CIV/T/19/79
IN THE HIGH COURT OF LESOTHO

In the matter of:

M.C.N.	Plaintiff
v	
1. M.S. N.	1st Defendant
2. N. M.	2nd Defendant

JUDGMENT

Delivered by the Honourable Mr Justice F.X. Rooney on the 18th day of February, 1980.

The applicant is the father of Th and Ts his children by his marriage to the respondent. He is seeking an order that directing that these children visit him on every alternative weekend and during one long and short school vacation each year. The application was opposed by his former wife who is prepared to permit the applicant to have access to the children on agreed afternoons once or twice a week provided that he does not take them to the home of the woman with whom he now lives.

The parties were married on the [date] 1968 at Ottawa, by a Roman Catholic priest in accordance with Canadian law. Th was born on the [date] 1970 and Ts on the [date] 1975.

On the 7th February 1979 the present Respondent commenced an action for divorce in this Court. The declaration alleged both adultery and desertion on the part of the husband and named N.M. as the person with whom the husband committed adultery.

On the 14th March 1979 the wife obtained a decree of divorce on the grounds of her husband's adultery with N.. The suit was not defended. Custody of

the children was awarded to the wife. The husband was granted liberty to-apply to this Court for access to the children. Other ancillary orders made at the same time and subsequently have no bearing on the issue raised in these proceedings which are solely concerned with the husband's access to his children.

The Respondent states in her affidavit filed in opposition that she would not wish her former husband to take the children during school holidays as they would

> "have to live with the woman who wrecked our marriage."

The applicant gave evidence on the 22nd November 1979- He admits that he is at present living with N. to whom, he claims, he is lawfully married under Sesotho law. He denies that his "marriage" to N. is adulterous. He has one child by her born during the subsistence of his marriage to the Respondent 'and another child is expected.

The applicant insists that all his children are entitled to equal treatment. Likewise he believes that all his "wives" are entitled to equal respect from all his children. He says that by custom children are brought up without prejudice against any wife of their father. The applicant declared his belief in the institution of polygamy and suggested that its abandon-ment by many Basotho had eroded the cultural traditions of the Basotho nation. The applicant himself is an honours graduate of Ottawa University. His father was a medical practitioner and his family is Roman Catholic. This does not mean that the applicant is not entitled to revert to a belief in or to practise a system of polygamy. But, this Court is inclined to regard much of what the applicant said as a pose adopted to meet existing circumstances.

At civil law, no other marriage contracted during the subsistence of a civil marriage is valid. This includes a customary union (Mokhothu v. Manyaapelo C. of A, 1/76, unreported).

In the present case which, is being decided under the civil law, I cannot regard N. as enjoying any higher status than that of a concubine. This position may be altered in the future if the applicant and his present consort so decide. The Respondent objects to her children being obliged to accept N. as anything more than her status under the civil law allows. She is the woman who brought about the end of the Respondent's monogamous union with the applicant.

Under Sesotho custom children of a marriage belong to the husband and his family. Because the marriage of the parties was a civil marriage, the law governing it and the issue of the marriage is the civil law. On the dissolution of such a marriage this Court is obliged to apply the principles of the civil law to the exclusion of Sesotho law and custom. I do not find this a satisfactory situation as it leaves unesolved the competing claims of the two systems. Family ties are a vital part of Sesotho society. The attitude of the civil law is not generally in accord with what as regarded as right and proper in a Basotho family relationship

As more and more marriages are contracted under the Roman Dutch Law and as more are dissolved by this Court, the nature and extent of the conflict between the two systems of law becomes more apparent as does the need to find an acceptable solution to the problem.

Under the civil law the custodian parent has the right to control the day to day conduct of the children. The position is stated thus by Hathorn J. on Wolfson v. Wolfson 1962 (1) S.A. 34 at 37 ana 38

> "It is well established that the custodian parent, whether the natural guardian or not, has the right to exercise inter alia the day to day control of the children- and that this includes the right to determine the persons with whom they may and may not assiciate, Fraser v. Fraser.1945 W.L.D. 112 at pp 116-7 and the cases there cited; Myers v. Leyxx±on, 1949 (1) S.A. 203 (T) at pp. 209 et sexx In applying this principle, the test applicable to the present case was laid down authorisatively by the full Court of the Transvaal in Vucinovich v. Vucinovich 1944 T.P.D. 1+3/.....

1944 T.P.D, 143. That test was also applied in Fraser's case. In each of these cases the custodian parent had imposed the condition that the child or children, as the case might be, should not be allowed while in the care of the non-custodian parent to associate with a particular person who was the person responsible for or connected with the break-up of the marriage. In each case it was held that the custodian was entitled to impose the con-dition.

At p. 146 of the report of Vucinovich's case, SIR JOHN MURRAY, giving the leading judgment, expressed himself thus:

'The objection must not, of course, be an unreasonable one: it must be a genuine one and it must obviously not go to the point of whittling down to a nullity the right of access which the mother possesses. But, subject to that limitation, it does not seem to be necessary to hold that the father - in this case the respondent - is not entitled to complain unless he can prove to the satisfaction of the Court that the actual association which he complains of is one which in fact is bad for the children. He is not under the obligation, in my view, of satisfying the Court that Beyer is a person of low character, association with whom is detrimental to the interests of the children. It is sufficient for him to show, in my opinion, that the objects, owing to the existing enmity, to the association of these children with Beyer. It seems to me that it would be an anomalous state of affairs that while the children are with the respondent and staying in his home circle he would be entitled to take every step that he pleases to prevent the children speaking to or associating with Beyer, but that immediately they leave his physical custody and proceed to stay with the appellant the children should be subjected,against the respondent's will, to an association with that person to whom he bona fide objects, merely because the mother insists upon the association.

It must be observed that the learned Judge in dealing with the question of reasonableness stated the proposition in negative form. He said that the objection must not be

an unreasonable one. He did not say that it must be a reasonable one. I think that he stated it in this way deliberately, for his meaning is made clear in the later passage in which he said

'It is sufficient for him to show, in my opinion, that he objects, owing to the existing enmity, to the association of these children with Beyer.

It is abundantly clear from this sentence, first, that the reason for the objection was the enmity that existed and secondly, that the fact that this reason existed made the objection not unreasonable.
I should also refer to two cases that were quoted in argument. The first is van Schalkwyk v. van Schalkwyk, 1942 (2) P.H. B.66, in which the Court refused to uphold the custodian's objection to the association of the children with a particular

person in the absence of evidence that the association would be to the detriment of the children. No cases are quoted and the reasoning of the Court does not appear from the digest. I am therefore not prepared to follow that case in the light of the careful reasoning of SIR JOHN MURRAY in Vucinovich's case. The other case is Scholtz v. Thomas, 1952 (1) P.H. B.17, which appears from the digest to support the view I have taken."

I do not think that it can be said that the respondent is being unreasonable in her objection to her children being required to associate with N., It may be that this Court might adopt a different attitude if N. was the lawful wife of the applicant and the applicant's attitude as to the obligation of his children towards her was modified to some degree. But, it is clear that at present, seeds of conflict and enmity would be planted in young minds if their father's wishes were acceded to.

The application is dismissed and I make an order that the applicant may have access to the children of the marriage on two afternoons each week between the hours of twelve (12) noon and six (6) p.m., but, he shall not permit N.M. to have any-contact direct or indirect with the said children while he has access to them or otherwise,

JUDGE
F.X. Rooney
18th February, 1980

For Plaintiff: Mr Maqutu
For Defendant: Mr Sello