IN THE SUPREME COURT OF BELIZE, A.D. 2002

(APPELLATE JURISDICTION)

INFERIOR COURT APPEAL NO. 4 OF 2002

APPEAL FROM THE INFERIOR COURT FOR THE CAYO DISTRICT

	(HELENA FRIESEN	Appellant
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BETWEEN	(AND	
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	(HENRICH FRIESEN	Respondent

BEFORE the Honourable Abdulai Conteh, Chief Justice.

Mrs. Marilyn Williams for the Appellant.
Mr. Cecil Ramirez for the Respondent.

JUDGMENT

This is an appeal from a decision of the Magistrate in Belmopan sitting as the Family Court given on 30th May 2002. By the decision, the Magistrate ordered that the custody of four children be given to the Respondent.

2. Against this decision the Appellant has now appealed to this Court on the following grounds:

   1) The decision of the Magistrate on 31st May 2002 was unreasonable.

   2) The decision of the Magistrate could not be supported having regard to the evidence.

   3) The decision of the Magistrate was based on a wrong principle.

3. The Appellant is the wife of the Respondent and they have nine surviving children of their marriage, a tenth having died sometime ago. The

children's ages range from ten months to thirteen years, and six of them are boys and three are girls. Both the Appellant and the Respondent are members of the Mennonite community in Belize. The members of this community are generally known to be distinct in Belize, often living in settled communities of their own with distinct life style, religion and economic pursuits. From the evidence in this case, it would appear that although generally separated from the rest of the Belizean society by their distinct mode of dress, life style, religion and settlement, the Mennonite community itself is not one homogenous entity. Within the community there are what the learned attorneys for the parties, Mrs. Marilyn Williams for the Appellant, and Mr. Cecil Ramirez for the Respondent, described as the conservative and traditional elements and the liberal elements. The former abjures anything modern such as electricity, modern household convenience and transportation, preferring instead the horse drawn buggy and teaching their children in a German dialect spoken within the community. The other element is not so inhibited, it avails itself to modern and other conveniences including affording its children instructions in English.

4. Somehow, things did not work out between the Appellant and the Respondent due largely to the differences between their religious outlook and disposition and the branch of the Mennonite Community, either the more traditional and conservative element or the more liberal, to which they should belong. The Appellant is of the traditional and more orthodox persuasion and it was agreed between the parties before their marriage that they would belong to this branch and live in the community of Barton Creek in the Cayo District. These differences and the inability or unwillingness of the Respondent to be a more thorough going adherent to the orthodox beliefs and practices of the community in Barton Creek or be more compliant to the desires and practices of the elders and the Church in that community caused the Appellant to move out of the matrimonial home sometime in 2000. The Appellant took with her seven of the children, the younger ones of the marriage, and the Respondent was left with the two oldest boys. The community itself especially its elders and the Church were vital to the parties: they provided a network of mutual support and assistance and affords its members a sense of belonging to a close-knit society. The Respondent himself originally was a founder of the Barton Creek Community.

5. In January 2002, the Applicant cause an application seeking custody of all nine children of the marriage to come before the Magistrate in Belmopan. At the time the oldest boys were living with the Respondent. The

Magistrate by his order of 25 January 2002, granted custody of the two eldest boys already staying with the Respondent to him. The Magistrate however ordered that the Appellant should have custody of the other seven children. The Magistrate also ordered mutual access in favour of the non-custodial parent. That is to say, he ordered that the Respondent in this appeal, Mr. Friesen, the father of the children, should have access to the seven children starting from Saturday 26 January and Sunday from 9 a.m. to 4 p.m., and access in favour of the Appellant to the other two children, starting from the following weekend after his order of 25 January 2002.

6. From the evidence, there were some difficulties relating to this access in favour of both parties stemming principally from their separate residences and the fact that the Appellant had to travel by horse and buggy to and from her own place.

7. However, the Respondent on 4th April 2002, went back to the Magistrate Court, this time as the complainant with an application pursuant to **section 4(b)** read together with **section 5(b) and (d) of the Married Persons (Protection) Act – Chapter 175 of the Laws of Belize Revised Edition 2000**, seeking custody of **all** the children, including the two oldest boys whose custody had already been granted earlier in January to him. The Magistrate then ordered that the four other boys whose custody he had awarded the Appellant be now given to the Respondent the father, and custody of the female children should remain with the mother.

8. The Magistrate said in his reasons for his decision that he applied **section 10(a) of Chapter 175 of the Laws of Belize** in arriving at it.

9. This raised a troubling issue which I put to the learned attorney Mr. Cecil Ramirez, for the Respondent. It is clear that **section 10** of **Chapter 175 of the Laws of Belize** was inapplicable to the Respondent's application before the Magistrate. The Respondent's application was for **custody** of all the nine children and not a **variation** or **discharge** of the order of custody that the Magistrate had made earlier in January. **Section 10(a) of Chapter 175** deals with the variation or discharge of an order already made under the Act upon fresh evidence to the satisfaction of the Court. This section is different in operation from both **section 2(b)** and **section 4(b)**, which entitle either a married woman or a married man to an order

for legal custody of the children of the marriage, on the grounds stated in **sections 3 and 5** respectively.

10. The Magistrate therefore erred when he treated the Respondent's application as one for variation, when in point of fact it was expressly pursuant to **section 4(b)** read along with **section 5(d)**. Different considerations apply in the case of an application under these sections from those under **section 10**: variation or discharge of an already subsisting custody order is for cause being shown upon fresh evidence to the satisfaction of the Court.

11. I must agree therefore with the learned attorney, Mrs. Marilyn Williams, for the Appellant, that in any event, **section 10 of Chapter 175** was the wrong principle to apply to the circumstances of this case, in as much as it provides for variation or discharge of custody orders, she submitted, it provides no assistance for making custody orders. She submitted rightly, in my view, that the proper law and applicable principles are to be found in **section 3** of the **Families and Children Act** and the **First Schedule** thereto – **Chapter 173 of the Laws of Belize, Revised Edition 2000**. This was more so as the Respondent was making an application for custody and not a variation of custody.

12. **Section 3 of Chapter 173** provides:

> *"The principles in regard to children's rights set out in the First Schedule to this Act shall be the guiding principles in the making of any decisions affecting a child."*

13. The First Schedule to the Act provides "Guiding Principles in the Implementation of the Act." Central to these is the **welfare principle**. **Paragraph 1** of this Schedule provides, as far as is material for this appeal, as follows:

> *"1. Whenever the State, a Court, a Government agency or any person determines any question with respect to –*
>
> *(a) the upbringing of a child*
>
> *(b) . . .*

the child's welfare shall be the paramount consideration."

14. **Paragraph 3** of the First Schedule lists several criteria and provides as follows:

> *"3. In determining any question relating to circumstances set out in subparagraph (a) . . . of paragraph 1 above, the Court or any other person shall have regard in particular to:*
>
> *(a) the ascertainable wishes and feelings of the child concerned in the light of his or her age and understanding;*
>
> *(b) the child's physical, emotional and educational needs;*
>
> *(c) the likely effects of any changes in the child's circumstances;*
>
> *(d) the child's age, sex, background and any other circumstances relevant in the matter;*
>
> *(e) any harm that the child has suffered or is at risk of suffering;*
>
> (f) *where relevant, the capacity of the child's parents, guardians or others involved in the care of the child in meeting his or her needs."*

15. **Section 30 of Chapter 173 of the Laws of Belize** expressly provides for the principles on which questions relating to the **custody or upbringing** or the administration of a child's property or income therefrom, are to be decided. This section also emphasizes the **welfare of the child** which it regards as the **first and paramount consideration**. It provides as follows:

> *"30. Where in any proceeding before any court –*
>
> *(a) the custody or upbringing of a child*
>
> *(b) . . .*

is in question, the Court shall in deciding the question, regard the ***welfare of the child as the first and paramount consideration****, and shall not take into consideration whether the claim of the father in respect of such custody, upbringing . . . is superior to that of the mother, or vice versa."* (emphasis added)

16. I had set out earlier the criteria of this **welfare of the child** principle as set out in the First Schedule: it is, in law, the first and paramount consideration.

17. In this appeal, I find that although the Magistrate made some advertence to **section 30 of Chapter 173 of the Laws of Belize Revised Edition 2000**, and correctly diagnosed the situation as arising out of the differences of the religious beliefs of the Appellant and Respondent, and that the children should not be made to pay the consequences of their parents' fault or delinquency, he however, failed to bear in mind the criteria that should inform a decision in a custody case.

18. Somewhat confusingly also, the Magistrate stated in his reasons for decision that the Respondent's application for custody was made pursuant to **sections 4(b) and 5(d) of the Married Persons (Protection) Act – Chapter 175 of the Laws of Belize Revised Edition 2000** where the Court applies **section 10(a)** in reaching its decision. This was no doubt, an error, as I have pointed out, these sections govern different situations. **Section 4** speaks to orders to which a husband is entitled (which may include legal custody of the children of the marriage) and **section 5** addresses the grounds upon which a husband may make an application under the Act. **Section 10** on the other hand empowers the Family Court to vary or discharge any order previously made under the Act.

19. This error on the part of the Magistrate and his failure to appreciate the import of **section 30** of the **Family and Children Act**, and in particular, the provisions of the First Schedule to this Act, resulted, I find, in his making an order regarding the custody of the four younger male children which is, on the facts of this case and on the evidence, difficult to justify or uphold.

20. The Magistrate in effect, by his order under challenge, separated the children by gender, and awarded custody accordingly. The result of the Magistrate's order was to grant custody of all the six boys to the father, the Respondent in this appeal, and to leave the mother, the appellant, with custody of the girls. He granted of course, mutual access to both parties as non-custodial parents.

21. In particular, I find and hold that the Magistrate failed to appreciate or apply **criterion (a) of paragraph 3** of the First Schedule to the Families and Children Act. This provides that in determining any question relating to the upbringing of a child, a Court shall have regard in particular to:

> *"(a) the ascertainable wishes and feelings of the child concerned considered in the light of his or her age and understanding."*

22. The Magistrate failed in this instance to have regard to the wishes of the children, whom I find, apart from the nine month old girl and the two year old boy, were all capable of expressing their wishes as to which of the parents they would like to stay with. There is no evidence that the Magistrate saw or interviewed the children to ascertain their wishes on the Respondent's application.

23. Having regard to the powers of this Court generally in proceedings on appeal as provided for in **section 121 of The Supreme Court Act – Chapter 91 of the Laws of Belize**, and guided by the provisions of **section 30 of the Families and Children Act**, in particular the provisions of the First Schedule to this Act, I decided to see and talk to the children in my chambers. This I did on Monday, 15 July 2002 in the presence of both the Appellant and the Respondent with their respective attorneys and interpreters.

24. Apart from the two older boys already living with the Respondent, all the other children, that is, those who could understand my questions, clearly expressed a wish and desire to stay with the Appellant. I got the distinct feeling that all the children would rather stay together as siblings. In particular the ten year old, eight year old, six year old and three year old boys whose custody had been granted by the Magistrate in May 2002 and the subject of this appeal, all clearly expressed the desire to stay with the Appellant.

25. The provisions of **<u>section 30 of the Families and Children Act</u>** are, I believe, inspired by and follow closely the wording of the United Kingdom **<u>Guardianship of Infants Act 1925</u>**, which in its **<u>section 1</u>** introduced the expression *"regard the welfare of the child as the first and paramount consideration."* Lord MacDermott in **<u>J v C</u> (1970) A.C. 668** at p. 710 gave a construction to this phrase which is not easy to improve upon and which, with respect, I adopt for the purposes of this decision. The Learned Lord stated:

> *"Reading these words in their ordinary significance . . . it seems to me that they must mean more than the child's welfare is to be treated as the top item in a list of items relevant to the matter in question . . . they connote a process whereby when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed."*

26. I think in the circumstances of this case, the Magistrate erred and did not give sufficient consideration or weight to the fact that it would be more in the interest and welfare of the majority of the children to grow up together as siblings with their mother rather than separating and apportioning them by gender – six boys to the father and the three girls to the mother on a *"boys to boys, girls to girls"* basis reminiscent of the infant playground.

27. I think it is self-evident that where there are siblings of both genders, it would be in their best interest and welfare if they were reared together, rather than being separated by gender, the females to the mother and the males to the father, because of differences between their parents; such division along gender lines, does not strengthen family ties or conduce to the children's welfare.

28. I think the welfare of the children, the first and paramount consideration, would best be served by returning the custody of the four boys back to the mother, the Appellant so they can grow up with their other siblings, the three girls with their mother. The four boys themselves expressly stated this wish when I interviewed them. This way, it would be less harmful and disruptive and minimize the upset in the children's lives, caused principally

by their parents' seemingly irreconcilable differences and outlook on life. It would of course be infinitely more preferable if all nine children could stay and grow up together as this would nurture and strengthen their blood relationship as siblings, but unfortunately their parents' differences stand in the way of this.

29. The Magistrate also seemed to have paid scant if any regard to the Case Reports presented by Mr. Nestor Novelo, the Community Development Officer in Belmopan. He recommended in his report after interviews with the Respondent in Spanish Lookout and with the Appellant in Barton Creek, recommended in fact that physical custody of **all** the children including the two older boys be given to the mother.

30. Also, Ms. Margaret Webb, the Social Worker in Belmopan after visits to the communities in Barton Creek and Pine Hill to which the Appellant is more associated and to Spanish Lookout where the Respondent now resides, and observation of conditions in these places, and after interviews with the children and the Appellant and Respondent, recommended that custody of the two older boys be granted to the Respondent and custody of the rest of the children should be granted to the Appellant.

31. In the light of all the above, I uphold the Appellant's appeal for the reasons that the Magistrate's decision/order of 30 May 2002 was not reasonable, could not be supported having regard to the evidence and that he came to the conclusion he did because he did not apply the correct principles.

32. Accordingly, I set the Magistrate's order aside and order that custody of the four boys, which gave rise to this appeal, be granted to the Appellant. The parties shall have access to the children not in their custody on alternate weekends starting on Saturday 27 July 2002 at 9 a.m. until Sunday at 4 p.m.

33. The Respondent shall pay the costs of this appeal, to be taxed if not agreed.

A. O. CONTEH
Chief Justice

DATED: 19th July, 2002.