1957

IN THE MATTER OF LYNN SCOTT BICKLEY AND ANN FELTON BICKLEY, INFANTS;

ERVIN FELTON BICKLEY, JUNIOR (*Applicant*) ..... } APPELLANT;

*Mar. 1, 4, 5, 6 Mar. 22

AND

BETTY CARSON BICKLEY AND RAYMOND W. BLATCHLEY (*Respondents*) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Infants—Custody—Matters to be considered by Court—Separation of parents—Residence in foreign jurisdiction—The Equal Guardianship of Infants Act, R.S.B.C. 1948, c. 139.

A husband and wife, both citizens of and resident in the United States of America, separated, and the wife obtained in the State of Nevada (which was not the State in which the parties were domiciled) a decree of divorce and an award of the custody of the two children of the marriage aged 9 and 11. The wife immediately remarried in Nevada. Shortly after this marriage, the second husband, who was also an American citizen, obtained a position in British Columbia, and he, the wife and the two children moved there in May 1955. The father made an application in the Courts of British Columbia for custody of the children and the trial judge, after hearing *viva voce* evidence for 8 days, awarded custody to him. The Court of Appeal reversed this order and awarded custody to the mother, primarily on the grounds that (1) the father had, by his own conduct, shown that he thought the children should be in their mother's custody rather than in his and (2) the evidence showed that the mother had so far brought them up with affection and care.

Held: The order of the trial judge should be restored. It was impossible to say that he had not made full judicial use of the opportunity given to him, and denied to the appellate Courts, of seeing and hearing the parties. This was particularly important in a case of this sort where so much depended upon the character of the parents whose claims were in conflict. It was not suggested that the trial judge misdirected himself on any question of law and the Court of Appeal was not warranted in setting aside his decision that it was in the best interest of the children that they should be in their father's custody.

As to the particular circumstances relied on by the Court of Appeal, it could not be said that the trial judge failed to give due weight to the second consideration, and on all the facts and circumstances of the case, the first had ceased to be of importance.

It was unnecessary in the circumstances to decide whether, under the law of British Columbia, the father of an infant had, as against the mother, a *prima facie* right to custody, if all other things were equal.

*PRESENT: Kerwin C.J. and Rand, Locke, Cartwright and Fauteux JJ.

1957

BICKLEY v. BICKLEY AND BLANCHLEY

APPEAL from the judgment of the Court of Appeal for British Columbia (1) reversing an order of Manson J. in respect of the custody of two infants. Appeal allowed.

W. B. Williston, Q.C., and *M. M. McFarlane, Q.C.*, for the applicant, appellant.

A. S. Pattillo, Q.C., and *J. F. Howard*, for the respondents.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal, brought pursuant to special leave granted by this Court, from a judgment of the Court of Appeal for British Columbia (1) pronounced on June 7, 1956, reversing an order of Manson J. made on February 9, 1956, and awarding the custody of the above-named infants to the respondent Betty Carson Blatchley.

The facts are fully stated in the reasons for judgment in the Courts below and a comparatively brief recital will be sufficient to make clear the reasons for the conclusion at which we have arrived.

The appellant and the respondent Betty Carson Blatchley, to whom reference will sometimes hereinafter be made as "the father" and "the mother", are the parents of the two girls whose custody is in question, Lynn Scott Bickley born on October 12, 1945, and Ann Felton Bickley born on October 20, 1947. All the parties are citizens of the United States of America.

The father and mother were married on February 19, 1944, at Newark, New Jersey. After the father's return in 1946 from overseas service with the American army they lived in various places in the eastern United States. They agree that from 1947 their married life was not entirely happy, and that it gradually deteriorated from year to year. The father is a hard-working and successful business-man. In ten years he has risen to the position of general sales manager of his company, with a remuneration of approximately $20,000 a year. The demands of business frequently required him to be absent from home for the greater part of each week, and one of the mother's complaints is that he sacrified his home life to success in his work.

For some time prior to July 1954 the Bickleys had been close friends of the respondent Raymond W. Blatchley and his wife. The Blatchleys' marriage was also deteriorating.

(1) 6 D.L.R. (2d) 199.

The respondents say that on July 7, 1954, they both realized for the first time that they were in love with each other. Mrs. Bickley at once informed the appellant and told him that she and Blatchley proposed to get divorces and to marry. The appellant asked her to defer action for a time in the hope that their marriage could be saved. They continued marital relations until September 1, 1954, and lived together until some time in October 1954 when the mother told the father that she intended to proceed at once with her plan for divorce and to marry Blatchley at some indefinite time thereafter. The appellant reluctantly acquiesced in this, and also in allowing the mother to have the custody of the children, although holding a lingering hope that in the new surroundings she might see things differently.

The appellant discussed the proposed divorce with the mother's attorney, and apparently agreed to attorn to the jurisdiction of the Nevada Courts in which she intended to proceed. According to the evidence such an attornment would have had the result that the Courts of the State of Pennsylvania would have recognized as valid a divorce granted by the Nevada Court. The parties appear to have assumed that prior to their separation the domicile of the Bickleys was in Pennsylvania. It may well be, as Mr. Pattillo argues, that their domicile was not clearly proved, but no one has suggested that it was in the State of Nevada at that time.

On October 19, 1954, after having made a division of their furniture and effects, the appellant took his wife and children to a hotel where they all stayed over night, and on the following morning put them on a plane for Reno, Nevada. On arrival the mother and the children took up residence there with the expectation that the appellant would instruct a Nevada attorney to appear for him, thus submitting to the jurisdiction of the Nevada Courts and enabling her to get her decree early in December and to return to the eastern States by Christmas.

In the meantime, Blatchley had left his wife early in July 1954. He had been transferred by his employer to work which allowed him to reside at Hot Springs, Arkansas. While there he retained a lawyer to effect a financial settlement with his wife.

1957

BICKLEY v. BICKLEY AND BLANCHLEY

Cartwright J.

Meanwhile, Bickley had delayed sending instructions to appear. Late in November or early in December he learned for the first time that his wife had committed adultery in the fall of 1951 with one Buckner, and he determined not to submit to the jurisdiction of the Nevada Courts. Buckner and his wife had been close friends of the Bickleys in and prior to 1951.

Early in December 1954, having completed six weeks' residence in Nevada, the mother commenced divorce proceedings, effected personal service on the appellant in Pennsylvania, and secured an undefended decree of divorce in Reno on December 31, 1954. This decree awarded her custody of the two children.

When the mother decided to proceed in this way, she telephoned Blatchley at Hot Springs. He immediately resigned his position with his company and left for Reno where he took up residence and commenced divorce proceedings against his wife. He secured his decree on February 17, 1955, and on that day married Mrs. Bickley.

Blatchley tried unsuccessfully to get satisfactory employment in Nevada. Early in 1955 he was appointed controller of a company in British Columbia at a substantial salary. His position with this company required him to live in Vancouver. He and the mother and children moved there early in May 1955, and established a home in which, at the date of the hearing before Manson J., the children were happily settled. While the motion for custody was not launched until December 5, 1955, it appears that the appellant had given instructions some time earlier and it cannot be said that he was guilty of undue delay in commencing proceedings.

The hearing of the application before Manson J. occupied eight days. Twenty-four affidavits were filed. Of the twenty-two deponents who made these affidavits, five were called as witnesses at the hearing, these being Dr. Whitman, Dr. Davidson, the appellant and the two respondents. There was no cross-examination upon the other affidavits. A total of fifteen witnesses were examined at the hearing. The father and the mother each gave evidence on three different days. It is obvious that the learned trial judge had an unusually full opportunity of observing the manner and demeanour of the parties. The mother of the appellant

was called as a witness and the learned trial judge had the advantage of forming from personal observation an impression as to her suitability for the task of assisting in bringing up the children.

On reading and rereading the reasons of the learned trial judge in the light of all the evidence in the record we find it impossible to say that he did not make full judicial use of the opportunity given to him, and denied to the appellate Courts, of seeing and hearing the parties; the advantage thus afforded to the trial judge is always great but peculiarly so in a case of this sort where so much depends upon the character of the parents whose claims are in conflict. It is not suggested that the learned judge misdirected himself on any question of law; and, in our respectful opinion, the Court of Appeal were not warranted in setting aside his decision that it was in the best interest of the children that they should be given into the custody of their father.

It may be that the strictures of the learned trial judge upon the conduct of the mother were expressed in terms unnecessarily severe, but the facts upon which they are mainly based are not controverted.

The evidence supports the view of the conduct and character of the father and of the suitability of his mother to assist him in caring for the children which the learned trial judge expressed in the following terms:

> As to [Bickley] I have had the advantage of seeing and hearing him under oath. I find him to be a quiet, sincere individual completely frank and honest. He admitted his shortcomings and his occasional flash of temper. . . . In my judgment there is nothing in the evidence to suggest that the applicant is cruel or a bully. There is probably no such thing as a perfect husband and father nor a perfect wife and mother. I find nothing in the evidence to support the view that the applicant is motivated by vindictiveness towards the mother of the children or by any other motive than a sincere affection for his children. He is in receipt of a good income as pointed out above. He rents a large home with two or three acres about it in a suburban residential area. School and church are within easy reach. Relatives are not too far distant, including both the grandmothers and the maternal grandfather. The applicant seems to be on very good terms with the maternal grandmother and it is noteworthy that the maternal grandmother has not taken any part in these proceedings. No affidavit of hers has been filed and the inference is that she does not think ill of her son-in-law. [It should be noted that we were informed by counsel that the maternal grandfather has since died.]

1957

BICKLEY v. BICKLEY AND BLANCHLEY

Cartwright J.

> If the children are given into his [*i.e.*, the appellant's] custody his mother, a woman of 64 and in good health and a sincere person of deep religious convictions whom I have had the advantage of seeing and hearing in the witness-box, will take up residence with her son and with the assistance of one or two servants to do the housework, will undertake the guidance and upbringing of the children during such hours as her son is at work. I am entirely satisfied that with her son the children in his home would have excellent care and upbringing.

In reaching the conclusion that the order of the learned trial judge should be reversed the Court of Appeal found two circumstances to be decisive, (1) that the father's opinion, expressed by his conduct, was that the children should be in their mother's custody rather than in his, and (ii) that the mother has so far brought them up with affection and care as is evidenced by the opinion of all the witnesses that the children are happy and well-behaved.

In our opinion, it cannot be said that the learned trial judge failed to give due weight to the second of these considerations. As to the first, it is quite true that, after all his efforts to persuade the mother to keep their home together and to give up Blatchley had failed, the father unwillingly agreed to her taking proceedings for divorce and keeping the children, with, we think, the lingering hope previously mentioned; but it must be remembered that at this time he was quite unaware of the mother's relationship with Buckner in 1951. It is not surprising that when he learned of it he took a different view of the proposed arrangement and of the mother's suitability to bring up the children. The Court of Appeal put aside this explanation for the reason that (1),

> even after learning of that [the Buckner incident] he did not think it made his wife unfit to have the children, because he made no effort to disturb the existing arrangement, but merely sought to preserve his freedom of action should he consider later that it was better to remove them from the mother's custody.

This passage appears to overlook the fact that as the children were then in Nevada, the only effective action which the father could have taken would have been in the Court of that State where the mother's action was pending, and by applying to that Court he would have attorned to its jurisdiction which was the very thing which he had determined not to do. The mother cannot be heard to say that she was lulled into security by his inaction for, on

(1) 6 D.L.R. (2d) at p. 204.

December 14, 1954, some days after the father had told her he was not going to attorn to the jurisdiction of the Nevada Court, she swore that he had on numerous occasions threatened to come to Nevada and surreptitiously obtain physical control of the children and that she was in fear that he would remove them from her care and custody unless restained from so doing, and on December 17, 1954, her attorney had written to his attorney as follows:

> Last week Mr. Bickley was served at his home with the summons in divorce. I rather assume he will not participate in the divorce proceedings since an appearance was not entered for him in Nevada; and since the agreements were delivered upon condition that an appearance was to be entered for him there, it is my understanding, and I believe we agree, that the agreements are void.
>
> Would you kindly, therefore, return the agreements to me as they are now cancelled.

In his reasons for judgment the learned trial judge stated that the spirit of the *Equal Guardianship of Infants Act,* R.S.B.C. 1948, c. 139, is that in all matters of custody the parents shall stand on equal footing. Mr. Williston argues that under the law of British Columbia, while the welfare of the infants is the paramount consideration, if all other things are equal the father has as against the mother a *prima facie* right to custody. We do not find it necessary to deal with this argument as the learned trial judge, while assuming an exact equality of *prima facie* right as between the parents, reached the conclusion that on the facts of this case the welfare of the children clearly required that their custody should be given to the father, and we have already expressed our opinion that that conclusion should not be disturbed.

It remains to consider whether we should make an order as to access. In our opinion it is desirable that the mother should have reasonable access to the children and that the children should not be deprived altogether of the companionship and society of the mother to whom they are so attached. But the practical difficulties of arranging such access are great and, as the result of our order will be that the children return to their father's home and the determination of such matters will thereafter lie within the jurisdiction of the Courts of their residence, we have concluded that Manson J. was right in deciding to leave the question of access to the decision of those Courts, in the event of the

1957

BICKLEY v. BICKLEY AND BLATCHLEY

Cartwright J.

parties not being able to reach an agreement. We observe that the formal order of Manson J. contained the following paragraph:

> AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the Respondents be at liberty to apply regarding the right of access to the said infants or either of them by either parent.

In our opinion this paragraph is unnecessary and should be struck out.

For the above reasons the appeal is allowed, the paragraph above quoted is ordered to be struck out and the order of Manson J. is otherwise restored. The appellant is entitled to his costs in the Court of Appeal and in this Court, including the costs of the motion for leave to appeal.

Appeal allowed with costs.

Solicitors for the appellant: Lawrence, Shaw, McFarlane & Stewart, Vancouver.

Solicitors for the respondents: Davis, Hossie, Lett, Marshall & McLorg, Vancouver.