

IN THE SUPREME COURT
OF THE TERRITORY OF
PAPUA AND NEW GUINEA

CORAM : FROST, J.

BETWEEN STANLEY DAVID FELSMAN v. JOYCE EVELYN FELSMAN

REASONS FOR JUDGMENT

1967
December 5
and 6.
MADANG
December 21.
MORRESBY
Frost, J.

This matter came before me at Madang as an undefended petition for divorce brought by the husband against the wife on the ground of adultery. After hearing evidence I found that adultery between the respondent and co-respondent had been proved and I granted a decree nisi on that ground. It now remains to decide the issue of custody of the only child of the marriage STEPHEN DAVID FELSMAN now aged three years nine months, each party having claimed custody.

The husband Stanley David Felsman is aged thirty-two years and the respondent Joyce Evelyn Felsman twenty-six years. Both were born in Queensland. They were married in Brisbane on the 18th March, 1961. A few weeks after the child was born on the 18th March, 1964, the petitioner decided to leave Brisbane and take up employment as a baker in Madang. The respondent did not really want to come to the Territory, nor was her family in favour of it, but she followed her husband and on the 9th May, 1964 arrived at Madang. A flat was available in the bakery building, but it seems to have been quite rough accommodation at first, and the petitioner had to get to work to make it comfortable. A Mr. Meek, an accountant, had already discovered from the petitioner that the respondent was qualified for office work, and the petitioner stated that after discussing the matter the respondent started work part time in that employment in July. As the baby was then scarcely weaned and indeed for a time she took him with her to work, perhaps this was too precipitate and at the hearing the respondent complained that it was at the petitioner's insistence and against her wishes that she started work so early. However the petitioner's hours of work, at the bakery, were from 4.30 p.m. until

10 p.m. except on Thursday and Friday when his work might continue until midnight, and this enabled him to devote his day to the care of the child. Apparently he fed and bathed him, and took him for walks and did whatever was necessary. Of course the respondent also assisted. However reluctant she may have been to start work, the respondent soon settled down in Madang. She made a home of the flat which was large and comfortable with two bedrooms and lounge, dining room and kitchen, laundry and bathroom, made curtains, and the like. She had a native servant. There is a small lawn at the side where the child was able to play. However the accommodation was certainly not ideal. The wife complained that the two bedrooms have windows right upon the footpath, and there have been incidents with passers by under the influence of liquor, but the real trouble is that the flat is separated from the bakery merely by an interior wall, with a door from the lounge to a large floor area where the dough is mixed and the loaves prepared, and then baked in the ovens. There is some machinery which runs until 8.30 or 9.00 p.m. of a night, and also some cake making machinery which is used from about 2 or 3 a.m. five or six nights of the week. Although the door from the flat is strong and tightly fitting, inevitably there is some noise from the machinery which can be heard in the flat, and the wife complained of it.

The petitioner progressed in his employment, trained two native bakers so that for some time his duties have been supervisory only, and it is quite possible for him to leave and attend some social functions of an evening. He commenced to play golf. Two prominent citizens of Madang both gave evidence that he was of good standing and repute in Madang. He earns \$70.00 per week clear, has the use of the flat and electricity, he owns a late model station sedan and has made substantial savings.

In the meantime the respondent came to enjoy her work. Indeed when unhappiness developed between them, and the petitioner wanted her to give up her employment the respondent refused to do so. Unfortunately a friendship developed between the respondent and the co-respondent, a married man about 32 or 33 years of age, who has a number of business interests in Madang. He did not appear at the

Court, but the respondent said he was a likeable man and easy to talk to. He had business relations with Mr. Meek, her employer, and he seems to have paid attention to her for some time before she responded. But by September 1965 he was writing her letters. She was seeing him both socially, although not alone, and at her home where he was a guest. By the early months of 1966 he had told her he loved her. He would get a divorce from his wife and he wished to marry her. The respondent fell in love with him and this was the main cause of the breakdown of the marriage. Lightfoot was quite a worthless man. Not only was he married, although separated from his wife in Australia, but also he was living with a single girl in Madang, by whom he had a child in September 1965, and the respondent became aware of it.

Whilst the wife thus became infatuated with the co-respondent she was finding little to interest her at home. The petitioner was looking after the child during the day, and she must have found the proximity of the flat to the bakery depressing. She had now lost her love for the petitioner. I am satisfied that the petitioner was quite devoted to her. He had come to the Territory because he saw no opportunity for advancement in Brisbane and he could see that at Madang there was a chance to make considerable savings. He was undoubtedly interested in his wife working, and contributing, as she did, to the household savings. At the same time the respondent also was interested in earning money; she comes from a large family, and as she said to the petitioner, she did want to have something, not like her mother after bringing up eight children. The petitioner had been unfortunate in his upbringing. His early years spent with foster parents had left him with an aggressive attitude to the world, and perhaps lacking in social graces. Sexually, the respondent says she found him too demanding, and began to sleep in another room late in 1965 or early 1966. He blamed her, and she returned to his bedroom, but by this time she was in love with the co-respondent. Although she says their relationship was at this stage platonic, he had declared his love for her and suggested that she should leave the petitioner. Early in 1966 he told her of his plans to complete by June the building of a block of offices and shops at Madang which would enable him to return to Australia, obtain a divorce

from his wife, marry her and take her to his parents in New South Wales. She was very willing to agree. She considered that Lightfoot would be a suitable foster father for Stephen. It seems never to have occurred to her that the petitioner had rights so far as Stephen was concerned.

It had already been arranged that the petitioner and the respondent should visit Brisbane on leave in March 1966, so she packed up her possessions, and secretly arranged for them to be sent home by ship, and she decided not to come back. After the petitioner and respondent arrived in Brisbane, she received a letter from the co-respondent in which he wrote that all that was keeping him in Madang was the completion of the building, and telling her of his love. So she started a letter in reply, in affectionate terms. She left it amongst her belongings, where by chance it was found by the petitioner, who thus first became aware of her intention to leave him. She told him everything; he said he did not believe the co-respondent. At his request she wrote a letter to the co-respondent in Madang telling him that the petitioner now knew of their arrangements, and asking him his plans. Naturally she received no reply. The petitioner returned to Madang late in May and at this stage she had told him she did not intend to return. He refused to accept this, and on his return he wrote her letters telling her that he had been to the co-respondent who had assured him that he had no intention of marrying her. To induce her to return, he wrote threatening to kill himself if she did not come back. So, concerned about his depression and remorseful for her own conduct, she decided to return to him, as she said, to make a go of it. However after her return in July 1966, the petitioner, having taken her back, but suspicious of her absences after she finished work, embarked on a course of conduct which was unwise. She said he would not let her forget what she had done, despite the fact that the co-respondent was then in Australia. He followed her when she drove about in her car, and on occasions drank too much. On one occasion overcome by drink, he threatened to kill himself and coiled some cord about his neck. Although it was not put to the petitioner in cross examination, she said he continued to force himself upon her. She said there were continual quarrels, and the respondent, not able to stand any more of it, and her nerves on edge, decided to leave the petitioner,

203

as she said, to think things over. When she told him, he lost his temper and attacked her physically. Indeed he was capable of violence when acting under strong provocation, as shown by his subsequent conduct to the co-respondent. On 30th October, 1966 the respondent took a room at the C.W.A. Hostel at Madang, taking the child with her. Although the petitioner's conduct was unfortunate, I am satisfied that the real cause of her leaving was that she had ceased to be in love with him, and her re-awakened interest in the co-respondent, who in the meantime, during October, had returned to Madang.

At first the respondent ignored him, but he must have thought her an easy prey particularly after she left the petitioner, so he began to write her letters. Then in November, he told her that he was getting rid of the other girl with whom he was living. She would be returning to Australia, and his divorce would be final on 14th November, 1966, so he could be free to marry the respondent and take her to Australia. She did not believe him at first, but her resistance ceased in November, when the girl did leave Madang, and he was able to show her a letter from his wife's Solicitors in Australia indicating that the decree nisi would be made absolute on 14th November, 1966. On the faith of his promise of marriage, she yielded to him and committed adultery with him. This occurred first at the end of November and early in December 1966. By this time she had moved with another young woman to Mr. Meek's house which was vacant during his absence on leave. In the early hours of the 14th December 1966, the petitioner and a friend entered the house. They saw the respondent dressed in a house coat, come from a darkened bedroom from which the co-respondent then emerged quite naked. She too was naked beneath the house coat. Although at the hearing the respondent denied that adultery occurred on this occasion, in view of the admission in her answer to the allegation in the petition that adultery had taken place on that occasion, she cannot complain of the Court finding adultery.

It transpired that the respondent was completely deceived by the co-respondent. The girl with whom he had been living returned a few weeks later and the affair was at an end.

On 6th March 1967 the respondent moved into a bungalow, where she stayed with the child until 13th June 1967. The respondent had earlier left Mr. Meek's employment and had taken an office position with the New Guinea Company. Apparently she was troubled by prowlers, and in June moved with her child to an upstairs flat, which she now shares with two young women. In fact the flat is the quarters for single women employed by the New Guinea Company. She has the largest bedroom in the flat where there is a bed for herself and another for the child. The flat is comfortably furnished and has the usual kitchen and laundry facilities. There is a verandah for the child to play but if he is to play on the lawn downstairs, as it is unfenced, she must go down and watch him.

The petitioner has taken objection to the respondent's conduct after she left the hostel. Whilst she was at the bungalow she became friendly with a German engineer called Klaus, who seems to have visited her there very frequently. The petitioner said his car was regularly standing outside the bungalow. The petitioner accused her of sleeping with him, but she denied it. Klaus used to take her out to dances and to the pictures. She is fond of him but at the hearing she denied that she has committed adultery with him. He loves her and has asked her to marry him. She says he is fond of Stephen. After he left Madang early in the year for Wewak, he returned in April or May, and she went out with him. Since then she has been friendly with two other men who have taken her out, but again she denies any intimacy. Recently Klaus came again to Madang (when in fact she was going out with another man), and renewed his offer to marry her when she is free. However Klaus is interested in taking a good position which he has been offered in Canada, and when they discussed it recently, she said she would not move Stephen around the world. They decided that he should go to Australia and think it over. The respondent had decided to go south in December, but her present intention is to wait until he returns in January and then go to Australia in February.

The petitioner also objects to the conduct of one of the girls in the flat, who apparently has many men friends. The respondent's

answer to this is that whatever the girl does, so long as it is not in the house it is not her business, and she has no men in the house. The petitioner also objects to the child sleeping in his mother's room, and in the single girls' quarters, and in my opinion it is a well founded objection. The respondent has no control over the guests of the other girls.

The respondent thus has Stephen living with her. He attends pre-school three afternoons a week. During the day when she is at work, he is looked after, with other children, by a Mrs. Petrides who is a licensed child minder at Madang. The respondent picks up the child on her return from work at 4.30. On some evenings before dinner she goes to the Madang Club or the Golf Club and takes the child with her. She gives him his evening meal, puts him to bed and provides his breakfast. She goes to the cinema and a dance each week when one of the other girls looks after him. But her present arrangements are quite temporary, for she wants to return to Australia in February. She has no definite plans. She is considering Klaus' proposal of marriage. She has thought about marrying him, but because it would involve Stephen going to Canada, she has not given an answer. If she did decide to marry him, she would want first to spend some time with her family in Brisbane. Her parents would be prepared to have the child, but they have a large family still at home, and she does not consider Stephen to be her parents' responsibility. She would like to get employment and settle down in Brisbane. But there is another possibility. She has a married sister in Perth who has suggested that she come and stay with them. Klaus did not appear at Court, and I was told nothing of the possible accommodation in Brisbane and Perth. For mother and child the future is clouded with uncertainty.

The petitioner proposes that if he is awarded custody that the child should stay with him. He has his days free to look after Stephen. He will give him his evening meal and put him to bed; in the evening and at night if his duties prevent him looking after Stephen, he has arranged for Mrs. Deasy who lives at the rear of the bakery and whose husband is also employed there, to look after the child together with her own. Mrs. Deasy was called as a witness and

said she would be prepared to look after Stephen when required in the evenings. He is free at the weekends. Next year the child will commence school in the mornings; if the boy is lonely with his father he will arrange for him to stay with Mrs. Petrides during the day. He has no immediate intention of returning to Australia; he proposes to stay at Madang until he has enough capital to return.

Pursuant to the Matrimonial Causes Ordinance 1963 Section 79(4) Miss Dorothy Rylah, the Welfare Officer at Madang, was asked by the parties' solicitors to make a report on the circumstances of each of the parties, and the accommodation available, and I received it in evidence. She considered the accommodation at the petitioner's flat above average; when visiting it she found it always clean and tidy. The playing space she considered was adequate but not ideal. She considered the child loved the mother and she handled him very well and between them there was a happy relationship. She inspected the respondent's quarters which were adequate and very well looked after. The respondent is considered a good worker and reliable. The child appeared to be happy with her. Miss Rylah went on to make recommendations, but I did not receive these in evidence.

Mr. Rissen submitted that a child so young should be left with his mother; her only moral failing was her love affair with the co-respondent who deceived her utterly and this does not disqualify her from obtaining custody. He submitted that the mother plainly loved the child and nothing could be said against her care for him. She looks forward to marriage with another man. In the meantime she will live with her mother or sister, and she is to be trusted to make a comfortable home in which the child could grow up in an atmosphere of love. He did not question that the petitioner loved the child, but if custody were granted to the petitioner, it would mean a well cared for and clean life for him in strictly bachelor quarters, with no homelike atmosphere. He submitted that the flat at Madang was unsuitable because of its proximity to the bakery, the noise of the machinery and the possibility of accident.

Mr. Bayliss for the petitioner submitted that while normally the mother of a child so young as Stephen would be granted custody, that I should deal with the situation as it now appears. There was a comfortable home and stable environment available to the child at Madang, with a father who, fortunately, because of the unusual circumstances of his employment, was able to care for the child and watch over him for the greater part of the day and night. He submitted that the mother's conduct in breaking up her marriage and the child's home, her adultery with the co-respondent and subsequent way of life as a single woman disqualified her on moral grounds from being granted custody. If she was granted custody, there was no certainty that the child would be taken to his grandmother's home or to Perth, and in any event, there was no material before the Court which would enable it to find that the child would be provided with a proper home. Indeed she might marry Klaus who has, apparently, no ties in Australia. The wife's circumstances and future were so uncertain that if any application by her were to succeed, it would be at a later date, when, it was to be hoped, she would have settled down and have a suitable home.

The law applicable to this application for custody is to be found in the Matrimonial Causes Ordinance 1963 Section 79(1) which provides:-

- (1) In proceedings with respect to the custody, guardianship, welfare advancement or education of children of a marriage -
 - (a) the Court shall regard the interests of the children as the paramount consideration, and
 - (b) subject to the last preceding paragraph, the Court may make such order in respect of these matters as it thinks proper.

This provision, in my opinion, supersedes in relation to a matrimonial cause, which includes an application for custody, the provisions of the Infants' Ordinance 1956 Section 7(1). See Matrimonial Causes Ordinance Sections 5(1); 7(1). The 1963 Ordinance in effect makes provision for the long established rule of the Court of Chancery in England in its jurisdiction over infants, that the welfare of the infant is the paramount consideration. The words of

the Matrimonial Causes Ordinance 1963 Section 79(1) carry the same meaning, in my opinion, as Section 17 of the Infants' Custody and Settlements Act 1899-1934 of New South Wales, which requires that upon any question with regard to the custody or upbringing of an infant "the Court in deciding that question shall regard the welfare of the infant as the first and paramount consideration." The High Court considered this section in Anderson v. Anderson (1) and said:-

"In the application of this injunction it is for the Court to give weight to particular matters such as the merits, demerits, or attitudes of those seeking the custody of the child or those with whom the child will in one event or the other have to live as matters bearing upon the welfare of the child rather than as independent considerations competing with that of the welfare of the child." *ibid.* at page 66.

Now it has long been recognized that the interests of a young child require that it should be in the care of its mother, provided of course, that the mother can provide a proper home and stable environment for the child. It is also a consideration that for the sake of a child's moral upbringing a child should not be left in the custody of an adulterous parent, but the interests of the child, in the circumstances, may require that such a parent be granted custody. (See in re L. (infants)(2), L. v. L.(3), Priest v. Priest(4) per Herring, C.J. at page 549).

But each case must be decided in the light of its own circumstances. Now I am satisfied that each parent loves the child. Indeed each party conceded the other's love for the child. The respondent seems to me a warm hearted mother, who would do what she could for him. As her present accommodation is purely temporary pending her return to Australia, I do not propose to say any more about it, other than that its atmosphere is quite unsuitable for the upbringing of a young child. What then is her future when she returns to Australia? An attractive young woman, she is concerned that life

(1) 34 A.L.J.R. 65.
(2) (1962) 1 W.L.R. 886.
(3) (1966) 1 W.L.R. 1079.
(4) (1965) V.R. 540.

does not pass her by; it is to be expected that she will continue the kind of social life with men friends that she has enjoyed at Madang. Her marriage has been dissolved, that phase of her life is at an end and her immediate future is one of instability and uncertainty. She wants to settle down and marry. She is considering Klaus' proposal of marriage and, if she accepts, the probability is that she will go abroad. She intends to go to Brisbane to see her mother; she may seek a job and settle in Brisbane, or she may go to Perth. She has been unable to tell the Court of any suitable and settled home to take the child to in Australia. I saw the child for a few minutes only, and allowance must also be made for the strange surroundings, but I did get the impression that he was an insecure little boy and under some tension. A stable environment which the mother cannot provide seems to be essential for him.

Such an environment is at present open to the child with his father. No attack has been made against his moral character or associates. The only criticism of him as a father by the respondent was that he was inclined not to be firm enough in disciplining the child on the Saturday or Sunday each week when he has had access since October 1966. I am satisfied that not only does he love the child but that he is prepared to devote all the time and care required for his upbringing. Because of the proximity of the bakery the flat is certainly not ideal. I was concerned about the risk from the machinery in the evenings, but the petitioner showed me the part of the bakery near the interior door, where he has his desk, and from which he is able to supervise most of the operations, and also to hear sounds in the flat, and I am satisfied he can be trusted to see that the boy does not stray inside the factory. The respondent was critical of Mrs. Deasy as a housewife, but she has not really had contact with Mrs. Deasy for over a year and her criticisms were directed to the difficult time for all young mothers when Mrs. Deasy was engaged in bringing up three very young children. I must say I was impressed by Mrs. Deasy, who has trained as a mothercraft nurse in Germany and I consider that with her assistance, the petitioner will be able to look after the child in the evenings. He has a native servant

who cooks, does the laundry and cleans the flat. He was accustomed in the child's infancy to give the child the care normally given by a mother. I take into account also that his occupation will enable him to devote all the time necessary for looking after the child during the day. I consider he is a reliable man determined to place the child's care and interests first.

Accordingly I have decided to grant custody of the child to the petitioner. But this order is not permanent; it can be varied. It seems to me that so young a child needs the care of his mother in a settled and suitable home environment and that this consideration overrides the mother's immoral conduct. Indeed the petitioner himself recognized this. From his own upbringing by foster parents, he knows what his child will miss in being deprived of a mother's care. At one stage he proposed that the respondent should leave Madang permanently and return with the child to her mother whom he respected as a very good woman who had brought up a large family, but the respondent refused to be dictated to.

I expressly do not prejudge the issue which will depend on the circumstances of each party at the time including the age of the child, but if the mother can provide a suitable home in Australia and is able to make proper arrangements for Stephen's care and upbringing, there would be nothing to prevent her from making another application on the ground that his welfare required her care as a mother which she was then able to provide.

I order that the child be delivered into the petitioner's custody at Madang at 10.00 a.m. on Sunday 31st December 1967. I reserve access. This is a matter upon which the parties are likely to agree. I also make the necessary declaration under Section 64(1)(a) of the Matrimonial Causes Ordinance 1963 that I am satisfied that proper arrangements in all the circumstances have been made for the welfare of the child. I further order that the co-respondent pay the petitioner's costs including the costs incidental to the custody proceedings.