Re Evelyn

(1998) 145 FLR 90; (1998) 23 Fam LR 53; (1998) FLC 92-807; [1998] FamCA 55

15 May 1998
Family Court of Australia
Full Court

Nicholson CJ, Ellis and Lindenmayer JJ

Nicholson CJ, Ellis and Lindenmayer JJ.

Introduction

This is an appeal against parenting orders made by Jordan J on 19 December 1997 concerning the child [whom we shall call "Evelyn" for the sake of anonymity. She was approximately one year old at the time his Honour made the orders appealed from.]

The appeal is brought by Evelyn's biological father and his wife, who we shall refer to as Mr and Mrs Q, (the Qs). [They reside in Queensland].

The respondents to the appeal are Evelyn's biological mother and her husband, Dr and Mrs S (the Ss) who reside in [South Australia].

Evelyn was conceived through a surrogacy arrangement. Mrs S was inseminated with the sperm of Mr Q and carried the child pursuant to an arrangement made between the two families. The details of that arrangement were the subject of dispute at trial but for the purposes of this introduction it is sufficient to say that proceedings were commenced after Mrs S travelled to Queensland where the child had been living with the Qs since shortly after her birth. She removed the child from the Qs and after a confrontation with Mr Q, returned with the child to [South Australia].

There was some telephone communication between Mr Q and Mrs S subsequent to her arrival in South Australia, during which he informed her of his intention to institute proceedings in the Family Court. The Qs' application was filed on 15 July 1997 in Brisbane and was returnable on 18 July 1997.

The Ss instituted proceedings in the Adelaide Registry of the Family Court on 16 July 1997, which proceedings were returnable on 1 September 1997. Bulbeck J transferred those proceedings to Brisbane.

23 Fam LR 53 at 55

There was a contested interim hearing before Hilton J in Brisbane on 18 July 1997 and his Honour made orders in terms of the Qs' application placing the child with them pending hearing. His Honour further ordered that the Ss have such contact as may be agreed and failing agreement as determined by the court.

The Ss lodged an appeal against that decision and proceeded with a stay application. Hilton J dismissed that application. The hearing of the substantive application was subsequently expedited as a preferred option to an appeal, having regard to the nature of the issues and the age of the child in particular.

In this regard, we note for the sake of completeness that in the course of argument, mention was made that the Chief Justice in his administrative position as head of the court had suggested an expedited trial in preference to an appeal from the interim order. In the words of Ms Powell QC for the respondents to the appeal, "the parties accepted the suggestion with some alacrity" and indeed there was no suggestion at any stage that this appeal bench ought to be altered.

Returning to events prior to trial, there were some difficulties between the parties in relation to the contact to be enjoyed by the Ss. On 31 July 1997, they made a further application to the Family Court seeking transfer of the proceedings to Adelaide and defined orders for contact.

That matter came before Hilton J at the Brisbane Registry on 5 August 1997 and his Honour made an order that the parties attend upon Dr V, psychiatrist, for the purposes of preparation of a report. It was further ordered, by consent, that the Ss have contact with Evelyn each Tuesday and Friday at the residence of the Qs between 10.00 am and 11.00 am, and at other times agreed to between the parties. His Honour adjourned the further hearing of the matter to 18 September 1997.

Mrs S enjoyed contact on seven occasions in August and five occasions in September prior to the further hearing of the matter. On some of those occasions, she was accompanied by her husband.

On 18 September 1997 the matter came before Jordan J, when orders were made which provided for the Ss to have contact with the child from 9.00 am to 5.00 pm on 19 September, 10, 11, 24 and 25 October, and 8, 9, 22 and 23 November 1997.

Mrs S had contact with her daughter during a total of 39 days, including the initial period of hospitalisation and the six days thereafter.

Before Jordan J, the Qs sought orders that they have the sole parenting responsibility for Evelyn and an order that they be the residence providers for her. The Ss sought an order that the child reside with them and that they be responsible for the day to day care, welfare and development of Evelyn. In the alternative, each of the parties sought orders for contact.

His Honour characterised the difficult and unusual case before him as follows:

It is apparent that this case is not about parenting capacity. The court is dealing with four different personalities and quite different parenting styles. However, it is clear that each household has the capacity to provide a very high standard of care for Evelyn. Each of the adults love the child and they are each committed to her welfare for the future. Simply stated, all of the parties wish to have the pleasure of raising this young girl.

The trial judge had before him evidence from five different experts and their evidence assumes some importance in this appeal.

The Qs relied upon the evidence of three experts: Mr T, clinical psychologist;

Professor N, Professor of Psychiatry; and Dr V, consultant psychiatrist. The Ss relied upon the evidence of: Ms M, clinical psychologist; and Dr R, consultant psychiatrist.

The involvement of so many experts was explained as follows by his Honour (appeal book p 47):

… the peculiar circumstances of this case justify objective and theoretical investigations of the circumstances surrounding Evelyn's birth, the parties involved in the arrangement and, most importantly, the implications of separation from adults and siblings for Evelyn, both in the short term and longer term. This necessitated the engagement of experts by each of the parties to explore relevant issues.

After hearing evidence between 24 and 27 November 1997 inclusive, Jordan J reserved judgment until 19 December 1997. On that day his Honour published carefully considered reasons.

Orders appealed from

On 19 December 1997, Jordan J made orders in the following terms:

1. That, until 9.00 am on 14 February 1998, the child, Evelyn … reside with Mr Q and Mrs Q (hereinafter referred to as "the Qs").

2. That until 9.00 am on 14 February 1998, Mr S and Mrs S (hereinafter referred to as "the Ss") have contact with the said child:

- (i) From 9.00 am to 5.00 pm
    - (a) On 20, 22, 24, 25, 27, 29 and 31 December 1997.
    - (b) On 2, 5–9, 12–16, 19–21 and 26–28 January 1998.
    - (c) On 2–4 and 9–10 February 1998.
- (ii) From 9.00 am on 22 January 1998 to 5.00 pm on 23 January 1998.
- (iii) From 9.00 am on 29 January 1998 to 5.00 pm on 30 January 1998.
- (iv) From 9.00 am on 5 February 1998 to 5.00 pm on 6 February 1998.
- (v) From 9.00 am on 11 February 1998 to 5.00 pm on 12 February 1998.

3. That from 9.00 am on Saturday, 14 February 1998, the said child reside with the Ss.

4. That as and from 14 February 1998, the Ss have responsibility for the day to day care, welfare and development of the said child.

5. That as and from 14 February 1998, the Ss and the Qs share responsibility for the long term care, welfare and development of the said child.

6. That the Qs have contact with the said child from 14 February 1998 at all such reasonable times as may be agreed to between the parties and failing agreement as determined by this court, such contact to include:

- (i) Until the said child turns three years of age, any period for up to four consecutive days in each month from 9.00 am to 5.00 pm on each of the first two days and from 9.00 am on the third day to 5.00 pm on the fourth day, provided that the Qs first give the Ss five days' notice in writing of the intention to enjoy such contact.
- (ii) Upon turning three years of age and until such time as the said child commences school —
    - (a) For four days in each month from 9.00 am on day one to 5.00 pm on day four, provided the Qs give the Ss five days' notice in writing of the intention to enjoy such contact.

    - (b) For three periods of up to seven days contact, including overnight contact, provided the Qs give the Ss five days' notice in writing of the intention to enjoy such contact.
- (iii) Upon the said child attending school —

    - (a) Contact on weekends from after school on Friday to the commencement of school on Monday for up to two weekends each month, provided five days' notice in writing is given of the intention to enjoy such contact, and provided further that such contact be exercised in South Australia unless otherwise agreed between the parties.
    - (b) All of the Easter and September school holiday periods and half of the June/July and Christmas school holiday periods.

7. That the costs of such contact be paid and distributed between the parties as follows:

- (i) The Ss share with the Qs the costs of one adult travelling to South Australia for the purposes of monthly contact and the costs of the Qs and [their adopted son] Tom Q attending South Australia on one occasion each year for such contact.
- (ii) That should the Ss elect to bring the said child to Queensland for the purpose of any such contact, the Qs shall pay half the costs of one adult to travel to Queensland.

It is apparent from the orders that his Honour was properly sensitive to the possibility of the Qs lodging an appeal and the importance of minimising any further change and disruption in the life of Evelyn and the families which each so much wish to care for her.

A notice of appeal was in fact filed on 13 January 1998. Arrangements were then made for the expeditious hearing of the appeal. It was necessary at the end of the hearing of the appeal for this court to reserve its judgment and accordingly, we stayed the operation of his Honour's orders in so far as they related to the period on and from 14 February 1998 and provided for the making of contact orders in favour of the Ss to run until such time as these reasons could be published.

It was urged upon us by Mrs Powell for the Ss that his Honour's orders should take effect pending our decision. However, we considered it inappropriate that they should do so because if the appeal was allowed, any transfer of the child would potentially further disrupt the consistency of her care arrangements. In our view, this would not be in the child's best interests. We invited the parties to make application for orders for contact if they were unable to agree as to contact arrangements pending our decision. However no such application was made and we assume that they reached agreement in this regard.

Background

At the time of trial, Mr and Mrs Q [were each in their late 30s and had been married for over ten years]. They have an adopted son of Aboriginal descent, Tom, for whom they have cared since April 1995. [Tom was aged nearly three when his Honour made orders in this case.] Mr Q is employed as manager of a family company in which he is a shareholder. Mrs Q trained as a midwife but is available to provide full-time care. Due to a total hysterectomy

arising from ovarian cancer, Mrs Q is infertile. The Qs were aware of Mrs Q's condition prior to the marriage.

[Dr and Mrs S are approximately the same age as the Qs and have been married for a similar amount of time as the Qs. There are three children of the marriage who, at the time of the trial judge's orders, ranged in age from approximately three to seven years of age.] Dr S is a medical practitioner. Mrs S trained as a midwife but is also available to provide full-time care to her children.

The background to Evelyn's conception as set out in Jordan J's judgment was not the subject of dispute before us and we set out his Honour's account below:

23 Fam LR 53 at 58

Mrs Q and Mrs S met in 1981 and became very close friends. Dr S and Mr Q met through their respective spouses and all four adults developed friendships which were sustained down the years and which resulted in sharing some joint holidays and jointly attending significant events.

Mrs Q's infertility had been the subject of quite a deal of serious discussion in the Ss' household. After much deliberation, Mrs S formed the intention to offer to bear a child for the Qs. She discussed the matter in detail with her husband, who said he became very supportive of the idea after he had discussed with his wife problems associated with finally relinquishing the child to the Qs.

In September or October 1995, the Ss travelled to Queensland for the purpose of spending a holiday with the Qs. By this time, the Qs had adopted Tom. However, Mrs S resolved to proceed with her offer with a view of enabling the Qs to experience child conception and child birth as close as possible to conceiving their own child. Accordingly, at the conclusion of that holiday, Mrs S made the offer to the Qs.

The Qs' initial reaction was of shock and extreme gratitude. They felt unable to make a decision at that time and discussed the matter at great length over the following months. Mrs S periodically renewed her offer and, in January 1996, the Qs decided to accept.

The material of each of the parties places a great deal of emphasis upon the discussions and alleged agreements surrounding the Ss' proposal and the Qs' acceptance. I will consider matters relating to the terms of, and the relevance of, the agreement later in my judgment.

The Qs travelled to South Australia for the birth and were present at the hospital when the child was born … Mrs S remained in hospital [a further 5 days] and she breast-fed the child with a view of facilitating the prospect that Mrs Q would also attempt to breastfeed the child. Upon discharge from hospital, the Ss and the Qs shared an apartment for six days. The child was in the primary care of the Qs during that time.

Although not the subject of formal evidence, counsel for the Qs informed the court, without demurrer from his opponent for the Ss, that Mrs S was registered as the mother in accordance with State legislation in South Australia and Mr Q was registered as the father.

… Evelyn and Mrs Q [then] returned to [Queensland].

Some frictions developed between Mrs S and the Qs whilst the Qs were in South Australia relating particularly to Mrs Q's unwillingness to persist with her efforts to breastfeed the child

and because of concerns Mrs S developed about the capacity of Mrs Q to properly nurture the child and to keep Mrs S informed.

There was only limited communication between December 1996 and February 1997 and this was the source of some concern for Mrs S in particular.

There was also limited personal contact between the adults between February and 11 July 1997, although Mrs S did correspond with Mrs Q in particular and sent cards to Evelyn. The Qs did provide a number of videos of the child and Mrs Q did write and include some photographs. It is clear, however, that Mrs S was becoming frustrated by what she regarded as an inadequate level of communication.

It emerges from the material of Mrs S that she was struggling with the task of coming to grips with her decision to hand the child to the Qs. She attended grief counselling and had contact with a relinquishing mothers' group. She says she came to the realisation that she could no longer abide by the arrangements. She says she was suffering emotionally as a result of the separation from her daughter and that, after much agonising, she concluded that it was better for herself, the child Evelyn and for her other children for Evelyn to be returned to her.

On 3 July 1997, Mrs S rang the Qs' home and left a message on the answering service informing them of her intention to travel to [where the Qs live]. She did not inform them at that time of her intention to remove the child. She arrived at 10.30 am on 11 July 1997 and shortly after she informed the Qs of her intentions. The Qs were clearly stunned and felt powerless to prevent the removal of Evelyn. Mrs S left with the child approximately three-quarters of an hour after she first arrived.

23 Fam LR 53 at 59

After further reflection on that day, Mr Q drove to Mrs S's mother's home … a drive of some two hours, with the view of confronting Mrs S about her decision. A highly charged conversation took place, but Mrs S persisted with her decision to reclaim the child. She apparently returned to South Australia the next day.

Subsequently there were the events and applications which we have already set out that brought the matter to trial before Jordan J.

The parties' proposals before Jordan J

His Honour's description of the parties' proposals was as follows:

The Ss' case essentially is that Evelyn should be with her natural mother and that such a placement would provide Evelyn with a sense of completeness and have the benefit of enabling her to be raised with her biological siblings.

The Qs' case is that it is in Evelyn's best interests to remain with them. They contend that she has grown very attached to them and their son, Tom, and that they are able to provide her with a settled, secure and familiar environment. They contend that to remove Evelyn from her home of the past 12 months may well be traumatic and harmful to her.

On the question of contact, there is a fairly stark difference of attitude. For her part, should the child be placed with her, Mrs S says that she will always agree to extensive contact between the Qs and Evelyn. She said she appreciates that Mr Q is the biological father and acknowledges and understands the degree of attachment and bonding which would have

occurred between Mr Q, Mrs Q, Tom and Evelyn during the time Evelyn has lived with them. She said that it would not be her intention to deprive the Qs of the opportunity to share and enjoy Evelyn whenever they are able to do so within the reasonable constraints of a normal contact arrangement.

In their affidavit, the Qs expressed a number of reservations about contact should the child remain with them. They believe that regular contact would create problems for Tom, in that he would observe Evelyn being treated differently. They feel that this may be prejudicial to the relationship between Tom and Evelyn. They express reservations about Mrs S's attitude to Tom and fear that she is not sufficiently supportive of the relationship between Tom and Evelyn. The Qs are concerned that there is the potential for Mrs S to alienate Evelyn from them. They have stated a belief that Mrs S is placing her interests above the child's interests and above her own duties to her husband and her three children. They contend that frequent contact would destroy the all important stability and security for the Q children. In their joint affidavit, they said they were not satisfied that physical contact was in the child's best interests and that they were opposed to it for the foreseeable future.

In oral evidence, Mr Q reiterated that he was not satisfied that physical contact was presently in Evelyn's best interests but he acknowledged that there would be a need for contact in the future and that he would take advice on the subject.

It became apparent in the course of Mrs Q's oral testimony on the subject that she did not, in fact, adopt as rigid an approach to the matter as her husband. Whilst she formally confirmed the contents of her affidavit, it was clear she was not entirely comfortable with the notions expressed therein. She acknowledged that Evelyn will be curious and that Mrs S and her children have much to offer Evelyn. She said she had the capacity to look to the future a little more easily than her husband. She said, for her part, she was hopeful that agreement could be reached with the Ss on the question of physical contact, although she stated a preference to avoid overnight contact until Evelyn was a little older, around three years of age. She said she had no problems with the Ss seeing Evelyn, although she thought it should be less frequently than the current fortnightly regime.

In the event that residency remains with the Qs, the Ss seek orders for frequent contact, including monthly visits for periods of four days, together with shared holidays. The Ss would like to have Evelyn taken to South Australia to enable the siblings to enjoy contact together.

In the event that Evelyn is placed with the Ss, there was general agreement between the Qs that they would want as much contact as possible. They would want to be kept informed as to Evelyn's progress and Mrs Q indicated that she would like monthly physical contact, subject to cost considerations.

The grounds of appeal

On 3 February 1998, the appellants filed an amended notice of appeal which narrowed the issues upon which the appeal would be argued and, similarly, the aspects of Jordan J's judgment which are germane to this appeal. It is convenient therefore to set these out now:

1. That the trial judge erred in the unique circumstances of this case in determining the issue of residence on the basis of the unsatisfactory evidence before him, in that the experts called by the parties in respect of the matters critical (to the determination of residence) had either limited or no contact with the parties and other relevant persons.

2. That the trial judge had an obligation to require and erred in failing to require the parties to provide or to appoint a court expert to provide expert evidence in relation to:

- (a) the nature of the relationship between Evelyn and Mrs S;
- (b) the nature of the relationship between Evelyn and Dr S;
- (c) the nature of the relationship between Evelyn and the S children;
- (d) the nature of the relationship between Evelyn, Mrs Q, Mr Q and Tom;
- (e) the capacity of each of Mr and Mrs S and Mrs (sic) and Mrs Q to provide for the needs of Evelyn including her emotional and intellectual needs such that the trial judge could assess this in a comparative way;
- (f) the attitude to Evelyn and the responsibilities of parenthood demonstrated by Mr and Mrs S and Mr and Mrs Q such that the trial judge could assess this in a comparative way;
- (g) a psychological assessment of Evelyn and an opinion as to her likely ability to cope with removal from the Q family and loss of her primary attachment to Mrs Q;
- (h) the nature of the relationship that exists and the likely future relationship between members of the Q and S families;
- (i) an assessment of Mr and Mrs Q and Mr and Mrs S in order to assist the court in determining who (or which family) is best able to assist Evelyn in handling potential future problems;
- (j) whether Evelyn will experience a greater sense of rejection of her biological mother or her biological father;
- (k) whether the fact of a court imposed residence order would have any effect on her sense of rejection by the biological mother;
- (l) the nature, degree and probable consequences of the grief which will be suffered by Mrs Q and Mrs S depending on the residence order.

3. That the trial judge erred in that he ought to have found that Evelyn's interests were best served by placing greater weight on immediate realities in the short term, as opposed to future hypothetical issues in the longer term.

4. That in finding that the effect of placement of Evelyn with the Qs would effect the mental stability of Mrs S and her ability to parent efficiently, the trial judge erred in that he:

(a) mistook the evidence of Dr R;

(b) failed to have any regard to the evidence of Dr V that there was no issue of psychiatric or psychological disturbance in any of the parties;

(c) failed to have any proper regard to the effect upon the Qs of Evelyn's removal from them and their ability to parent adequately in the future.

The application to call fresh evidence

The first issue that arose on the appeal was an application by Mr Kirk SC to call fresh evidence. The substance of his application was, first, that all of the

expert witnesses called at the trial recognised that they were operating in uncharted territory in the area of surrogacy and that they were not truly experts in that field.

Second, he said that his Honour had given considerable significance to the theories of the experts called by the Ss as to the long-term problems that they anticipated that the child would suffer if she were to be separated from her biological mother.

Third, he said that there had been no proper assessment or evaluation of the families carried out by a suitable independent expert.

Accordingly, he sought leave to call evidence from an American expert psychologist, Ms H, from whom a report had been obtained and annexed to the affidavit sworn in support of the application to call fresh evidence. That report revealed that Ms H had practiced for 15 years in the area of surrogate parenting and had counselled over 400 families from 1983 until the present time.

She expressed herself as critical of the expert evidence that had been called and said that it was wrong to rely, as some of the experts had done, on parallels to be drawn from adoptions and the experience of children who had been adopted.

Mr Kirk argued that had that evidence been before the court from a person of Ms H's experience, it is likely that it would have affected the outcome of the case. He pointed to various findings of his Honour that he said that he may not have arrived at had he had the benefit of Ms H's evidence, in that her evidence was in direct conflict with those findings, particularly as to the long term effects on the child of being separated from Mrs S.

In particular he pointed to passages in Ms H's report where she said:

My experience is that children adjust well to the unique surrogate mother arrangement because of the lack of ambiguity, lack of grief and the support of relationship between the families, which minimises abandonment issues. This legacy and this clarity are important to the children and to the families involved in surrogacy.

And again:

One disturbing element of the report was the continual emphasis on the importance of the genetic mother raising a child to the point of suggesting that an adoptive mother is inherently unable to raise a confident and whole female child.

Mr Kirk recognised that he faced the difficulty that when the evidence of Dr R and Ms M, who were the principal experts called by the Ss, was produced shortly prior to trial, no attempt was made to call evidence of the type now sought to be called from Ms H.

However he said that the fact that neither counsel nor the trial judge recognised that the evidence was deficient did not mean that the fresh evidence should not be admitted.

The final hearing of the matter was set down for trial on 24 November 1997. Directions were given that all affidavits should be filed by 28 October 1997. The appellants sought and obtained an extension to file their affidavits until 13 November and subsequently the respondents obtained an extension until 18 November for reply. However, the copies of the affidavits filed by the appellants were not served until 19 November. On that day it appears that the appellant's solicitors were also given unsworn copies of the affidavits of Ms M and Dr R, although these were not formally served until 21 November.

It appears that so far as a family report was concerned the matter had come on for mention before Jordan J on 18 September 1997 in relation to an issue of

contact. At that time the issue of a family report was discussed and his Honour gave an indication that he did not consider it to be necessary having regard to the report of the psychiatrist, Dr V, who was engaged by the appellants and who had seen all of the parties. In fact Dr V's evidence was admitted without cross-examination.

In her written outline of argument, Ms Powell QC, for the respondents, submitted that the principles in relation to the introduction of fresh evidence were well settled and referred to *In the Marriage of Abdo* (1989) 12 Fam LR 861 at 870 ; FLC 92-013 at 77,322.

She said that these were:

- The discretion must be exercised judicially for the purpose of avoiding injustice;

- One of the matters that will affect the exercise of discretion is the policy of the law as to finality;
- Another aspect is that in cases where to allow the admission will result in a partial or complete retrial, the discretion should be exercised sparingly;
- Other considerations are whether the evidence could have been obtained with the exercise of reasonable diligence and whether it has cogency in the sense that it is credible and would have been likely to affect the outcome of the case.

She said that the affidavits filed in support of the application assert that:

- The appellants had consulted three experts prior to trial;
- The first occasion that they saw the reports of Dr R and Ms M was 21 November 1997;
- They were not then advised to seek other expert evidence and no instructions were given to do so until January 1998;
- Ms H was located by means of an Internet search between 21 and 23 January 1998.

She said that no objection was taken at trial to the late filing of the affidavits of Dr R and Ms M and no adjournment was sought to either consider the contents of the affidavits, or before each expert was called.

She argued that there was no reason to suppose that Ms H's website did not exist at relevant times in 1997 and submitted that accordingly we should infer that her existence could have been discovered with reasonable diligence.

Finally, she attacked the credibility and relevance of Ms H's evidence.

With the exception of the last point, Ms Powell's arguments are well founded.

In our view, the course of events made it impossible for the application to call fresh evidence to succeed. While it is true that proceedings involving the welfare of a child are not strictly adversarial, where a party is represented by experienced senior counsel and makes a decision to proceed with a trial without seeking an adjournment to call evidence-in-reply, we would be extremely loath to permit the calling of fresh evidence, which, with the exercise of due diligence, would undoubtedly have been available at the time.

We think that the issue as to the late receipt of expert evidence from the respondents is irrelevant. As was pointed out in the course of argument, the time for the appellants to seek evidence of the type given by Ms H was well before trial. Their new solicitors discovered Ms H on the Internet and there is no reason why diligent trial preparation would not have discovered her earlier.

The business of the court would from a practical point of view become

impossible if parties were at liberty to conduct a complex trial as these parties did in this case and then, when an unfavourable result is achieved, trawl around looking for expert evidence to contradict the evidence already given.

In fact Ms H was not readily available for cross-examination had she been called as she was in the USA and expecting to give birth at any moment, so that it was unlikely that she would have been available for some time.

Further, the admission of her evidence would of itself have required that a new trial should be ordered, since we would have been in no position to evaluate her evidence against the other experts without it being put to them and we would also have had no opportunity of evaluating the parties from our own observations. Accordingly, we decided for the above reasons to exercise our discretion to refuse to admit the evidence.

We now turn to the substance of the appeal.

The appeal

The first ground argued by Mr Kirk traversed, to some extent, the argument that he advanced in support of his application to call fresh evidence. However it differed in the sense that he argued, not only that the evidence was deficient, but that the trial judge was in error in not requiring that further evidence be called. The basis of this submission was that, of the four experts who gave evidence before the trial judge, Professor N, Dr R and Ms M had not seen any of the parties and Mr T had not seen the Ss. Only Dr V had seen both the Ss and the Qs.

Mr Kirk said that the evidence was deficient for the following reasons:

- No welfare report had been ordered;
- There had therefore been no proper evaluation of the two families and their interaction with the child;
- The report of Dr V was deficient in that it was a psychiatric report and was not a proper evaluation of the parties;
- There had been no conference of experts;
- The reports of Professor N and Ms M were received at such a late stage that there was insufficient time available to the appellants for them to answer them;
- The three experts upon whom the trial judge substantially relied, namely Professor N, Ms M and Dr R, had not seen or evaluated the child or the two families involved;
- His Honour's decision was due to the weight given by him to hypothetical future issues such as Mrs S being the best person to assist the child through adolescence and the likelihood that she might suffer a major depression if she lost the residence issue. It was put that this caused his Honour to pay too little regard to present realities in the absence of any proper evaluation of the parties;
- The evidence that his Honour did rely upon consisted of largely untested theories.

He therefore argued that at some stage of the hearing the judge ought to have concluded that additional evidence was required and he therefore erred in determining the case without it.

In support of this proposition, he relied upon the cases of *In the Marriage of Morgan* (1982) FLC 91-225; *In the Marriage of Foster* (1977) FLC 90-281 and *A-G(NSW) v Wentworth* (1991) 24 NSWLR 347.

Before dealing with this first ground of appeal it is we think necessary to also consider the arguments raised in relation to the second ground, which are to some extent interrelated.

The second ground asserted that the lack of what was said to be a proper evaluation of the respective couples and their relationship with the child, meant that the trial judge was under a positive duty to either request the parties to provide or to order the provision of a court expert to deal with these matters. It also asserted that his Honour should have required such evidence in relation to the issues of:

- Whether the child will experience a greater sense of rejection by her biological mother or her biological father;
- Whether the fact of a court imposed residence order would have any effect on her sense of rejection by the biological mother;
- The nature, degree and probable consequences of the grief that will be suffered by Mrs Q and Mrs S as a result of the order.

In this regard Mr Kirk referred to the judgment of Wilcox J in *Obacelo Pty Ltd v Taveraft Pty Ltd* (1986) 10 FCR 518 ; 66 ALR 371 where his Honour held that a presiding judge has power to call a witness even over the opposition of a party, for the purposes of enabling each party to cross-examine that witness upon material matters, but the decision to take such a course should be exercised sparingly and with great care.

He also relied upon the statement appearing in the dissenting judgment of Kirby P (as he then was) in the judgment of the New South Wales Court of Appeal in *Marquet v Marquet* (unreported, delivered 23 September 1987) where his Honour said at p 11:

There was, regrettably, no expert evidence before his Honour as to the psychological effect of such disruption upon the life of such a young child, in being removed at the age of two and a half years from the environment of his relationship with his mother, especially given the virtual continuity from his birth. In my view, such evidence should have been given at the trial. I regard it as virtually indispensable for the proper resolution of a case such as the present not to usurp the judicial function but to help it to be properly exercised. If necessary, it should have been required by his Honour. His Honour's task was not, in this case, simply to resolve the respective rights of the parties before him. His orders affected the rights of a person who was not a party to the litigation but whose interests were principally at stake. In

such circumstances, I consider that a judge of the court is entitled to seek expert assistance from a child psychologist or psychiatrist as to the typical impact of the disturbance of established relationships.

The majority judgments did not deal with this issue and his Honour's decision did not turn upon this aspect.

As to the power to call witnesses, Mr Kirk referred to O 30 r 5 of the Family Law Rules which confers power on the court to call any witness and O 30A r 3 which enables the court to appoint an expert of its own motion.

He also relied upon the decision of this court in *Re P (a child); Separate Representative* (1993) FLC 92-376 at 79,896, where the Full Court pointed out that cases involving children are not strictly adversarial.

The principal argument advanced by Ms Powell on these issues was that it had not been established that the evidence was deficient to the point of obliging the trial judge to require additional evidence or at all.

She pointed out that Jordan J had before him two reports of Dr V. One was provided on 4 August 1997 for the interlocutory proceedings and was prepared

on the basis of filed material and correspondence referred to Dr V. A second report dated 10 September 1997 related to interviews that he had with the appellants and respondents in August and September 1997 and gave insight into their respective backgrounds and attitudes in relation to their children and in particular, to Evelyn. She said that this material provided more background than would normally be found in a family report ordered under s 62G of the Family Law Act 1975. She said that he also had the benefit of the report and evidence of Mr T, who had seen the appellants, and of Professor N, both of whom had seen the reports of Dr V, and the evidence of Ms M and Dr R.

She said that in addition, the judge had the opportunity to make his own assessment of the parties in the witness box in light of these reports. She said that so far as Evelyn was concerned, Mr T had described her as contented and as a fairly happy baby. She argued that having regard to Evelyn's age it was unlikely that anything more would come from an assessment than this. She pointed out that a comment appearing in Professor N's report as to the need for an assessment of Evelyn was made at a time before he had seen Mr T's report.

Ms Powell argued that orders for the appointment of a court expert should only be made where the court does not have any expert evidence upon an issue of fact or opinion. She drew an analogy in this regard with the almost equivalent English rule discussed in *Abbey National Mortgages Plc v Key Surveyors Nationwide Ltd* [1996] 3 All ER 184.

She said that in any event, even if there was room for the operation of the trial judge's discretion to appoint another expert, there was no need for such an appointment.

She distinguished *In the Marriage of Morgan* and *A-G (NSW) v Wentworth* (above) upon the basis that they involved ill-prepared cases with inadequate evidence, not expert evidence with which the appellants disagreed. So far as *In the Marriage of Foster* (above) was concerned, she said that there was an agreed change of circumstances after trial together with inadequate evidence upon relevant matters. We would add that that case was one where the evidence before the trial judge was manifestly inadequate and there had been a lengthy delay between

the trial and the hearing of the appeal during which period there had been significant changes in the circumstances of the child.

We have no doubt that there are circumstances where it is incumbent upon the trial judge to refuse to proceed with the hearing if the evidence is manifestly inadequate to enable a proper decision to be made and where it is possible for evidence to be obtained that would throw further light upon the matters in issue. The authorities already cited make this clear. To this we would add the decisions of this court in *In the Marriage of Sajdak* (1992) 16 Fam LR 280 ; (1993) FLC 92-348, *In the Marriage of Lonard* (1976) 2 Fam LR 11,116 ; FLC 90-066 and *In the Marriage of Bartlett* (1994) 17 Fam LR 405; FLC 92-455. This is particularly so in a case involving the interests of a child.

We also have no doubt that there will be cases where the trial judge has the right and may in some circumstances have the duty to either require the parties to call additional evidence or to call such evidence if it is available and we respectfully agree with the observations of Kirby P in *Marquet's case*(above).

The question is whether this case falls into such a category. We have no doubt that it does not. Both parties were represented by experienced senior counsel at trial. No application was made by the appellants to call further evidence. No suggestion was made to his Honour that any additional evidence was in fact

available or likely to be available, or that the available evidence, including that of Dr R and Ms M was inadmissible, inadequate or irrelevant for a proper determination of the proceedings.

No ground of appeal relates to the trial judge's reception of the expert evidence or to his taking that evidence into account, in coming to his conclusion.

So far as the issue of a family report was concerned it seems quite clear that both sides were content with Dr V's evidence in this regard and the fact that he was not called to give oral evidence supports this view. The subject of a family report was given brief consideration by the trial judge in September and no submission was made then or later that one was desired. In this regard we agree with the submission of Ms Powell that it is unlikely that a family report would have carried the matter any further.

The reality of the matter was that the trial judge had the reports and evidence of five experts in front of him. The situation is therefore distinguishable from *Marquet's case*, where no expert evidence was available. It is true that his Honour was dealing with a ground breaking area of the law, but in our view, in the circumstances of this case, he was entitled to take the view that the evidence that was called was likely to be the best evidence available, given its nature and the nature of the legal representation in the case. Moreover, it was not suggested to the trial judge that the hearing be adjourned to enable any of the experts who had not seen both the Qs and the Ss to interview them or any other relevant persons.

The fact is that in the absence of the evidence of Ms H, there was nothing to suggest that the available evidence was in any way inadequate or misleading. Aspects of it were certainly open to criticism and these criticisms were made, both at trial and before us, but this falls a long way short of a situation where the trial judge was in any way obliged or required to halt the trial for the purposes of obtaining fresh evidence or calling such evidence himself. Accordingly, the first two grounds of appeal fail.

In our view it is the third ground of appeal which presents the greatest difficulty in this case. In approaching it we do so fully aware of the strictures facing an appellate court contained in cases such as *House v R* (1936) 55 CLR 499 and *Gronow v Gronow* (1979) 144 CLR 513 ; 29 ALR 129 ; 5 Fam LR 235 ; FLC 90–716.

His Honour in this case found that the child Evelyn was currently leading a "happy, contented, settled life under the loving care of" the Qs. He also found that she had a close primary attachment to Mrs Q and a strong secondary attachment to her biological father.

He expressed himself as greatly impressed by all parties as parents and was of the view that a change of residence would cause Evelyn "distress and separation anxiety" and would have an adverse effect on Tom.

He also found that in relation to future contact with the Ss, the Qs would abide by orders in a positive and constructive way and that Mrs Q would be devastated by the removal of Evelyn from her care.

His Honour also made the following important findings:

- That Evelyn will suffer problems relating to issues such as abandonment and identity during her adolescence;
- That Mrs S was best equipped to deal with those problems;
- That Mrs S will suffer extreme grief if Evelyn is not placed with her;

23 Fam LR 53 at 67

- That the loss to Evelyn of not growing up with her biological half siblings outweighs her loss of her relationship with her adopted brother, Tom.

Mr Kirk attacked these latter findings upon the basis that they were future and hypothetical findings. He said that at best they were untested theories or guesswork in relation to problems that may arise for Evelyn in the period from adolescence to early adulthood. He said that if the court endorsed such an approach, this would inevitably mean that, save in the most exceptional circumstances, the biological mother would always succeed in a residence application for infant surrogate children.

He pointed out that where his Honour purported to quote Ms M as saying that "These issues will become particularly significant for Evelyn as she reaches adolescence and early adulthood", she did not make that statement with particular reference to Evelyn but in a theoretical context.

He also submitted that the evidence supported the proposition that the trial judge was entitled to form the view that the Qs, with the assistance of Mrs S during contact, would have handled any future problems with great care and attention.

Ms Powell said that the case turned on the factors identified by his Honour in his judgment namely:

- (vi) What are the implications for the child and what are the short term and long term advantages and disadvantages for the child in remaining with the Qs?
- (vii) What are the implications for the child and what are the short term and long term advantages and disadvantages for the child in being placed with the Ss?

- (viii) Who is best equipped to handle the difficult task of dealing in an open, sensitive and appropriate way with the complex issues confronting Evelyn as she develops through childhood?

This contention was clearly correct for his Honour said:

In my view, items no (vi), (vii) and (viii) on the list of primary issues really represent the crux of this matter. The essential enquiry is a determination of what are the short term and long term implications for Evelyn in the placement options available to the court and what is the optimum environment in which to raise this child, given the complexity of the issues confronting her.

Ms Powell said that the decision of the trial judge as to the long term implications for Evelyn was not based simply upon the proposition that Mrs S was the biological mother, although he regarded that as a factor in her favour. She agreed that his Honour had said that the fact that she was the biological mother was a factor in her favour having regard to the expert evidence of Ms M and Dr R.

However she pointed to his Honour's finding that Mrs S would be a good mother in any event and to what she said was his finding that Mrs S, the person, was the best person to undertake the fundamental and important task of bringing up the child.

She said that the tenor of the relevant passages in his Honour's judgment and the fact that during the course of these passages he had referred to what he said were unfavourable factors relevant to the Qs and favourable factors referable to Mrs S made it clear that he was not simply deciding the matter upon the basis that she was the biological mother.

23 Fam LR 53 at 68

We think that this contention is correct. We draw support for this conclusion from the following passage of his Honour's judgment:

The court needs to determine, therefore, if there are any long term advantages in placing Evelyn with her biological mother and then consider whether those advantages outweigh the identified problems associated with interfering with Evelyn's current care arrangements.

In my view, there are a number of significant potential advantages for Evelyn in a placement with the Ss. Primarily, the advantages are those identified by Ms M and Dr R. I have already accepted that Evelyn's path to adulthood is going to be somewhat complex and testing. She potentially has a number of significant issues to confront, including her uniqueness arising as a result of the surrogacy arrangement, her identity, rejection issues and questions of her own sexuality.

Some of the potential problems, such as the perception of rejection by her biological mother, necessarily disappear with a placement with the Ss. I am satisfied that other issues, such as identity issues, sexuality issues and a sense of being different, are less likely to emerge as problems for Evelyn in the S household. Further, if they do arise, they are likely to be better accommodated in that environment.

Although I have no doubt that the Qs would do their very best to deal appropriately with the difficult task of confronting the number of important issues for Evelyn in an open and frank way, I believe that Mr and Mrs S may well be better equipped in that regard. This observation

is not intended as a reflection against the Qs, but rather is to acknowledge the reality of the situation now created by the initial agreement, the events of July 1997, and this litigation.

Understandably, the Qs are experiencing feelings of hurt, anger and breach of trust as a result of Mrs S's actions. In the circumstances of this case, the Ss obviously have little cause to reciprocate those feelings and there is, in fact, an absence of hostility on their part. No doubt, much of the Qs' anxiety would disappear once a decision was made in their favour, however, I have a sense that they would continue to feel somewhat threatened by Mrs S and they each acknowledged that it would be difficult to have their faith in Mrs S restored. The Qs each referred to a concern about the prospect of alienation during any periods of contact between Evelyn and the Ss. Again, those concerns were not reciprocated by the Ss.

I believe that there is the potential for such apprehensions to interfere with the Qs' capacity to at all times accommodate open, sensitive and appropriate dialogue with Evelyn about the Ss. Similarly, the Qs are likely to continue to struggle with their all-important dealings with the Ss. It is to be noted that Mr Q, in particular, experienced quite some difficulty in saying anything positive about Mrs S when giving his evidence.

The Ss, on the other hand, are unlikely to be burdened by such considerations. Of course, they have less cause to feel threatened. Indeed, to the contrary, I believe Mrs S, in particular, would feel deeply for the Qs if there is a change of residence and that her sense of guilt, remorse and sorrow for the Qs would drive her to accommodate their relationship with Evelyn in every way humanly possible.

Related to that, I believe Mrs S will be uninhibited in her capacity to assist Evelyn to deal with her problems in an open, sensitive and appropriate way. Most importantly, as I have indicated in my review of the expert testimony, I am satisfied that Mrs S is, of all the adults, the person best suited to the task of assisting Evelyn to understand her background. She is the best person to deal with many of the important issues which might emerge for Evelyn and, as I have said earlier, she is the only person who can provide definitive explanations relating to her own motives and thinking on many critical issues surrounding Evelyn's creation and placement.

I have a very real sense that Evelyn's unavoidably complicated life will necessarily be somewhat less complicated in the S household. In pure mathematical terms, she would have ready access to five of the eight most significant people in her life in that

environment. More importantly, in my view, such a placement is likely to raise fewer questions in Evelyn's mind and more of those questions can, in any event, be more readily answered in that home.

I acknowledge that a placement with the Ss will deprive Evelyn of the opportunity to reside with her biological father and with a child with whom she would have already formed some relationship. However, I have concluded that, on balance, a child in Evelyn's situation is more likely to cope readily with the prospect of being required to visit the home of her biological father and step-brother from the comfort of the home of her biological mother and two biological sisters and one biological brother, than she would on the alternate outcome.

Again, in the longer term, I am of the view that the prospect of Evelyn having problems arising as a consequence of a sense of loss of the opportunity to be raised with her biological siblings is a greater loss than that likely to be occasioned if she is now separated from Tom. On that issue, I have accepted the proposition advanced by Ms M, and in part conceded by

Professor N, that a child is likely to place some special significance on biological sibling relationships which is not so readily replicated in non-biological relationships.

In the longer term, I have a sense that Evelyn would find residence in her mother's home as a more natural situation, where she would have an even greater chance of happiness and a reduced prospect of being unable to deal with the problems likely to confront her.

In a negative sense, I accept the evidence of Ms M that a placement with the Ss is likely to offer a less traumatic solution for Evelyn in the longer term. In a more positive vein, I accept the evidence of Ms M and Dr R to the effect that the optimum environment within which Evelyn can deal with the longer term issues is in the home of her biological mother.

We think it quite clear from this passage that his Honour was weighing up on the basis of the personal qualities of the parties as well as the situation in which they found themselves the relative benefit to the child of one placement or the other. He was singularly better equipped to do this than we are when sitting on appeal, having had the opportunity to observe all of the parties in the witness box during the trial.

Nevertheless there does remain the question of his Honour's acceptance, in the final paragraph of the passage last quoted, of the evidence of Ms M and Dr R that "the optimum environment within which Evelyn can deal with the longer term issues is in the home of her biological mother". Professor N was inclined to doubt their views as to this, as his Honour pointed out, as was Mr T.

Speaking for ourselves, we may not have accepted this evidence as readily as his Honour did, nor may we have drawn the same conclusions. However, it was, in our opinion, open to him to do so.

In *Rice v Miller* (1993) 16 Fam LR 970 ; (1994) FLC 92-415 the Full Court adopted the reasoning of Lindenmayer J in *Hodak v Newman* (1993) 17 Fam LR 1; FLC 92-421 that while the fact of parenthood is an important and significant factor in considering which of the proposals best advance a child's welfare, the fact of parenthood does not establish a presumption in favour of a natural parent nor generate a preferential position in favour of that parent from which the court commences the decision making process.

Their Honours stressed that each case must be decided on its own particular facts with the welfare, (now best interests) of the child being the paramount consideration: at Fam LR 978; FLC 80,240.

Notwithstanding that the present case concerns a surrogacy situation, it

remains clear, as a matter of principle, that there is no presumption in favour of a biological parent nor any presumption in favour of the biological mother where the child is female.

In our view, his Honour correctly applied this approach in the present case. While it is true that he ultimately gave the biological mother a preferential position, he did so on the evidence before him in the particular circumstances of this case and after considering the various parenting capacities of the persons concerned, and the opinions of the expert witnesses on the subject. It is not asserted that in this process, the trial judge was not entitled to place any weight on what may be described as future hypothetical issues, but rather, that he placed too much emphasis on those issues and insufficient weight on short term issues which favoured the appellants.

Questions of the weight to be given to long and short term issues were for the trial judge to decide and his emphasis on the former, in the circumstances of this case, does not constitute appellable error. As we said above, no objection was taken at trial to the admissibility and relevance of the evidence of any of the experts, and no ground of appeal challenges the admission or relevance of that evidence. Furthermore, his Honour did not start from a point of view of preference for the biological mother, but arrived at that position in the peculiar circumstances of the case.

We are less sure about his Honour's conclusion that:

… there are special aspects of relationships between biological siblings which cannot be replicated and that the potential benefits for Evelyn in being allowed to grow up with her biological brother and biological sisters outweigh the potential disadvantages of being separated from her adopted brother. Related to that, I am of the view that it is likely that Evelyn's sense of loss of opportunity to be raised with her biological siblings would assume greater proportions than the loss she would experience at being separated from her adopted brother.

We have some concerns about the generality of this conclusion, however, we think it quite apparent that this was merely an additional factor which his Honour thought supported the mother's case and we have no doubt that he would have arrived at the same conclusion regardless of this finding.

Mr Kirk also drew attention to the fact that many of the assumptions of Ms M and Dr R were drawn from experience with adopted children. He argued with some force that such parallels are dangerous, because of the different nature of the adoption experience. In particular he drew attention to the fact that the present arrangement is unique, in that it was always intended that there should be regular contact between the child and the non-resident parents and that it was also intended that the child should be told the full story when she is old enough to appreciate it.

However, Dr R in fact drew more heavily upon parallels with foster care, pointing out that the present situation was unique even in a surrogacy context and saying that there were more parallels with fostering. Further, Ms M was obviously conscious of the distinction between adoption and surrogacy and his Honour accepted that she was the witness with the greater degree of experience with surrogacy arrangements, both as a result of her studies and practical experience. Accordingly, we consider that the third ground of appeal fails.

We turn now to the fourth ground of appeal.

His Honour's view as to the psychological effect of a decision in favour of Mrs Q having a devastating effect upon Mrs S was strongly attacked by Mr Kirk

and we believe with some justification. It is true that there was evidence to this effect before his Honour, but we are inclined to the view that it was speculative and was not supported by the only psychiatric witness, Dr V, who was not called and thus not asked about it. Again the comment might be made that if this was thought to be material by senior counsel for the Qs, there was nothing to stop him applying to call Dr V to deal with the issue.

Further, we think that the finding was of doubtful direct relevance if the decision had been to make a residence order in favour of the Qs, although no doubt such a result would have had some effect on the emotional well being of the child. Again, however, and Mr Kirk conceded

as much in argument, it was not the real basis of his Honour's decision and thus we do not regard it as a basis for setting the decision aside.

Before his Honour, an argument was mounted on behalf of the Ss that the various State and Commonwealth provisions relating to surrogacy, led to the inevitable conclusion that for various reasons, the law required a decision in favour of the Ss. His Honour, correctly in our view, rejected this proposition as artificial and based his decision squarely upon the principle that "the paramount consideration remains the best interests of the child".

This argument was not pursued on appeal, although Ms Powell drew our attention to that part of his Honour's reasons for judgment where his Honour expressed himself as being comforted in his decision by the law's public policy of discouraging surrogacy.

However she pointed out that this did not form part of his decision and we agree with this view. If it had been otherwise, we would have had considerable reservations about it, because we cannot see that such an approach would have been consistent with the court's obligation to regard the best interests of the child as the paramount consideration.

Conclusion

In conclusion we should say that we can well understand his Honour's difficulties with the decision in this matter and we have felt the same difficulty. It is particularly difficult when all concerned have acted with the best of motives, as they did in this case and whatever decision is made is one that will have a severe effect upon the unsuccessful parties.

For the above reasons we are not satisfied that his Honour was in error, or that his discretion miscarried. Having regard to the function of an appellate court as laid down in *House v R* (1936) 55 CLR 499, it is not to the point whether members of this court would have reached a different conclusion to that of the trial judge. The appeal must therefore be dismissed.

Proposed orders

We propose to invite the parties to make submissions as to the best method of effecting the transfer of the child Evelyn from the care of the Qs to that of the Ss. So far as the question of contact is concerned there was no appeal and there were no submissions to the effect that the contact regime ordered by his Honour was inappropriate and we propose that those orders take effect.

At the completion of the hearing of the appeal we did not hear submissions from either party as to the costs of the appeal. We therefore propose to give directions enabling the parties to make such written submissions as to costs as they are advised. Upon receipt of such submissions the court will dispose of the costs issue without further oral argument.

Order

Accordingly, the court orders:

(1) That the appeal is dismissed.

(2) That if the parties are unable to agree as to the consequential orders to be made within fourteen (14) days then the parties be at liberty to make written submissions as to the

arrangements for the transfer of the child Evelyn... from the care of the Qs to the care of the Ss, and consequential matters, within a further period of fourteen (14) days.

(3) That the respondents have liberty to make written submissions as to costs within twenty-one (21) days and the appellants to have a further 14 days to respond in writing thereto.