

Case note morrison v  
jenkins (1949) 80 clr  
626



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----- *MORRISON v. JENKINS* -----

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--- (1949) 80 CLR 626

(Whose baby case)

Name of Court:

- High Court of Australia

Name of Case:

- *MORRISON v. JENKINS*

Citation:

- (1949) 80 CLR 626

Parties to the Action:

- Alberta Gwen Morrison, the Appellant
- Jessie Jenkins, the Respondent

Nature of Case:

- Civil Matter (Family Matter)

Date of Judgement:

Date of Decision: 22<sup>nd</sup> December, 1949

Bench:

- Five Judges Bench (Large/Full) including Chief Justice.

1. Mr. Latham CJ, (dissenting)
2. Mr. Rich J,
3. Mr. Dixon J,
4. Mr. McTiernan J, (dissenting)
5. Mr. Webb, J.

Facts and Summary:

Mrs. Alberta Gwen Morrison gave a birth of a baby girl on 22<sup>nd</sup> June 1945 in the 'Kyneton Hospital' in Victoria. On that same day, within five minutes another lady named Mrs. Jessie Jenkins also gave a birth to a baby girl in the same ward.

Mr. and Mrs. Morrison claimed that their baby girl had been swapped in the ward with the baby girl of Mrs. Jenkins. And Mrs. Jenkins had left the hospital with their baby (baby named Nola Jenkins). After four years, this matter reached to the high court with completion of all lower court proceedings.

Mr. and Mrs Morrison wanted the back of their baby Nola, but the Jenkins family did not want to return Nola because they were convinced that they Nola was their baby and they had brought a child right from the hospital.

At that time, there was no DNA testing, but from the report of blood test showed that Mr. Morrison could not be father of the baby which they had had

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from the Victoria Hospital. After that, the Supreme Court of Victoria held in this matter that the baby girl (Nola) was the daughter of Mr. and Mrs. Morrison and Jenkins Family should be return Nola to custody of her real parents.

The decisions and judgments of judges in the high court were divided.

On the one part, Mr. Justice Rich and Mr. Justice Dixon said that the status of parentage of a child is so much doubt ful as wll as itfavorable be in the favourable circumstance for the child to return child to her original parent from persent custody parent.

On the second part, Mr. Justice Webb did not agree with the decision of the tarial judge that the baby girl belonged to Morrisons' family. There was an evidence which included another fact which was that the within twenty four hours there was more children born and might be one of those have been given to Morrison family.

On the third part, Chief Justice Latham and Mr. Justice McTiernan said that Nola should be given back to Morrison family. According to Mr. Justice McTiernan, blood test is a enough evidence for proving that Nola is the child of Mr. Morrison. He also explained that The test of " best-interest-of-the-child" only applied when parents fight with each other for the custody of minor, but in this situation parents are together and real parents are natural and lawful guardian of their own child and also have an absolute legal right to the custody of their own child.

The majority of judges' decision were that Jenkins family should retain the custody of Minor child Nola and Morrisons's family should retain custody of Johanne. And in the result, the appeal was refused.

Brief Judgement/Decision of Trail Court/High Court:

The decision by the supreme court of Victoria (Barry. J) regarding above said matter is that Nola was the daughter of Mr. Morrison and the welfare of children is that to leave and brought up with her own real parent because real parent can take care better than others. Nola should in the custody of her real parents. According to Herring C. J, the writ of habeus corpus is un suitable of this proceeding because this is a proceeding for the determination of the parentage of child but application for the habeus corpus is much suitable procedure because oarents wants to obtain the custody of their own child. According to Fullage. J. there is benefit of doubt as the parantge of the child even no order should be made if a slightest doubt is occurring. Low J. Agreed by all other members of the bench.

Relevant law:

Legitimacy Declaration Act 1858 section 1

The Marriage Acts 1928-1941 (Vict.), s. 136 are derived from the English Guardianship of Infants Act 1925

Halsbury, Laws of England, 2nd ed ., vol. XVII., p. 666

Section 136 of the Marriages Acts 1928-1941 (Victoria) provide that the court have power to decide the question of custody of minor regarding the welfare as the first essential consideration.

Halsbury, Laws of England, 2nd ed., vol. XVII., p. 666 stated that “” a father, whose infant child is not in his custody, and a mother, where she is entitled to the custody, may, in the absence of good reason to the contrary, obtain the custody of the child by a writ of habeas corpus”

According to

Issue:

The main issues in this case were that:

- Whether is this matter relating to guardianship or parentage?
- Whether is it the welfare of child or not to change the guardianship?
- Whether is there defacto relationship has existed between child and present guardian?
- Whether appeal should be allowed or not?
- Which parents have custody right on the child?
- Whether common law applied on this matter?
- Whether Nola is legitimate child of Mr. and Mrs. Morrison?

Ratio Decidendi:

There are two points in which determines the judgment of all judges that is:

That the welfare of child is more important than anything and welfare of child is a paramount consideration.

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That the Parentage of child is legitimate.

According to Mr. Latham, that this is a welfare of the child that he or she should be brought up with and by its real parents not other than and should be in the custody of her real parents. And Mr Latham fully supports the judgment of Mr. Barry J the Judge of Supreme Court of Victoria. He also mentioned the affidavit of Mr. Morrison in the trial court proceedings that Mrs. Morrison gave evidence that she never ever had any sexual relationship with any person except her husband. And Johanne Lee is not a child of her husband.

Mr. Rich J, stated that the one thing which is more important after parentage issue that is welfare of child. In this matter the de-facto relationship has formed between the both parents and children and they have also defacto relationship exists between siblings and other family members.

McTiernan J. relied on the scientific evidence which was blood test. He also mentioned that the natural parents are the lawful guardians of their own child and have right to custody. And they have the right of habeas corpus. He also state that the in the interest of welfare of child it is most important thing that parent should take care of their own child.

Mr. Webb J. mentioned that both children are well developed and attractive but he was not able to check and observe the features of resemblance with parents and that kind could placed reliance on them.

Mr. Dixon J. gives the opinion that this matter donot have any question of law and have only question of fact. According to him welfare of a child as a

paramount consideration and never be neglected. He also fully support the view of the High Court that the whole future happiness and welfare of both child is on stake.

Obiter Dicta / Notes:

After the hearing of both parties; the leave to appeal dismisses by a majority of three to two judges, Mr. Rich, Mr. Dixon and Mr. Webb JJ; Mr. Latham CJ and Mr. McTiernan J dissenting. All judges of court describe and set the standard of proof at very high level.

Mr. Rich J.

He stated that the Morrison must exclude ' every other reasonable hypothesis'[1]

Mr. Dixon J.

He expressed his agreement with the view of the Victorian Full Court.[2]

" the further inference or conclusions which have been drawn as to the precise manner in which the babies were handled and exactly by whom are doubtful and in some respects speculative and they are unsafe."[3]

Mr. McTiernan J.

He stated that ' all reasonable doubt' must be excluded.[4]

Mr. Webb J.



He was not prepared to go so far. His Honour stated that while a court cannot change the standard of proof, ' it can and should insist on exact or cogent proofs on issues of grave importance like that of parentage'.[5]

Mr. Latham CJ ,

that the appeal should be allowed with costs, that the decision of the Full Court should be set aside and that the order of Barry J. should be restored.

[6]

Conclusion:

In my point of view, This case is a family matter of guardianship as well as parentage. Morrison family wanted return their baby from the Jenkins family. There was sufficient evidence for proof that Mr. Morrison was the father of baby girl but the majority of judges of high court did not allow to give custody of baby. So that guardianship of baby girl remained status Quo.

The evidence proves that the baby born on 22<sup>nd</sup> June 1945 and belonged to Mrs. Morrison. Affidavits and cross examinations as well as blood test of baby and Morrison also proves that the Nola is a legitimate child of Mr. Morrison but after all of these was not in the favour of child to change the guardianship and return to her real parent because there was defacto relationship existed and if court change the custody of the child then it may be harmful effect on child.

This is very unusual and interesting case because this case treated as special case because there is no question of law included in this case. The case is depends upon question of fact rather than question of law and

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treated as a special case. Because in normal circumstances, father and mother fights for custody of the minor but in this case two different families were fighting for custody of the child. The Majority of judges agreed after examined the evidence that Mr. Morisson was a father of child but they focus on welfare of child rather than legitimacy of child. - - - - -

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[1]Morrison v Jenkins [1949] HCA 69 (22 December 1949) page 640

[2]Morrison v Jenkins [1949] HCA 69 (22 December 1949) page 646

[3]Ibid page 643

[4]Ibid page 648

[5]Ibid page 654

[6]Ibid page 637