason to conclude that they would be placed at risk by living in his household. Indeed, his Honour found that because of the new husband's kind and considerate nature the welfare of the children would be promoted by

being with him. On the other hand, he took into account the fact that the applicant had also remarried and was in a position to offer a home to the children. He made no criticism of the present spouse of the applicant: he found her to be a person of good character and reasonably stable, and said that there was nothing about her make up which would lead him to conclude that the children would be placed at risk in any way by being brought into contact with her. So far as the attitudes of the children were concerned, his Honour found that M. enjoyed a good relationship with his father but that C. did not wish to live with him. The judge concluded that separation would not promote their welfare.

In the end, apart from the injunction, there was one question and one question only which occupied his Honour: how to resolve the issue of custody in a way most likely, in the circumstances as they then existed, to promote the welfare of the children. In the course of a hearing which occupied several days, the learned Judge had the benefit of seeing and hearing both the parties and their respective spouses and other witnesses called by the applicant. He therefore had a first-hand opportunity of determining for himself the answer to that question. After weighing the various considerations, his Honour concluded that in all the circumstances the wife should retain custody of both

children. Whether that decision was right or wrong is not to the point in these proceedings. What is material is that there is nothing whatever to justify the intervention of this Court.

In discussing the evidence before him his Honour noted the disposition of the applicant to allow himself to be distracted from the central issue of the welfare of the children, which was the real issue, by concentrating on denigrating the wife, exposing supposed conspiracies and playing up the alleged weaknesses of the legal system associated with the administration of the Family Law Act. I think it is fair to say that such disposition remained evident during the three hours or so in which the applicant addressed me in support of this present application. He is of course distressed by the failure of his successive applications for custody of M. but he is inclined to attribute that failure not so much to any particular miscarriage of justice in his particular case as to basic weaknesses as he perceives them in the system as a whole.

The Full Court gave detailed consideration to the applicant's criticism of the decision of Connor J. Their

Honours failed to find any appealable error, either in his Honour's findings or in the exercise of his discretion. With respect to the restraining order, their Honours were satisfied that his Honour was fully justified in making such order in view of the long history of litigation, most of which had been instigated by the applicant and which must have had a deleterious effect upon the children. I am satisfied that there was power to make the order. It should be noted that the orders which Connor J. made do not have the effect of barring any further proceedings. There is no reason to suppose that leave would not be given for the institution of further custody proceedings provided that the applicant could show that the circumstances surrounding the children had changed to such an extent as to raise a serious question with respect to their welfare.

I have taken an unusual course in dealing with the present application. It must not be taken to set a precedent. Section 95 of the Family Law Act makes it plain that the High Court does not ordinarily embark on a review of the decisions of courts exercising jurisdiction under that Act. I have taken this course in an endeavour to reassure the applicant that the administration of justice has not miscarried in his case and that for the time being he must accept the decision of the Family Court as being in

the best interests of the children. I say "for the time being" because circumstances may change. I would venture to add that one respect in which they may have to change to raise any possibility of a further review is that the applicant give serious and sustained attention to his own rehabilitation. This would include not only the resumption of employment but a moderation of his feelings of hostility towards his former wife.

If this had been an appeal, it must of necessity have been dismissed. I can perceive no ground on which special leave to appeal could be granted. Similarly there has been no failure to exercise jurisdiction. There is nothing to attract the jurisdiction of this Court to issue a prerogative writ.

The application is refused.

IN THE HIGH COURT OF AUSTRALIA

IN THE MATTER OF AN APPLICATION FOR AN ORDER NISI FOR A WRIT OF CERTIORARI DIRECTED TO THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA (PAWLEY, SIMPSON AND STRAUSS JJ.) AND TO CONNOR J.

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REASONS FOR JUDGMENT

Judgment delivered at Canberra (in Chambers)

on the 6th day of June 1984

RM74/30574