IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M. 242/79
M. 243/79

Special Consideration

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BETWEEN REX MITCHELL SINNOTT formerly of Wanganui, but now overseas, occupation unknown

Appellant

A N D SUSAN TAHI SINNOTT formerly of Wanganui, but now of Hamilton, Femme sole

Respondent

Hearing: 24 June 1980

Counsel: M.H.W. Lance for Appellant
M.J. Cameron for Respondent

Judgment: 29 July 1980

JUDGMENT OF GREIG J.

The two children who are the subject of this matter were born on 6 June 1968 and 31 July 1969. They are not the natural children of either the parties but were "adopted" in accordance with Maori custom by the respondent Susan Tahi Sinnott. From the additional evidence which was given before me it appears that although there was no formal arrangement it was understood that the natural parents gave up the children to the respondent and she had the responsibility of looking after them except that help may be sought from the natural parents and their family if required. To all intents and purposes however, the children remain the respondent's children and there can be no question that at all relevant times she was the foster mother of those children.

The appellant and respondent were married on 6 August 1971. Before the marriage the respondent assumed that the children would come to the marriage but before the marriage actually took place the appellant made it clear that he did not wish to have the children and they were looked after by someone else.

In October 1971 the appellant and respondent went to Australia but by the middle of 1972 the respondent was pining for the children and she returned to New Zealand and then went back to Australia with the two children. The appellant, respondent and the two children stayed together and the two children assumed the surname of Sinnott as a matter of convenience. The respondent returned to New Zealand with the children in May 1973 and in July 1973 the appellant then returned to New Zealand. It appears that from July 1973 until September 1973 the appellant, respondent and the two children stayed together.

In September 1973 the appellant left for Wanganui leaving the respondent and the two children. It seems that the marriage relationship had at this stage deteriorated and indeed in March 1974 the respondent applied for separation and non-molestation orders stating in that application "there is no child of the family as defined in the Domestic Proceedings Act 1968 who is affected by the application".

In August 1974 there was a reconciliation and from then until April 1975 the appellant, respondent and the two children stayed together in the home in Wanganui which the husband had purchased. While they were living together in Wanganui there seems to have been a relapse in the marriage

relationship and applications were made in December 1974 by the respondent for past and future maintenance for herself only and for exclusive possession of the matrimonial home. The appellant in a notice of defence on 3 February 1975 mentioned the difficulties which had occurred over the two children and stated "the children have never been adopted by us but have lived with us for about two years. During this time I have helped to pay for their upkeep and generally maintained them."

In July 1975 the respondent made application for maintenance orders in respect of the children and it is that application which finally came on for hearing in April 1978, the decision upon which is the subject matter of these appeals.

In December 1975 the parties entered into a formal separation agreement which recorded the date of separation as 7 April 1975, gave the respondent the right to occupation of the matrimonial home until 31 January 1977, made no provision for maintenance and provided that the respondent should have custody of the two children. The appellant was to pay all outgoings on the matrimonial home and it seems that he by that intended to provide a home for the respondent and for the two children.

The appellant petitioned for divorce and the marriage has since been dissolved. In that petition the children are referred to but it was explained to me that that was done because of the particular provisions in the Matrimonial Proceedings Act and that as a result it was thought proper to include a reference to the children. I do not think that that matter should be taken into account against the appellant.

In the decision on the application for maintenance for the two children the Learned Magistrate (~~as he then was~~) found that the children were members of the family of both parties immediately before the separation of the appellant and husband, decided that it was reasonable that a maintenance order should be made against the appellant and made orders that he pay in respect of maintenance of each of the children the sum of $5.~~00~~ per week, such maintenance orders to expire on 30 October 1978 unless the respondent showed cause prior to that date why they should be extended. The purpose of that part of the order was to ensure that the respondent should take all possible steps either to place the children with their natural parents or one or other of them, or to obtain maintenance payments from the natural parents, or to take such action as she could to provide properly for the children on her own.

The appellant appeals against the order of maintenance and the respondent cross-appeals against that part of the order which requires her to take the other steps I have mentioned or in limiting the date of the order.

By the terms of s.35 (3) of the Domestic Proceedings Act 1968 relevant to this case the court has jurisdiction to make a maintenance order in respect of a child against the foster parent of any child on the application of the other foster parent as if the first mentioned foster parent were the father or mother of the child in any case where the child is a member of the family immediately before the separation (in this case) of the appellant and respondent. That section also makes provision for maintenance orders against step parents but there is no real difficulty in regard to step parents because that relationship is an

objective one which depends on the status of marriage: (See Sample v/ Sample [1973] 1 NZLR 584 and Lineham v/ Lineham [1974] 1 NZLR 686). The position of foster parentage is however another matter. It does not depend on any objective status such as marriage. There is no assistance in the Act as to the meaning of a foster parent and there is no New Zealand case which assists in the meaning.

The questions that have to be decided are firstly whether the appellant was a foster father to these children, it being obvious that the respondent is a foster mother, and then whether the children were members of the family immediately before the separation. In the end these two questions are the same because it seems to me that membership of the family in such a situation as this involves foster parentage and vice versa. This is so in this case because there is no suggestion that there was any revocation of the position or status of the children in the family immediately before the date of separation. I assume that the status of being a member of the family is revocable, at least in the case of a foster child, so that there could be cases where there was a foster parent but the children were not members of the family at the relevant time. This does not, as I have said, come into issue in this case.

The recognised dictionary meaning of a foster parent is one who has a specified relationship to a child but not by blood. The Oxford dictionaries indicate that in former times and perhaps particularly in the Scottish dialect the term included a wet nurse and her husband. It is in effect, someone who takes the place of the father or mother and who acts as a father or mother in the upbringing and maintenance of the child. It is not enough in my view, to make a person a foster father, that he should merely be the husband of the foster mother.

It was argued that the principles declared in Snow v. Snow [1971] 3 All E.R. 833, applied and that it was necessary to show that there had been a substantive and unconditional acceptance of the children by the appellant before it could be said either that he was a foster father or that the children were members of the family. That case and the principles there set out depend upon the particular provisions of the United Kingdom Statute which expresses the requirement that the child must be accepted as one of the family.

Our Statute does not contain any such requirement and as a result there is a relevant distinction and I find therefore that the principles in Snow v. Snow are of little, if any, help in this case. The distinction I have referred to has been noted by Cooke J. in W. v. W. [1975] 2 NZLR 454.

Having said that, neither the condition of step parentage nor the status of being a member of a family can be decided entirely objectively. Both require some, at least implicit, acceptance which can be shown from words or conduct. The fact that a child is included in a family and receives some care, maintenance, affection, discipline or any other things which normally form part of family life may indicate a fostering or membership of the family. The fact that there may have been a rejection or refusal to receive the children or to give them any parental attention at one time will not be conclusive as to the situation at another time. It is important too to remember that it is not necessary that the foster parent should provide the loving care and attention that an ideal parent might. All families are different and the quality of membership of a family may and does vary from family to family.

As I have noted there were three periods during which the children lived with the appellant and respondent. Each of these periods was relatively short but the marriage itself was short. It seems clear that in each of these periods the appellant made some contributions in money towards the maintenance of the four persons. In Australia that appears to have been a rather separate provision but it was nonetheless a general provision to the household.

In Wanganui, which is the important period in my view, some maintenance was paid for household expenses and he certainly provided a home for the respondent and the two children. He has himself recorded that he paid maintenance and helped to pay for their upkeep. It does seem that at least in Australia and in Wanganui the appellant acted to some extent as a father, allowed them to use his name and was treated by the children as a father. The situation in Australia may well have been forced on the appellant by the return of the respondent with the children and in Wanganui the appellant may have felt obliged to acquiesce in the return of the children for the purpose of reconciliation. Nonetheless it seems to me that there was, especially in Wanganui, an implicit acceptance of the children and that he was at least then a foster father and that the children were then members of the family. There is nothing to show any attempt to revoke either of those conditions immediately before separation and indeed to the contrary is the provision in the separation agreement for the maintenance and upkeep of the matrimonial home for the respondent and her children. In my view the appellant was the foster father of both of the children and they were members of the family immediately before separation.

The next question is whether the Learned Magistrate (~~as he then was~~) was correct in making an order for maintenance on the ground that it was reasonable to do so. Although I agree that the appellant was a foster father he was that for only a short period or periods and was a somewhat unwilling foster father. He certainly is no longer a foster father and has now no connection or association with these children. His contribution in respect of the care of these children is very small and, as a short term and unwilling foster father, his responsibility in the particular circumstances towards these children is slight. It is also relevant I think that the respondent has only latterly sought maintenance for these children against the appellant and for whatever reason, the proceedings have taken a long time to come to hearing and indeed to appeal.

The respondent because of the Maori custom under which she has adopted the children is unwilling to seek any maintenance from the natural parents of the children but that is not a matter which is recognised under our legislation. I agree with the Learned Magistrate (~~as he then was~~) that that consideration is not a valid one. The potential legal responsibility of the natural parents is a further relevant consideration in this matter, as is the fact in any event, that the respondent for the greater part of her fostering of these children has maintained them on her own.

In my view the Learned Magistrate did not give proper weight to all these considerations and he was in error in finding that it was reasonable that an order should be made against the appellant even though in the limited terms that he decided.

In the circumstances of this case it is not reasonable that an order should be made against him and I will allow his appeal and order that the orders of maintenance and costs made in the decision of June 1978 be vacated. The cross-appeal is consequentially dismissed.

I make no order as to costs.

Solicitors for Appellant: Treadwell Gordon & Co., Wanganui

Solicitors for Respondent: Chatwin & Hemara, Hamilton