Probably will not be reported; if by any chance it is, perhaps report as S. v. S. without full name.

Associate to the Rt Hon. Mr Justice Turner 14/6/71

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON DISTRICT
WELLINGTON REGISTRY

No. D. 96/70
IN DIVORCE

BETWEEN [redacted] of Lower Hutt, Carpenter,
Petitioner

AND [redacted] of Lower Hutt, Married Woman,
Respondent

AND [redacted]
Intervener

Hearing: May 19th & 28th 1971

Counsel: Thomas for Petitioner
Bungay for Respondent
Tizard for Intervener

ORAL JUDGMENT OF TURNER J.

We are a little late; and in some ways it might seem preferable for me to reserve my decision until after the weekend, so that I could deliver my judgment with a finish, and freedom from superficial errors, which might make it pleasanter for the parties to read. But there is a great deal to be said, in a case like this, a family dispute, for the Court which heard the matter giving its judgment on the spot, while everybody is here, and can hear just what has influenced the Judge toward the various conclusions to which he comes. The parties will therefore have to forgive some lack of finish in the judgment which I now deliver, exchanging for it the advantage of hearing my processes of thought, orally expressed, as they pass through my mind.

This petition must be dismissed: and I say that first, because I do not want the parties left in suspense

while I say why I have been brought to that conclusion. Here are two young people who have got themselves into a sad state of emotional turmoil,from which the husband seeks a way out by presenting to the Court a petition to have his marriage declared null and void, pursuant to a comparatively new section in our Divorce legislation, section 18(2)(2), I think it is, of the Matrimonial Proceedings Act 1963. This section provides that it is a ground for dissolving a voidable marriage, that a wife-respondent was at the time of the marriage pregnant by some man other than the petitioner.

In support of his petition the husband produced some lay evidence, and some medical evidence, to support what he himself said in the box. His own evidence was that he had known his wife ever since their schooldays; that even from those days he had had intercourse with her as a single girl from time to time. That ultimately in January 1969 she confided to him that she was pregnant, that he married her immediately as a decent fellow would; that they lived together until the baby was born; and that at this time it did not occur to him that the child was anyone else's but his own. Then one day one of those squabbles which take place even in the most well-conducted households the wife turned on him, and said that the child might not be his at all; and then this conversation went from bad to worse, until by the end of that day the marriage was over from every practical point of view. It was only a short time until she departed from the house, not to return thereto. There was some discussion about an agreement to wind the marriage up short of Court proceedings. I am not told why that broke down - I can easily imagine the kind of considerations, however, on

which that suggestion may have foundered. But now I have to resolve formally in this Court the question whether he has proved that this child is not his.

If I had held in his favour, that would have ended the dispute, and he could have had his marriage declared void, washed his hands of the responsibility of this matrimonial venture, and started this aspect of his life again. But now that I have decided this petition against him, some other means will have to be found of facing up to the position. He may on reflection well decide to accept the position, with his young wife and this child who may indeed be his. If that eventuates as the result of these proceedings, it could be the best result. No-one can be held to blame for the kind of accusations that have been made in this Court, and now they have been decently washed up between two decent people it is still not too late for them to make common ground once again, with this day forgotten, except as exemplifying that both husband and wife behaved decently in Court in difficult circumstances. If, on the other hand, that proves impossible, no doubt some agreement can be reached as to the future.

Now the reason why I have decided that the husband's petition must be dismissed is simply this. For reasons of public policy there has always been a very strong presumption in English, and therefore in New Zealand law, that a child born in wedlock is the child of the husband. That presumption applies not only to children born more than nine months after marriage, but to children born so soon after the marriage that they could not have been conceived in wedlock. The law accepts that, on the whole, public policy is best served by not too careful an examination into the marriage bed, and it has always been its policy to presume such children to be the

children of the two parties to the marriage; but that presumption, strong though it is, has always been capable of being rebutted by what was called in the leading case of Morris v. Davies (1837) 5 Ch. & Fin. 163; 7 E.R. 365) "strong, distinct, satisfactory and conclusive" evidence.

I will not now review the cases, with which I am perfectly familiar having decided a matter of this kind some years ago in a deliberate judgment in Jones v. Jones 1953 N.Z.L.R. 915 where most of the leading authorities are to be found shortly reviewed. I have scrutinised the evidence as it has been led, remembering that the Court starts off with this child's right to be thought legitimate; and it is to be shaken from that position only by strong and conclusive evidence. Now the evidence of the two doctors, given with commendable moderation, was such as by itself to incline the Court to look at the remaining evidence with extra care. The doctors, though pretty sure for themselves of their own positions, expressed themselves very carefully, and they commended themselves to me because of that care. Had the evidence of the petitioner and the lay witnesses been stronger, I might have turned back to examine the doctors' medical evidence with greater detail than I propose now, because I think that this case must necessarily fail on the lay evidence. The petitioner was really in a hopeless position. He said that he had had intercourse on only about six occasions before marriage. Respondent said that there were many more occasions. Even if I had to choose between these two versions without any indication to guide me as to which to prefer I might from the surrounding circumstances have been inclined on this point to accept the wife's evidence. But the husband, I thought, found himself in a position where he could not maintain such a definite position as the one in which he started. There

were at least two pointers in his evidence to which I ought to refer. One was the definiteness with which he and his supporting witnesses stuck to the 30th November as the day when intercourse took place at his parents' house. It turned out afterwards, from unimpeachable documentary evidence that on that particular day the two young people were in a motel at Levin. Moreover, the occasion which took them there was one which the petitioner had failed to remember even when reminded in his evidence when first in the box. The second point was the little exchange which took place as to the application that he signed for the Registrar (to change the baby's name). I thought there that it was fairly obvious that he must have signed his name there, knowing that it was for a change in the baby's name. It did not influence me in the slightest that he had signed the application over the word "father". Mr Bungay made two submissions in that regard, which I instantly dismissed; but I was left with the feeling that the petitioner could not bring himself on this small matter to be absolutely frank. I did not find it in my heart to blame him, and I commend the witnesses on both sides for the frank, moderate and decent attitude which they displayed in this Court; but the evidence of the petitioner cannot and does not bring him to the point where I can properly say to myself "I know that there was no intercourse at a time which could have resulted in the conception of this child"; and if I cannot say that, the petitioner must fail.

It cannot matter that Mr Smyth had intercourse with the wife at a time when he could have been the father, whether he could have been the father does not much matter. The question here is, <u>has the petitioner shown that he was not the father</u>? It is not his fault that he cannot show this.

It is for these reasons, and not because of any submission made by Mr Bungay based on the signature to the application, or on Section 8 of the Domestic Proceedings Act that I rest my judgment. These submissions I dismiss. On the grounds however that the petitioner's evidence cannot, and does not, convince me to the necessary degree of assurance that he could not have been the father of this child I must dismiss his petition and I do so. My judgment does not necessitate any formal finding against the intervener, and I therefore make none, one way or the other. Respondent will have her costs; I allow $150 plus disbursements. I make no order as to the intervener's costs.

Solicitors for Petitioner: Agar Keesing Evans & Comerford, LOWER HUTT

Solicitors for Respondent: Bungay, Kwock & Co., WELLINGTON

Solicitors for Intervener: Christie, Craigmyle, Tizard & Dickson, WANGANUI