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*May 30, 31
June 3
June 26

IN THE MATTER OF RICHARD JOHN MAAT AND ROLAND CHARLES MAAT.

AUSTIN HEPTON AND ETHEL HEPTON (*Defendants*) ..... } APPELLANTS;

AND

HERMAN MAAT AND TRUDY MAAT (*Plaintiffs*) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Infants—Custody—Governing considerations—Prima facie right of natural parents to custody.

The natural parents of an infant are entitled to its custody unless by reason of some act, condition or circumstance affecting them it is evident that the welfare of the child requires that custody be given to some other person. The natural parents can lose their right only by abandoning the child or so misconducting themselves that in the opinion of the Court it would be improper to leave the child with them. Their wishes in respect of custody must not be disregarded unless very serious and important reasons connected with the child's welfare require it. *Re Baby Duffell*, [1950] S.C.R. 737; *In re Agar-Ellis* (1883), 24 Ch. D. 317, applied. The fact that the natural parents of a child have consented to its adoption does not affect this principle. It cannot be said that a consent to adoption, once voluntarily given, is in effect irrevocable, or that the withdrawal of this consent before the adoption has been completed should be disregarded by the Court unless it appears to be in the best interests of the child that withdrawal be allowed. *Re Baby Duffell, supra,* applied.

The mother of newborn twins, who before their birth had told the doctor and others that she wished to have them adopted, signed a consent to their being taken from the hospital by the doctor, to be given to adopting parents. After her discharge from the hospital she and her husband both signed formal consents to the adoption of the children, but within three months they changed their minds. They were at first unable to find out where the children were, but eventually, having done so, they took proceedings to obtain custody. The trial judge awarded custody to the foster parents with whom the children had been placed, but this judgment was reversed by the Court of Appeal. The foster parents appealed.

*PRESENT: Rand, Locke, Cartwright, Abbott and Nolan JJ.

Held (Locke J. dissenting): The appeal should be dismissed. The conduct of the respondents, though reprehensible in many ways, did not constitute "very serious and important reasons" sufficient to justify the Court in depriving them of custody of their children.

Per Locke J., *dissenting*: Under the law of Ontario the paramount consideration in matters of custody, to which all others must yield, is the welfare and happiness of the infant. *McKee v. McKee,* [1951] A.C. 352 at 365, quoted and applied. Here the trial judge, having heard the parties and considered the matter most carefully, awarded custody to the appellants. It was not shown that in so doing he had acted on any wrong principle or disregarded any material evidence; on the contrary, he had clearly followed the principle declared in the *McKee* case. Accordingly, under the rule laid down in that case at p. 360, his decision should not be disturbed.

APPEAL from a judgment of the Court of Appeal for Ontario reversing a judgment of Treleaven J. on an issue as to the custody of two infants. Appeal dismissed.

C. L. Dubin, Q.C., for the defendants, appellants.

J. J. Robinette, Q.C., for the plaintiffs, respondents.

RAND J.:—It is, I think, of the utmost importance that questions involving the custody of infants be approached with a clear view of the governing considerations. That view cannot be less than this: *prima facie* the natural parents are entitled to custody unless by reason of some act, condition or circumstance affecting them it is evident that the welfare of the child requires that that fundamental natural relation be severed. As *parens patriae* the Sovereign is the constitutional guardian of children, but that power arises in a community in which the family is the social unit. No one would, for a moment, suggest that the power ever extended to the disruption of that unity by seizing any of its children at the whim or for any public or private purpose of the Sovereign or for any other purpose than that of the welfare of one unable, because of infancy, to care for himself. The controlling fact in the type of case we have here is that the welfare of the child can never be determined as an isolated fact, that is, as if the child were free from natural parental bonds entailing moral responsibility—as if, for example, he were a homeless orphan wandering at large.

The view of the child's welfare conceives it to lie, first, within the warmth and security of the home provided by his parents; when through a failure, with or without parental fault, to furnish that protection, that welfare is

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threatened, the community, represented by the Sovereign, is, on the broadest social and national grounds, justified in displacing the parents and assuming their duties.

This, in substance, is the rule of law established for centuries and in the light of which the common law Courts and the Court of Chancery, following their differing rules, dealt with custody. As applied in equity, where the absolute right of the father, recognized in the common law Courts, was not acknowledged, it is now by s. 3 of *The Infants Act,* R.S.O. 1950, c. 180, the governing law of Ontario.

As was said by my brother Cartwright in *Re Baby Duffell; Martin and Martin v. Duffell* (1):

> The wishes of the mother [here the parents] must, I think, be given effect unless "very serious and important" reasons require that, having regard to the child's welfare, they must be disregarded.

and by Bowen L.J. in *In re Agar-Ellis; Agar-Ellis v. Lascelles* (2), quoted in the *Duffell* case at p. 747:

> . . . it must be the benefit to the infant having regard to the natural law which points out that the father knows far better as a rule what is good for his children than a Court of Justice can.

It might be that the foster parents would furnish to the children here a home of easier circumstances and better fortune than that of the respondents; but who can say that that difference is for the ultimate welfare of the child? It might, in fact, prove to be the reverse. Carried to its logical result, the presumption that it would be would involve the conclusion that a modest home can, with better grace, be torn apart than one of opulent means. This needs only to be mentioned to be rejected. In the home of the respondents a third child, a daughter, was born in the year following the birth of her brothers, and that what forms the home for this child is not fit for nurturing these young boys cannot, in the circumstances shown, be seriously urged.

Various acts of the mother in special relation to these boys are argued to show her unfitness to resume the care of them. At the time of their birth this young woman was 21 and the father 23 years of age, they had within 5 or 6 years of that time come to this country from Holland, the husband had been out of work for almost 6 months, they

(1) [1950] S.C.R. 737 at 746, [1950] 4 D.L.R. 1.
(2) (1883), 24 Ch. D. 317 at 337-8.

were undoubtedly passing through very dark days and hope was at its faintest. That at such a time thoughts from which they would afterwards shrink could enter their minds needs only a bit of imagination to be understood. The mother's evidence does exhibit almost a primitive idea of her duty to a Court in this country; but she was young, in a strange land, fighting for her children, and however much she is to be condemned as an individual, it would be psychologically unsound to take that conduct to evidence her unfitness as a mother. Within less than 2 months of handing the children over these parents were seeking them and that desire had been made known to the foster parents. Whether it was instigated by the admonition of the maternal grandmother to remember their duty as Dutch parents or by the awakening of the parental sense or both is unimportant; that it was not for the purpose of exacting a price was the conclusion of the Court of Appeal in which I entirely concur; and it is not disputed that from September 1954 they sought first to discover the whereabouts of and then to recover their children. It may not unfairly be suggested that if the foster parents had extended to the respondents the sensitive and sympathetic imagination that enabled them to long to bestow parental love on children of strangers, they would have better understood the thoughts and feelings of the young couple seeking their own, and not have sought to strengthen their claim by keeping the whereabouts of the children secret. I should have thought that, to avoid any unnecessary distress to the latter, however temporary it might be, they would at least have allowed the dispute to be determined without delay. Nor can I view the pain of a permanent separation on the part of these foster parents to be comparable with that of the natural parents.

I find it, therefore, quite impossible to say that the conclusion arrived at by the Court of Appeal was wrong. The appeal must be dismissed, but there will be no costs.

LOCKE J. (*dissenting*):—In my opinion this appeal should be allowed.

There can be no doubt as to the principles to be applied in matters of this nature in the Province of Ontario since the judgment delivered by the Judicial Committee in

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McKee v. McKee (1), which reversed the judgment of this Court (2) which had, in turn, set aside the judgment of the Court of Appeal (3) and that of Wells J. who had heard the application for custody (4). In that case Lord Simonds said in part (p. 360):

> Further, it was not, and could not be, disputed that the question of custody of an infant is a matter which peculiarly lies within the discretion of the judge who hears the case and has the opportunity generally denied to an appellate tribunal of seeing the parties and investigating the infant's circumstances, and that his decision should not be disturbed unless he has clearly acted on some wrong principle or disregarded material evidence.

He said further (p. 365):

> It is the law of Ontario (as it is the law of England) that the welfare and happiness of the infant is the paramount consideration in questions of custody . . . To this paramount consideration all others yield.

In this matter Treleaven J., after having heard the parties and given the most careful consideration to the matter, awarded the custody to the appellants. It was not shown, in my opinion, that in doing so that learned judge either acted on any wrong principle or disregarded any material evidence. On the contrary, it is clear that he followed the principle declared by the Judicial Committee in the *McKee* case, which I have quoted.

As the other members of the Court are of the opinion that this appeal should be dismissed, I refrain from making any comment on the evidence other than to say that my consideration of it would lead me to the same conclusion as that reached by Mr. Justice Treleaven and by Mr. Justice F. G. MacKay in the Court of Appeal.

The judgment of Cartwright, Abbott and Nolan JJ. was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario, reversing a judgment of Treleaven J. and ordering that the respondents do have the custody of the infants Richard John Maat and Roland Charles Maat.

(1) [1951] A.C. 352, [1951] 1 All E.R. 942, [1951] 2 D.L.R. 657.
(2) [1950] S.C.R. 700, [1950] 3 D.L.R. 577.
(3) [1948] O.R. 658, [1948] 4 D.L.R. 339.
(4) [1947] O.R. 819, [1947] 4 D.L.R. 579.

The infants whose custody is in question are twins. They were born on June 23, 1954, in lawful wedlock. The respondents are their natural parents, but since leaving the hospital, on or about July 23, 1954, the children have been in the custody of the appellants.

At the time of the trial of the issue before Treleaven J. in November 1955 the respondent Herman Maat was 24 years of age and the respondent Trudy Maat 22. Both of them were born in Holland. The former came to Canada in July 1949 and the latter in September 1952. They met each other in September 1952 and were married on October 10, 1953.

Shortly after their marriage Herman Maat experienced difficulty in securing steady employment. He was unable to keep up the payments on a home which he had purchased and lost it. For some time the respondents' only home was a trailer. In this they moved to Windsor where Herman Maat sought employment without success. In May 1954 he returned to Toronto where he got work with a former employer. He left his wife living in the trailer at Windsor and returned there at week-ends. He did not get a room in Toronto but slept in his truck. In June 1954 he brought his wife and the trailer from Windsor and they lived in the trailer at the trailer camp in Cooksville, some 10 miles west of Toronto. On the drive from Windsor to Cooksville they suffered some minor mishaps.

Speaking of their state of mind at this period the learned trial judge says:

> There can be no doubt they were both greatly worried about the expected child, and there is much convincing evidence that both parents regretted it was going to be born.

On or about June 16, 1954, Trudy Maat consulted Dr. J. D. Smith of Cooksville. There are direct contradictions between the evidence of this witness and his wife, who is also a doctor, on the one hand and that of the respondent Trudy Maat on the other. Where it conflicts with that of the respondents the learned trial judge has expressly accepted the evidence of the Smiths and I proceed on the basis that the facts are as testified to by them. Trudy Maat was very upset emotionally and was crying. She told the doctor that she was pregnant, that she and her husband did not want to have the baby, and that she had, at the sugges-

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tion of her husband, taken an overdose of pills without result. She asked the doctor to bring on an abortion. He, of course, told her he would not do this, and went on to say that she must let the child be born and could make one of three choices, to keep it, to have it adopted through the Children's Aid Society, or to have it adopted privately.

The next day Trudy Maat returned to the doctor's office and told him that she and her husband wanted the baby to be adopted. He examined her, found her condition normal and formed the opinion that the child would be born in about a month. About a week later Herman Maat telephoned the doctor that his wife's pains had commenced. Dr. Smith arranged for hospital accommodation, went to the trailer and told Herman Maat to take his wife to the hospital. The doctor asked if they still wanted to give the baby up and they both said that they did. Later in the day the twins were born. Being premature they were placed in an incubator. That evening Herman Maat went to the hospital to see his wife. He had asked the doctor if he could see her and the doctor, thinking that he might not be able to see her if he went alone, offered to drive him to the hospital. Mrs. Smith was also in the car. On the way Mrs. Smith asked Herman Maat if he was sure he wanted to give the babies up and he replied that he wanted to get it over with. Neither of the parents saw the children. On the fourth day after their birth Dr. Smith again asked Trudy Maat the same question and she replied in the affirmative. It is customary for a newborn baby to leave the hospital with the mother unless written instructions are given to the contrary. Trudy Maat signed the necessary form to permit the babies to be taken out by Dr. Smith and knew they were to be taken to adopting parents. When she was able to leave the hospital, apparently on June 30, Dr. and Mrs. Smith drove her home and on the way went to the office of Mr. Leslie Pallett, a solicitor whom the respondents had visited at Dr. Smith's suggestion before the babies were born. At that time Herman Maat had told Mr. Pallett that they wished to have the baby adopted and when Mr. Pallett learned that the Maats were married he tried to discourage them from taking this course. The Smiths also tried to persuade them to keep the children.

In Mr. Pallett's office Trudy Maat signed a consent to the adoption of each twin and later in the day Herman Maat came in and signed these also. Mr. Pallett explained to them that the making of an adoption order would permanently deprive them of their parental rights. On July 31 Trudy Maat went to Mr. Pallett's office to ask about a notice she had received regarding the registration of the children's birth. At Mr. Pallett's request she signed fresh consents as he understood that her consent should be on a document other than that signed by her husband. Mr. Pallett asked her if she had changed her mind about the adoption and she replied in the negative. In reciting the above facts I have proceeded on the evidence of Mr. Pallett which the learned trial judge accepted in preference to that of the respondents.

At no time did the Smiths or Mr. Pallett disclose to the respondents either the identity or the whereabouts of the appellants, to whom the twins had been given when they left the hospital.

By the middle of September 1954 the respondents had regretted their decision and were actively seeking to recover their children. They interviewed Dr. J. D. Smith and Mr. Pallett, both of whom refused to tell them where the children were but communicated to the appellants the respondents' request for their children. The request was rejected. The respondents consulted a solicitor who wrote to Dr. Smith on October 6, 1954, but received no answer. After months of persistent effort the respondents finally discovered the whereabouts of the children and the respondent Herman Maat forcibly repossessed them. On being visited by the police, however, the respondents were persuaded for the time being to relinquish such possession and the present proceedings resulted. It is not suggested that there was any undue delay in commencing these proceedings.

Mr. Pallett testified that on the occasion of the last-mentioned visit, after he had told the respondents that the appellants would not give up the babies and that he did not think he could do anything for them they went out. His evidence continues:

> Very shortly after the husband came back in and said to me, "Will they give me some money for the babies?" I said, "Get out." He said, "Will I get my money back?" I presumed he was referring to the money paid for the hospital bill, and we had a few nasty words, and he left.

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This was put forward as indicating a willingness upon the part of Herman Maat to sell his children but I am quite unable to so interpret it. Assuming that he used the words quoted, it must be remembered that Maat had just been told by Mr. Pallett, the only lawyer with whom he had had any discussion about adoption, that he could not get the babies back, and that he was at this time without independent advice, Mr. Pallett being solicitor for the appellants. Under these circumstances what he said was consistent with his seeking repayment of the expenses to which he had been put in connection with the birth of the babies if, as he had just been told was the case, he could not have the babies themselves. I share the view as to the incident expressed by Aylesworth J.A. as follows:

> . . . I must say at once that if the learned trial judge attributed any particular significance to what was then said as bearing upon the question of custody I must respectfully disagree.

I agree with the following statement of Aylesworth J.A. as to the appellants:

> It is quite clear that Mr. and Mrs. Hepton are of reputable character and no one suggests that they are not both well qualified and anxious to become foster parents or that the twins presently in their custody have not been well and lovingly cared for. Respondents at the present time are considerably better off financially than the Maats and are both in their middle thirties and childless.

I also agree with the view of the respondents which he expressed as follows:

> The evidence shows that the young parents, although of extremely modest means, are hard-working, religious people of respectable parentage. They are regular attendants at their church and have many friends in their community of the same racial strain as themselves.
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> . . . If in any of the quotations which I have made from the learned trial judge's reasons he is to be taken as concluding that the parents are unfit persons to have the custody and upbringing of their children then again I must respectfully disagree. I am quite unable to find anything in the evidence so far as the welfare of their children is concerned in impeachment of the appellants from a moral, spiritual or social viewpoint; reference has already been made to the economic situation, or even to the contrast in the economic situation, as between appellants and respondents, but the appellants are much younger than the respondents and have yet to make their way in their new country. As I have already said, the evidence indicates that they are industrious and of good character . . .

The material position of the respondents at the time of the trial was accurately described by the learned trial judge as follows:

> Since the babies were born the Maats' material position has improved somewhat. They no longer live in the trailer but are now in a modest apartment. The locality, however, is not a very desirable one in which

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to bring up children. They have had another child born to them, a daughter. As at present situated if the twins are returned to them all three children would be occupying the same room. Herman Maat is earning between $80 and $90 a week as a truck driver for a fuel oil company.

With the greatest respect it appears to me that the learned trial judge has attached too much importance to the consents to the adoption of the infants which were signed by both of the respondents. The argument that a consent to adoption once voluntarily given by the natural parents is in effect irrevocable or that the withdrawal thereof should be disregarded by the Court unless it appears to be in the best interests of the child that withdrawal should be allowed was unanimously rejected by this Court in *Re Baby Duffell; Martin and Martin v. Duffell* (1). That case concerned the claim of the unmarried mother of an illegitimate child but as Aylesworth J.A. points out: "The position of a man and his wife jointly seeking custody of their children is of course at least on a par with that of the mother of an illegitimate child." In the course of his able argument, Mr. Dubin submitted that much that was said in the judgments delivered in *Re Duffell* as to the principles by which the Court should be guided in dealing with a question of custody in which one of the parties is a natural parent and the other a stranger in blood, was *obiter*. I incline to disagree with this submission and in any case I regard it as settled law that the natural parents of an infant have a right to its custody which, apart from statute, they can lose only by abandoning the child or so misconducting themselves that in the opinion of the Court it would be improper that the child should be allowed to remain with them, and that effect must be given to their wishes unless "very serious and important reasons" require that, having regard to the child's welfare, they must be disregarded.

While not accepting this view of the law, Mr. Dubin put forward a number of matters which in his submission should be regarded as "very serious and important reasons" that the respondents should not have their children; these may be summarized as follows: (i) the desire of the parents to procure an abortion, (ii) the fact that they consented to give up the children for adoption when their circumstances were such that it was not impossible for them to have kept them, (iii) the conversation as to money with which I have

(1) [1950] S.C.R. 737 at 745-6, [1950] 4 D.L.R. 1.

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dealt above, (iv) their apparent willingness to give untrue testimony, (v) the taking of the children from their carriage without the permission and against the will of the appellants, (vi) the sense of irresponsibility which, it was argued, the above matters indicate, (vii) the suggestion that their desire to get the children back was not spontaneous but was inspired by their spiritual adviser and by the wife's parents and that there is no evidence that they have real love for the children.

As to the last of these items, I can find nothing in the evidence to warrant the inference that the respondents are actuated by any motive other than the normal desire of parents for their children, and I cannot see in what way it would have been possible for them to demonstrate their love for the children, whose whereabouts were concealed from them for months and who were thereafter kept from them, except by doing their best to regain possession of them. I do not find it necessary to deal with the other items in detail as I share the view of my brother Rand and that of Aylesworth J.A. that they do not warrant the conclusion that the parents are unfit persons to have the custody and upbringing of their children.

In argument we were pressed with the authorities that emphasize the peculiar advantage possessed by the trial judge in cases as to the custody of infants and the reluctance of appellate Courts to interfere with the exercise of his discretion; but, in the case at bar, with respect, I am of opinion that the learned trial judge erred in principle in failing to give due weight to the fact that the respondents are the natural parents of the children and in attaching undue importance to the consent to adoption which the respondents withdrew when the children had been for less than two months in the possession of the appellants.

Having reached the conclusion that the respondents are fit and proper persons to have the custody and upbringing of their children and that there is no very serious and important reason requiring that, having regard to the children's welfare, the wishes of their parents must be dis-

regarded, it follows that I would dismiss the appeal, but before parting with the matter I wish to adopt the view expressed by Aylesworth J.A. as follows:

> Indeed, so far as the welfare of the children is concerned, I do not think it should be overlooked that now that the whereabouts of the children is known to the appellants their desire to keep in contact with their children if the children are left with respondents may well work against the children's welfare; nor do I think it unimportant that the children are almost bound to become aware of their ancestry and of their racial heritage. Knowledge of these things and that they are being brought up in alienation from their own flesh and blood is something which to my mind must play an important part on a consideration of what is best for the welfare of the children. Nor is it without significance that in their parents' home they will in all probability experience the affection and companionship of their sister and perhaps of future brothers and sisters. I also regard these as additional considerations demonstrating in an affirmative way the absence in this case of anything of a serious or important nature militating to deprive the parents of custody.

While in view of the difference of opinion in the Courts below and in deference to the full and able arguments addressed to us I have set out my reasons in my own words, and perhaps at undue length, I wish to express my agreement with the reasons of Aylesworth J.A. with whom Roach J.A. concurred.

I would dismiss the appeal. Both counsel made it plain that, whatever the result, costs were not asked and there will be no order as to costs.

Appeal dismissed without costs.

Solicitors for the defendants, appellants: Pallett & Pallett, Port Credit.

Solicitor for the plaintiffs, respondents: W. E. G. Young, Woodstock.

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*PRESENT: Taschereau, Rand, Locke, Fauteux and Nolan JJ.