Darren Edward Warner, In re [1976] FJHCWP 1; Civil Case 17 & 18 of 1976 (7 June 1976)

IN THE HIGH COURT OF THE WESTERN PACIFIC
(CIVIL JURISDICTION)

NEW HEBRIDES REGISTRY
Civil Case Nos. 17 and 18 of 1976

In the Matters of **DARREN EDWARD WARNER** and
JANINE MARIE WARNER, infants

And in the Matters of the Guardianship
of Infants Act 1886 and 1925

CORAM: Hampson R. M., Commissioner.

JUDGMENT

Civil Case Nos. 17 and 18 of 1976 brought by Marilyn Dawn Warner as applicant against her husband Michael Francis Warner claiming custody of Darren Edward Warner and Janine Marie Warner respectively were by consent consolidated. In support of the application were filed affidavits by the applicant, Alfred Henry Bradshaw, June Esmee Marshall and Deanna Lillian Martin and, in reply, by the respondent, Frederick Jungwirth, Lesley Macfarlane, Paul Julian Treadwell and Norman Alfred Westley. In addition the respondent filed an affidavit by Judith Mary Stober annexing a social report, which she had made after interviewing both parties and the children following an agreement to this effect of both counsel. By agreement of counsel only the applicant, the respondent and Mrs. Stober were cross-examined on their affidavits. After such evidence the Court interviewed the two children separately in the presence of both counsel. Considering all the

evidence I am satisfied that the background of the application is that the applicant and respondent were married in 1963, the son Darren was born on 18 April 1964 and the daughter, Janine on 12 December 1965. For some years the family lived in Papua-New Guinea, where the marriage was not without problems, then in February 1974 they came to Vila where the respondent took up employment with the British Residency as a health inspector. The respondent found this job frustrating and very difficult to make headway and he was not unable to take his unhappiness home. He was somewhat unfair, offensive and domineering towards his wife and I accept his evidence that she did not appreciate the reason for this. Soon after arrival in Vila the applicant and respondent began to frequent the yacht club and within six months one David Wintour was a friend of the family. A close friendship arose between the applicant and Mr. Wintour which had developed to intimacy by March 1975. The respondent received some sympathy from a Miss Hird, this relationship developed and they were intimate at least in July 1975. In June 1975 the applicant went to Australia for four months but on her return marital relations deteriorated again. On approximately 9th October 1975 the applicant left the family home taking the children with her, on her evidence by agreement and on the respondent's evidence because he was not aware that he had any legal right to custody. Shortly after the respondent returned and took the children back to his home. They have remained with him since then to all intents and purposes. In an effort to reconcile, the applicant, the respondent and the children had an overseas holiday together from 5th December 1975 to 19th January 1976. The reconciliation attempt was not a success, the applicant and respondent parted within a few days and have lived separate since. The applicant intends to initiate divorce proceedings in Australia and then hopes to marry Mr. Wintour.

Both statute law and case law are clear that the first and paramount consideration is the welfare of the children.

The applicant, the respondent and Mrs. Stober all urge that the children should remain together, the children themselves want this. I am satisfied with the sincerity of all concerned in this regard and that the welfare of the children will be best promoted by brother and sister staying together.

Considering all the evidence, the demeanour of witnesses and submissions by counsel I am satisfied that both parents are suitable persons to be awarded custody of the children, the personality differences, comparative flexibility and stability in neither case come anywhere near disqualifying either of the parents.

It follows that this Court must ultimately make an order taking away the custody of the children from a parent who is eminently suitable to have custody. I must emphasise to both parents the importance to the children of such parent being afforded and exercising access to the full. The atmosphere of tension and artificiality which has pervaded while these proceedings were pending must be felt deeply by the children and they are now entitled to relaxation and natural contact

from both parents as well as the love which it is clear they have always received. This will be most difficult for the parent deprived of custody but receiving access, bitterness will be felt towards the other parent, those who swore affidavits and even opposing counsel and the Court; but such bitterness must be kept away from the children.

Counsel for the respondent urged that on the authority of S. v S. 1972 there was a principle that in custody cases the Court should see the new partners of the parents. The full report and judgment are not available, and from the brief footnote in Vol. 13 Halsbury 4th edition the following points are evident:-

1st. the footnote does not suggest this is a hard and fast principle applicable in every case;
2nd. while the greatest respect must be paid to the footnote, it emanates from the Divisional Court which would not be of greater jurisdiction than the High Court and it would not therefore be obligatory to follow in this case; and
3rd. the preceding sentence of the footnote reads "parent with actual care and control of child should not be allowed to delay proceedings"; I do not think that the delays inevitable in obtaining and studying a copy of the Solicitor's Journal in question are justified.

However, I have considered reopening the proceedings to call Mr. Wintour. If this would lead to a more just decision it should be done. The Court has already had a quantity of evidence about Mr. Wintour, taken at its worst that he is someone the children do not like very much, prone to violence, rough in his manner, not as gentle or tolerant as the respondent, these features are not of such importance as to disqualify the applicant if she would otherwise be granted custody; and on the other hand when the evidence is viewed in its best light, the children enjoy his company, they would benefit from exposure to him, he is of good character, the children seem natural and relaxed in his company, even so these advantages would not be such as to hinder a grant of custody to the respondent. In the particular case now before the Court I am satisfied it would not take the matter any further to call Mr. Wintour.

The children expressed the wish to remain with their father, both in their interview with Mrs. Stober and later to the Court. Although their preference is important, nevertheless in view of their ages, the length of time they have been with their father and all the circumstances of this particular family I take the children's statements with great caution and am not prepared to accept them as a deciding factor.

I have taken into account the various headings which counsel have put forward as being matters for the Court to take into consideration, also the particular features of the applicant's and the respondent's case, while these matters are relevant and assist orderly thinking it is not proper to come to a decision on a strict mathematical

basis, the problem comes back to the question what is the best for these two children in the circumstances of their particular family in the light of what the Court has received in evidence with particular reference to the two parents. Taking everything into account I have come to the conclusion that despite the shortcomings in the respondent's nature the children would benefit most from the good relationship he has with them, from the settled routine, from his insightfulness and his ability to recognise his own faults if they are placed in his actual custody and care, and furthermore that provided both parents recognise the importance of the applicant's access to her children then Darren and Janine can continue to benefit now and through adolescence from their mother's flexibility, warmth and awareness of the oncoming problems of adolescence.

Orders are therefore made:

(1) Custody of Darren Edward Warner and Janine Marie Warner to respondent.
(2) Reasonable access reserved to applicant.
(3) No orders as to maintenance or costs.
(4) Leave reserved to either party to apply for definition of terms of access, maintenance, costs, or restrictions upon removal of the infants or either of them from the jurisdiction of this Court.

Dated at Vila this seventh day of June, 1976.

R. M. Hampson
Commissioner