

D'Agostino, P. and D'Agostino, M. [1976] FamCA 79; (1976) FLC 90-130; (1976) 2 FamLR 11,322 (5 November 1976)

Between D'AGOSTINO, P. and D'AGOSTINO, M.

(1976) FLC ¶90-130

Other publishers' citations: [\(1976\) 2 FamLR 11,322](#)

Family Court of Western Australia.

Judgment handed down 5 November 1976.

Before: McCall J.

1. **McCall J.:** These proceedings were commenced in May 1976 in the Supreme Court of Western Australia when the wife filed an application seeking custody of the three children of the marriage, maintenance for the said children, and an order that the wife have the sole use and occupation of a house situated in Dianella, the respondent paying all the rates and other outgoings in respect of the said premises. On the 9th June, 1976, the wife filed a further application seeking an order that, pending the disposal of the proceedings, the husband pay to her maintenance and that she be entitled to the sole use and occupation of the house in Dianella. The husband at the same time applied for an order that he have reasonable access to the three children of the marriage. These interim applications were heard on the 24th June by *Brinsden J.* who made an order granting the wife an injunction restraining the husband from entering premises situated at Highgate and granting to the wife maintenance in the sum of \$30 per week.
2. *Brinsden J.* at the same time granted the husband access to the children each Sunday between the hours of 12.30 p.m. and 5 p.m. provided access was exercised in the presence of a third party to be agreed between the husband and wife.
3. On the proceedings coming on before me it was agreed that the wife should have sole custody of the three children of the marriage, but the matters in dispute were the questions of access, maintenance and the use and occupation of the house at Dianella.
4. The parties to these proceedings were married in June 1965. There are three children of the marriage who are all girls — J., now aged 11 years, M., nearly 9 years, and G., nearly 4 years of age. For some years the parties have resided at premises situated at

479 Beaufort Street, Highgate. These premises consist of a shop with a dwelling at the rear. From the shop at the front of the premises the husband conducts his business as a hairdresser and in the dwelling attached to the shop the family had lived. The relationship between these parties deteriorated to such an extent that by the 10th March 1976 they separated. The husband then apparently moved out of the house as the result of certain incidents that took place between the parties and has been, ever since, boarding with a friend. The wife and the three children have remained resident in the premises at the rear of the shop.

5. After cohabitation came to an end the wife discovered that the husband had sexually assaulted the eldest child of the marriage and in April 1976 he was convicted and fined in the Children's Court at Perth. Following this the wife had the connecting door between the shop premises and the residence at the rear boarded up which thereafter prevented any access between the two portions of the premises. There is no doubt in my mind that the evidence relating to the sexual assault resulted in *Brinsden J.* making his order for access in the restricted terms set out.

Custody and Access

6. The question of custody of the three children is not in dispute. The husband has agreed that the wife should have sole custody of the children and in view of the evidence led before me I think there is no doubt that a custody order should be made. The existing access order has created difficulties. The husband's complaint is that he finds it difficult to comply with the restrictive provision in the existing order, namely that there must be a third person present during the time that he exercises access, and, secondly, the wife wishes to have the access changed from the Sundays to Saturdays. She is agreeable to the husband seeing the children provided the restrictive provision remains. Since the order of *Brinsden J.* there have also been difficulties effecting access. The wife has complained that the husband failed to take the children on one occasion when she had them ready and on another occasion they were reluctant to go with him. On the other hand, the husband has complained that if he arrived a few minutes late from the appointed time, then the children had been taken out by the wife.
7. The principal questions to be determined here are whether access should be permitted at all and, if so, when and under what circumstances. The conviction of the husband was admitted by him; however an affidavit sworn by the eldest daughter upon whom the sexual assault took place was to the effect that the assault was not an isolated act and had occurred on at least three occasions. This was denied by the husband. In these circumstances the wife, in my view rightly, believes that if the children are with the husband alone then there is a real danger that they are in peril. The husband admits to one assault only, and professes repentance and is apologetic for what has happened. But the wife, understandably, is uncertain as to whether the conduct of the husband will be repeated in the future.

8. In determining a question relating to access of a child the Court is directed by sec. 64(1) of the *Family Law Act* to regard the welfare of the child as the paramount consideration. In my view this direction would over-rule even the consent of a parent to the other parent enjoying access if, in fact, the Court were of the view that the best interests of the child would not be suited by maintaining contact with the other parent. It is accepted at the present time and in the present state of the law that it is in the interests of a child to retain contact with both of his parents where the parents are no longer cohabiting, or where the family is no longer functioning as a single unit. Access has in the past on occasions been expressed as being "no more than the basic right of any parent" (see *S. v. S. & P.* (1962) 2 All E.R. 1, at 3-4). However, in view of the provision in the *Family Law Act* referred to above, in my view it is more apt to describe the question of access as being "not so much the question of the father being entitled to his daughter's company, as one of the daughters being entitled to the right to get to know her father, to enjoy his company and to enjoy the benefit which one may at least assume any child would get from being in the company of its father" (per Selby J. in *Melean v. Melean* [1964] A.L.R. 246, at 248). I would also respectfully agree with the Full Court of the Supreme Court of New South Wales in *Cantrill v. Whatman* (1969) 15 F.L.R. 10, at 15, where the Court went on to say:

"We think that, prima facie, it is not in the interest of a child that it should be brought up without a father. It would require a strong case indeed to justify a contrary conclusion although, doubtless, there are cases where it may be proper for the Court in its discretion to refuse a parent access."

9. In a case such as this the Court must always have some doubts as to whether access to the children by the father is likely to place the children in some moral danger. I am influenced in the decision I propose to make regarding access by the fact that the wife is now prepared to allow the husband access to the children provided, however, there are appropriate safeguards to ensure that there is not likely to be any repetition of his past conduct. The safeguards that I would therefore require would be the presence of an adult third person at all times when the children are with their father and that at no time is the father to have the children individually. In other words, it is my intention that when the father has access to the children they should be together as a group and an adult person accompanying them. In addition, this is an appropriate case in which access should be supervised by a Welfare Officer. I appreciate that this does not mean that when access is being exercised the Welfare Officer will be present, nor is he required to be so. It is not the intention of this order that the Welfare Officer is to be the third person present during the enjoyment of access by the father. However, the availability of a Welfare Officer to whom both the parents (and the children) can turn will provide an additional safeguard to the children being subjected to conduct in the future which would be detrimental to their welfare. In view of the difficulties of implementing access in the past, supervision by a Welfare Officer may help to avoid a repetition of these past difficulties.
10. As to the times when access should be enjoyed, again there was disagreement as to whether this should be on Saturdays or Sundays. Present access is on the Saturday

afternoon from 12.30 p.m. to 5.30 p.m. The husband's complaint about this was that when he finished working on Saturdays he was accustomed to having a sleep during the afternoon. It was accordingly inconvenient for him to take the children on Saturday, and Sunday was far more convenient. On the other hand, on Sundays the wife took the children to church in the morning and after lunch she took them out to visit friends, and there was apparently a fairly standard routine for the children for most of the day during Sunday. Again, this question must be determined by reference to the best interests of the children and not necessarily to the convenience of the parties. I am not attracted to the submission on behalf of the husband that access on Saturdays would interfere with his afternoon rest. In my view it is more important that the children's normal routine be continued and that therefore it is for the parents to fit in with what is in their best interests. However, it may be that on Sundays the husband is capable, as he said he was, of taking the children to visit friends which would not be possible on Saturdays. In these circumstances it seems to me that access should alternate between Saturdays and Sundays. Accordingly the husband is to have access on each alternate Saturday from 1.30 p.m. to 5.30 p.m. and each alternate Sunday from 1.30 p.m. to 5.30 p.m., the access to be enjoyed under the conditions I have outlined above.

Property

11. The parties for some 10 years had been living at the premises at 479 Beaufort Street, Highgate. In 1972 they purchased a house in Dianella. This house was intended to be the matrimonial home into which the parties would eventually move. It was purchased for approximately \$16,000 with \$2,500 being paid by way of deposit and the balance of \$13,500 being secured on a first mortgage on the premises. This Dianella house was registered in the joint names of the parties. They did not move into the house immediately upon acquiring it, but instead put tenants into the house so that the rent would meet the mortgage payments, and then proceeded to effect some improvements to it. The present position is that the tenants are still there but are prepared to move out at any time. The wife's case is that she is desirous of moving into this jointly owned house of the parties and seeks an order for the sole possession of it. In short, her case was that apart from the Dianella house providing a far better environment for the children to grow up in, the present situation where the husband is working in the front part of the present premises with the family at the rear, separated by a door only, is too disturbing for the children because of the close proximity of the husband. He can be heard working in the shop during the day time. If he comes back in the evening to do his book work, which is apparently quite frequently, his presence can be heard and again the children are disturbed. There is also occasional communication between them by notes being passed under the connecting door.

12. In the circumstances in which these parties separated, and in the light of the custody and access arrangements that I have outlined above, I accept the evidence that it is not in the interests of the children to be living in such close proximity to their father. I also accept that, following the sexual incidents referred to earlier this year, there has been some difficulty with the children settling down. In my view it is in the interests of the children to move to other premises. The present situation where constantly the presence of a father is known and felt, but a father with whom contact by the children

is unusually restricted by the Court, is an undesirable one and is to be avoided if at all possible.

13. In addition to this factor it appears to me on the evidence that was led that the accommodation available in the Dianella house is far superior to that at the rear of the shop as a suitable environment in which these children should grow up. It is a normal suburban house with ample play areas, lawn and yard around it for the children to exercise and play. This in particular is the facility that is lacking in the premises at the rear of the shop.

14. It was argued before me, however, that there was no power to make the order asked. It was submitted that an order granting possession of the house in Dianella by way of an injunction was an order that it was not competent for the Court to make without proceedings being issued for principal relief. The application is for an injunction pursuant to sec. 114(1) of the Act. For a State Court such as this, which cannot concern itself with a question of legislative competence of the Australian Parliament under the [Constitution](#), the question is simply to determine whether the power to grant such an order falls within the provisions of the statute. [Section 4](#) of the Act permits proceedings between the parties to a marriage for an injunction in circumstances arising out of the marital relationship. If I am satisfied that these are such proceedings, then the Court has the power to grant an injunction as it thinks proper, including an injunction in relation to the property of the party to the marriage, or relating to the use or occupancy of the matrimonial home. Without attempting to define exhaustively what are "circumstances arising out of the marital relationship", I am satisfied that these proceedings fall within that category. They relate to the custody and access of the children of the marriage and to the appropriate and desirable accommodation of the wife and children as a result of facts and circumstances that have arisen within the context of a marriage. The property concerned is the property of the husband and wife. It was purchased by them during the marriage for their joint use in a marital capacity. In my view, accordingly, within the terms of the statute power is given to make the order sought.

15. In any event, the question has now been considered by the Full Court of the Family Court in *Davis and Davis* (1976) FLC ¶90-062. In that case the Family Court of Australia said:

"However in our view it does not follow that the restrictions on [sec. 79](#) should lead to restrictions on the Court's power to deal with the use and occupancy of the matrimonial home in proceedings between the parties to the marriage at any time during the marriage,"

16. and further on the Court continued:

``Provided that the property is clearly defined as matrimonial property, e.g. property acquired during or in contemplation of the marriage for the benefit of the parties to the marriage."

17. In this case the home at Dianella was clearly purchased by the parties to provide a future matrimonial home into which the parties would move when they were ready to do so. It had been their intention to move into the house earlier in 1976. It was purchased with joint contributions from the parties and was registered in their joint names. It therefore clearly becomes property falling within that described in *Davis's case* and in [sec. 114\(1\)](#).

18. The next question is should the power be exercised? Again in *Davis's case* the Court indicated the criteria that should be applied in deciding whether to exercise the power. [Section 114\(1\)](#) simply says the Court may make such order ``as it thinks proper". The Court continued (at p. 75,309):

``The matters which should be considered include the means and needs of the parties, the needs of the children, hardship to either party or to the children and, where relevant, conduct of one party which may justify the other party in leaving the home or in asking for the expulsion from the home of the first party."

19. I do not propose to traverse the evidence again, but suffice it to say that the needs of the children in this case to me indicate that they should be re-housed in premises that are not in such close proximity to the father. It is therefore their needs and the conduct of the parties which outweigh other considerations in this case. In my view it is highly desirable that the wife and children move to the Dianella house. Accordingly, the wife is entitled to an order giving her the sole use and occupation of the Dianella house and an injunction should be granted restraining the husband from entering the premises and from interfering with or molesting the wife and children.

Maintenance

20. Both parties to this marriage are employed. The husband is employed full time conducting his hairdressing business from the premises in Highgate. The wife is employed part-time as a ledger machinist and further augments her income by doing some books for a nearby garage at home. The wife's total income from employment and child endowment is \$140.50 per week. After recounting all her expenses her evidence was that if she were to obtain possession of the house at Dianella, then maintenance in the sum of \$48 per week would be required to enable her to live there and together with her own earnings she would then be able to meet the outgoings on the house in particular the mortgage payments and the rates and taxes.

21. The claim for \$48 per week was strongly opposed by the husband. He claimed his income was insufficient to enable him to live and meet such a payment. In support of his claim he produced the copy of his income tax returns for the years ending June 1975 and June 1976. From the latter return his evidence was that his net income from the business for that year was \$4802. His expenses, including the \$30 per week maintenance now being paid exceeded this figure. In addition, he claimed that there were pressing debts which were incurred as a result of improvements effected to the Dianella house and which he was unable to meet.
22. On the question of the husband's takings from his business, a question of credibility did in fact arise. The wife in the past had been in the habit of assisting him in maintaining books containing the daily and monthly returns from the business. She stated that the husband had a Day Book in which the actual returns and expenses were noted and that these were not accurately transcribed to a second book which was kept for the purpose of giving to his Accountant to prepare his income tax return. In short, she alleged that the figures produced for the tax agent understated the actual income received. This was denied by the husband who produced both books. However, he stated that the previous Day Book that had been kept had been destroyed at the 30th June and a new one commenced. The new one he produced and the figures in it coincided with the Monthly or Yearly Book that was kept for the purpose of preparing the tax return. I can only say that the pristine condition of the new one, which did not give the appearance of a book into which figures were entered daily, has left me in some doubt as to whether the income tax return does accurately reflect the husband's income from his business. In any event, accepting the figures in the return and the husband's evidence as to his expenses, there are at least two items which need not recur in the future which would enable an increased sum by way of maintenance to be paid to the wife. He no longer has a watchdog for the business which in his last tax year cost \$244 to maintain. Also, if the wife vacates the premises at Highgate, the husband can then resume possession of them and he will not be obliged in future to pay \$10 per week board for living at the accommodation which he now has. These two items alone will enable him to find a further \$15 per week to pay for the upkeep on the premises at Dianella. I am not satisfied that arrangements cannot be made relating to the outstanding debts.
23. Without at this point further examining the various figures presented to me, I am satisfied that a maintenance order in the sum of \$45 per week can be afforded by the husband and accordingly should be made.

Orders

24. The orders I make are therefore:
1. The wife is to have the sole custody of the three children of the marriage, namely J., M. and G.

2. The husband is to have access to the three said children on alternate Saturdays and Sundays between the hours of 1.30 p.m. and 5.30 p.m. Such access is to be enjoyed in the presence of a third adult person agreed upon by the parties, and during such access the children who are with the father are not to be separated. Access is to be supervised by a Welfare Officer of this Court.

3. The wife is to have the sole use and occupation of the premises situated at and known as 436 Grand Promenade, Dianella, and the husband is restrained by injunction from entering upon or remaining on the said premises.

4. The husband is restrained from interfering with or molesting either the wife or the said children of the marriage.

5. The husband is to pay to the wife maintenance in the sum of \$45 per week, such sum to be apportioned as to \$15 per week per child. Payments are to be made to the Collector.