

RAND ON FAMILY LAW: WIVES AND MOTHERS AT MID-CENTURY

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In Rand's oeuvre of nearly six hundred judgments, a mere twenty or so fall within the domain of family law. This is not surprising when one considers that the 1940s and 50s were not particularly active times for litigation, reform or evolution in Canadian family law.¹ Divorce required proof of adultery, support was determined less on the basis of need or ability to pay than on the basis of marital misconduct, and custody often went to the father despite development of the 'tender years' doctrine.² Family law decisions that Justice Rand did write dealt with a full range of issues including adoption, alimony, custody, divorce, marital property and the presumption of advancement; but almost none of these stand out as significant in shaping the family law regime of the nation as we know it in the twenty-first century.

In roughly half of the family law decisions in the Supreme Court of Canada when he was a member, Justice Rand wrote separate reasons in support of the majority position. In a further third of the cases he simply concurred with the majority or the decisions were unanimous. In two cases he wrote dissenting judgments, and in two he wrote the majority reasons. Most of these decisions have disappeared into legal oblivion, with barely any mention in subsequent cases over the fifty-plus years since they were written. The clear exception is in the three adoption cases in which he wrote separate reasons. These are discussed in the second half of this article.

But there are four other cases that exemplify Justice Rand's general approach to family law, an approach that stands in sharp contrast to the more creative approach credited to him in areas of public law. Ian Bushnell, in *The Captive Court*, concluded

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¹ J. D. Payne, et al., *An Evaluation of Spousal and Child Support Rights and Obligations of Marriage Breakdown and Divorce in Canada* (Ottawa: Minister of Public Works and Governmental Services, 1999).

² Karina Winton, "The Spoilt Darling of the Law: Women and Canadian Child Custody Law in the Postwar Period (1945-1960)" (2002), 19 *Canadian Journal of Family Law* 193.

that Justice Rand was committed to “creative jurisprudence and freedom”³ in an era of sterility and blind acceptance of precedent. In family law, however, his deference to established precedents and the “universally accepted attitudes and working assumptions of our polity”⁴ preserved the position of husbands as masters of their domestic realm and of all those who inhabited it. This conservative approach to judicial discretion was in keeping with how other scholars have characterised Rand’s approach in general, considering him to be loyal to precedent and cautious in allowing legal principles to be moulded.⁵ This is the approach most evident in these cases.

The first two of these four cases dealt with matrimonial property and somewhat shaped the evolution of married women’s ability to gain property rights. *Minaker v. Minaker*⁶ and *Carnochan v. Carnochan*⁷ were cited in the 1970s by the Supreme Court of Canada when it first confronted the possibility of using the constructive trust to allow a wife entitlement to farm properties which she had helped to build and maintain. In *Murdoch v. Murdoch*, Martland J. specifically rejected the possibility of any judicial discretion under the married women’s property legislation that would allow a claim to shared ownership of land. Referring to decisions by then more than twenty years old, he noted that there was no hint of such discretion in *Minaker* and that there was an implicit rejection of the existence of any such power in *Carnochan*.⁸ *Minaker* concerned a wife’s claim for title to the matrimonial home, and Rand stated:

The facts tend, no doubt, to excite sympathy for the wife and child, but we must resist the danger of allowing it to outrun rules too well and too long established to be disregarded.... In the early period of their married life the wife accepted the difficulties of the situation courageously and for three or four years worked in outside employment at wages; but they went into the common fund used to carry the family life from day to day. It is, I think, impossible to trace any part of the money so earned into the purchase of the land.... For those reasons the [trial] judgment in this respect cannot stand.⁹

Similarly in *Carnochan*, where the wife sought to maintain possession of the matrimonial home even though the husband was the registered owner, the Court held that any question as to title to property must be decided according to applicable rules of law and equity, although questions of possession could be resolved by judicial

³ Ian Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (Montreal & Kingston: McGill-Queen’s University Press, 1999) at 311.

⁴ *Ibid.*

⁵ R. P. H. Balcome, et al., *Supreme Court of Canada Decision-Making: The Benchmarks of Rand, Kerwin and Martland* (Toronto: Carswell, 1990) at 64.

⁶ [1949] S.C.R. 397.

⁷ [1955] S.C.R. 669.

⁸ *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423, at 432.

⁹ *Supra* note 6, at 402-03.

discretion under the statute.¹⁰ Another important family law decision shaped by Rand judgments was *Pelech v. Pelech* of the *Richardson, Caron* and *Pelech* trilogy.¹¹ *Bickley v. Bickley*, which dealt with a father's claim to custody of his children, and *Carnochan v. Carnochan*, where the wife's right to possession of the marital home under the *Married Women's Property Act* was upheld, were both cited to bolster the proposition in *Pelech* that deference should be given to the decision of the trial judge in family law cases because the trial judge had the benefit of hearing and seeing the parties and witnesses in the case.¹²

Justice Rand's unwillingness to exercise creativity to upset the gender norms of the day (even when he appeared to recognise the apparent unfairness) could also be seen in his contrasting treatment of husbands and wives in family law disputes. In the second two of these four cases that exemplify Rand's approach, he applied different standards to husbands and wives seeking to avoid bargains they had made.

In *Pahara v. Pahara*¹³ the husband had transferred title to numerous farm and town properties to the name of his wife, something he claimed to have done only because she nagged him: as Rand stated, "it was the easier course to comply with than resist."¹⁴ The parties had also, early in their marriage, signed a reciprocal will under which each left all his or her property to the other. Several years before her death, the wife revoked the reciprocal will and made a new will leaving all of her property to her children; and then, just hours before her death, made a final will that left her property to her two daughters, with a request that they provide for the husband during his lifetime. The husband came to court to claim property rights to all the properties registered in the wife's name that had passed to the daughters under her will. The wife's labours in acquiring and maintaining the properties were noted, but the court held that this did not entitle her to deal with the properties in her subsequent wills. The husband was permitted to repudiate his own decision to register the properties to his wife's name and was successful in having the title to all the properties restored to his name.

By contrast, in *Maynard v. Maynard*,¹⁵ a wife who agreed to accept a lump sum payment for all claims for alimony and maintenance was held to her decision. Justice Rand noted:

¹⁰ *Supra* note 7, at 673.

¹¹ *Pelech v. Pelech*, [1987] 1 S.C.R. 801; *Richardson v. Richardson*, [1987] 1 S.C.R. 857; *Caron v. Caron*, [1987] 1 S.C.R. 892.

¹² *Pelech*, *ibid.*, at paras. 24 and 33.

¹³ [1946] S.C.R. 89.

¹⁴ *Ibid.*, at 91.

¹⁵ [1951] S.C.R. 346.

...it may be that the petitioner was badly advised, or that she herself exercised poor judgment, in agreeing to accept the particular sum. But that occasional hardship cannot justify a departure from rules governing the course of courts which are necessary to their proper functioning; and where the parties act freely, with full opportunity to ascertain all relevant facts, they must abide by that adjudication of their private quarrel to which they gave their consent.¹⁶

Indeed, Justice Rand stated that to allow the wife to disavow her agreement would be an “unprecedented indulgence” and “an extravagance in paternalism”.¹⁷ Interestingly, such language was not employed in describing the husband’s situation in the *Pahara* case just mentioned. One wonders why Justice Rand was not concerned about patronising or indulging the husband who might have exercised poor judgment.

While women did not fare well in most family law decisions of the Supreme Court of Canada in the middle of the last century, as illustrated by the four cases discussed above, it could be argued that the situation was better for birth mothers who were more likely to be favourably treated in adoption cases. In March 1948, Lily Aves Duffell gave birth to a child outside of marriage.¹⁸ When her son was one month old, she signed a consent form as a statutory declaration under the *Adoption Act* and gave the child into the care of Raymond and Myrtle Martin for adoption. Two months later, before the adoption was final, Ms. Duffell sought to regain custody of her baby. The Martins resisted and the matter went to court. Although the trial judge was not prepared to remove the child from the Martin’s custody, the Court of Appeal held that the paramount consideration was the welfare of the child and that the child should be returned to Ms. Duffell and her parents. That court did not elaborate on the factors it considered relevant in making this decision about the best interests of the child; but it did state that it was not sufficient for Ms. Duffell to show merely that she was the mother of the child. The Supreme Court of Canada upheld that decision; but Justice Rand went further and held that the mother had a right to the child that could only be lost if she abandoned the child or was of questionable character. The intended adoptive parents, the Court held, did not have any rights that would supercede hers. This preference for the birth mother meant that, even where all parties had agreed that the child would do equally well with the adoptive parents, and where the birth mother had already signed the adoption papers, the child was returned to the birth mother. According to Justice Rand, the consent of the mother to give the child up for adoption must continue until the adoption was completed; and in cases where either custodial arrangement would be for the benefit of the child:

¹⁶ *Ibid.*, at 365-6.

¹⁷ *Ibid.*, at 365.

¹⁸ *Re Baby Duffell-Martin v. Duffell*, [1950] S.C.R. 737.

[the] father knows far better as a rule what is good for his children than a Court of Justice can. Only omniscience could, certainly in balanced cases, pronounce with any great assurance for any particular custody as being a guarantee of ultimate “benefit” however conceived.¹⁹

Several years later, relying on the *Duffell* case, the Court found that, beyond “*parens patriae* [of] the Sovereign [as] constitutional guardian of children”, there was a *prima facie* right of natural parents to custody of a child unless “by reason of some act, condition or circumstance affecting them it is evident that the welfare of the child requires that that fundamental relation be severed.”²⁰ The Maats were a young married couple who had emigrated to Canada from Holland a couple of years before their twins were born. Although they had made strenuous efforts to establish themselves and had even purchased a house, by the time their children were born they had lost the house and were living in a trailer, while Mr. Maat was experiencing repeated periods of unemployment. They sought to make arrangements with the assistance of their doctor to give the twins up for adoption. Three months later, they decided that they would be able raise the children themselves and they hired a lawyer to assist them in recovering custody of the infants. At trial, custody of the twins was granted to the adopting parents, but this was overturned on appeal. At the Supreme Court of Canada, Justice Rand affirmed the entitlement of the natural parents to maintain custody of their children and stated that the controlling fact was that “...the welfare of the child can never be determined as an isolated fact, that is, as if the child were free from natural parental bonds entailing moral responsibility, as if, for example, he were a homeless orphan wandering at large.”²¹ Justice Rand seemed content to make this assertion while providing a two paragraph summary of this young family’s qualifications to provide for their children. In their concurring judgment, it was Cartwright, Abbott and Nolan JJ. who provided the rich context that allowed the children’s welfare to be looked at as more than an isolated fact.²²

A 1958 decision continued this trend of awarding custody to the birth mother.²³ Helen Agar, a young unmarried woman, gave birth to a child who was immediately given over for adoption. Within several months of his birth, Miss Agar consulted a lawyer and took steps to have him returned to her custody. The process took more than a year, as the agency delayed in communicating her desire to the adoptive parents; and she had no way of reaching them directly, as she did not know who the adoptive parents were. At trial, the judge determined that she was unstable (because she had changed her mind about the adoption and because she had stated her hope to marry the father of the child but ultimately decided not to do so, among other reasons) and

¹⁹ *Ibid.*, at 747.

²⁰ *Hepton v. Maat*, [1957] S.C.R. 606, at 607.

²¹ *Ibid.*

²² *Ibid.*, at 611-615.

²³ *Agar v. McNeilly*, [1958] S.C.R. 52.

less able to provide a good home than the adoptive parents. He determined that the child should stay with them.²⁴ The Ontario Court of Appeal²⁵ and later the Supreme Court of Canada²⁶ were impressed by Miss Agar's work history (she had held positions of increasing responsibility in banks across Canada and in the United States) and her plans for the child's care while she was at work. This reaffirmed entitlement of a natural mother, even an unmarried one, to have custody of her child absent clear evidence of abandonment or lack of good character or ability to support the child in suitable surroundings.

It may seem more than a little surprising that these mothers were successful in their claims for custody of their children as against the families who wished to adopt. The Court, particularly Justice Rand, took a significant step in privileging a 'natural mother,' especially an unmarried one, over a model married couple in a time when family stability and conformity were so highly valued.²⁷ This strong affirmation of a natural parent's right to make decisions about the care and custody of her child can still be seen as part of the modern approach to adoption in the later twentieth century and might represent a moment of the judicial creativity that Bushnell thought characterised Rand.²⁸ If so, this stands in marked contrast to the more conservative and static approach shown in the bulk of his family law decisions, illustrated in the four cases discussed in the first half of this essay. But then even these apparently creative decisions about adoption could be seen to be in conformity with norms of the times, when one realises that this post-war period was also the height of the 'tender years' doctrine. The rhetoric and ideology of motherhood that both the 'tender years' doctrine and the preference for 'natural mothers' implied glorified women's domesticity and essentialized women as mothers only. As Karina Winton has argued, the predominant logic that operated in all child custody decisions of the period, even those that appeared to favour mothers, was the social regulation of women's character and conduct, the insistence that the best interests of the child would only be served if the mother was self-sacrificing and of utmost good character.²⁹ The judicial discretion contained in the best interests of the child approach put all mothers under close scrutiny for their conformity with the ideals of perfect womanhood, described by Susan Boyd as follows:

²⁴ *Agar v. McNeilly*, [1957] O.W.N. 49.

²⁵ *McNeilly v. Agar*, [1957] O.R. 359.

²⁶ *Supra* note 23.

²⁷ For example, J. Payne, *supra* note 1; C. Backhouse, "Shifting Patterns in Nineteenth Century Canadian Custody Law" in D. H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 1 (Toronto: University of Toronto Press, 1981) 212; Sharon Carstairs and Tim Higgins, *Dancing Backwards: A Social History of Canadian Women in Politics* (Winnipeg: Heartland Press, 2004); J. Drakish, "In Whose Best Interest? The Politics of Joint Custody" in B. J. Fox (ed.), *Family Patterns, Gender Relations* (Toronto: Oxford University Press, 1993).

²⁸ Bushnell, *supra* note 3, at 296 *et seq.*

²⁹ Winton, *supra* note 2, at 201, 206 and 235.

Mothers must be full-time carers for their children; this care must occur within the context of a heterosexual nuclear family seen to be natural and timeless; mothers must put the interests of their children before their own; and they must be sexually pure and otherwise provide a good role model.³⁰

Much has changed since Ivan Rand was deciding family law cases in the 1940s and 1950s, but in many ways not much has changed at all. The power of the law to regulate women's choices as mothers continues to reinforce this devoted ideal in spite of the massive social changes that have occurred in the past half century.³¹ Rand, it seems, was not alone in his cautious approach and loyalty to precedent, at least when it came to families.

³⁰ Susan B. Boyd, "Is There an Ideology of Motherhood in (Post) Modern Child Custody Law?" (1996) 5 *Social and Legal Studies* 495, at 495.

³¹ Lorna Turnbull, *Double Jeopardy: Motherwork and the Law* (Toronto: Sumach Press, 2001); Nancy Mandell and Ann Duffy, eds., *Canadian Families: Diversity, Conflict and Change*, 2d ed. (Toronto: Harcourt Canada, 2000).

