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IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

M.35/84

904

IN THE MATTER of the Adoption Act 1955

AND

IN THE MATTER of an application for an order that consent to adoption be dispensed with

BETWEEN M MARRIS
of
Gore

Appellant

A N D THE DIRECTOR-GENERAL OF SOCIAL WELFARE of Wellington

Respondent

Hearing: 1 August 1984

Counsel: Mrs T. McKenzie for Appellant
R.H. Ibbotson for Respondent

Judgment: 3 AUG 1984

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JUDGMENT OF ROPER J.

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This is an appeal against an order made by Judge W.H. Reid dispensing with the consent of the Appellant to the adoption by a Mr and Mrs A of her two children. They are E and S who will be The application for dispensation was made by the Director-General of Social Welfare.

Subsection 8(1)(a) of the Adoption Act 1955 provides:-

" 8. Cases where consent may be dispensed with -

(1) The Court may dispense with the consent of any parent or guardian to the adoption of a child in any of the following circumstances:-

(a) If the Court is satisfied that the parent or guardian has abandoned, neglected,

> persistently failed to maintain, or persistently ill-treated the child, or failed to exercise the normal duty and care of parenthood in respect of the child; and that reasonable notice of the application for an adoption order has been given to the parent or guardian where the parent or guardian can be found."

In the present case the application was made on the ground that the Appellant "had failed to exercise the normal duty and care of parenthood in respect of the children".

In an admirable reserved decision the learned District Court Judge considered the evidence with care and referred to the decided cases where the principles governing the exercise of the discretion in this difficult field are enunciated. I have myself read the evidence and his decision with the greatest care and I am completely satisfied that he reached the only decision open to him. So completely do I agree with his decision that it is difficult to think of anything that can be usefully added.

Mrs McKenzie's first submission was that the learned Judge misdirected himself in finding a failure to exercise the duty and care of parenthood proven, or reached that conclusion by failing to consider the totality of the evidence. It was accepted by Mrs McKenzie that up to November 1978 there had been a failure of duty and care by the Appellant. It was at that time that both children, being then only one and two years old, were placed under the guardianship of the Director-General. Almost from the time E was born the Appellant's care of her attracted the attention of the Social Welfare Department. When three months old she was sent to Karitane Hospital because of her failure to thrive. The Appellant was invited to attend a mothercare course but declined. When E was returned to her mother she was found by social workers in sodden and insufficient bedding and clothing, with the Appellant never at home when the social worker called. After S was born both children were found to be suffering from weight loss and nappy rash and both were sent to Karitane Hospital. The Appellant and her husband, from whom she is

now separated, were asked to attend Karitane to learn parenting skills but that was unsuccessful. By the time the children came under the guardianship of the Director-General E had spent only eight months with her mother, and S two and a half. The children were placed in the foster care of the A in December 1978 and have remained there ever since.

Mrs McKenzie submitted that as the children were in care it was impossible for the Appellant to exercise her parenting skills as she had no access to them, so that a failure of duty and care after November 1978 had not been proven.

The short answer to that is that despite the best endeavours of the Department the Appellant flatly refused to co-operate in planning goals for a reunited family, or to accept the assistance she so obviously needed in learning child care and household management. In fact she resented the Department's involvement. She changed her address frequently and for long periods could not be located. A prime duty of parenthood must surely be to fit oneself for the task.

I am quite satisfied that a continuing failure to exercise duty and care was established, and that the degree of failure was high.

Mrs McKenzie's next submissions were really variations on the theme that the learned Judge erred in exercising his discretion to dispense with consent. In this exercise the learned Judge adopted Speight J.'s approach in L v. B (1982) 1 N.Z.F.L.R. 232. In that case Speight J. referred to the judicial reluctance to sever natural parent and child relationships, the importance of bonding, and the overriding and paramount importance of the child's welfare.

I agree with the learned District Court Judge that on all counts dispensation was called for. The evidence established that the children regard the as their parents, as well they might having been with them for five

important years in their young lives. They are well cared for and happy.

The learned Judge expressed the view, based on the evidence of a psychologist, that "any disruption in that relationship would be catastrophic for the children with a severe risk to the children's development". Mrs McKenzie accepted that view but submitted that a course short of adoption would meet the case. The Appellant would apparently be agreeable to the becoming guardians, or being awarded custody with access rights reserved to the Appellant, and would even be agreeable to the children's names being changed to A: .

In L v. B Speight J. said at page 236:-

> "The true situation, I suggest, is that the whole relationship, including its history, must be examined to ascertain whether the severing of the relationship will promote the child's [illegible], and that considerations of benefit by the continuation of the relationship must be examined from the point of view of benefit to the child either by the continuation of guardianship or access or legally confirmed parentage. To allow a greater measure of consideration to the interests of the parties other than the child itself, seems to me to be catering for matters such as injury to pride, which are rightly rejected in guardianship and custody cases, and are in my respectful view equally irrelevant in adoption consent cases. The question I suggest is this: For what purpose is the relationship of separated parent to child to be continued? Because the parent has something helpful to offer in the child's upbringing? Or because to sever the relationship would be hurtful to the separated parent's feelings? It is a brutal question, but I suggest the answer is obvious."

The learned Judge referred to that passage and saw a clean break as the answer in the circumstances of the case. I am in no doubt that the best interests of the children demand that that be so. Any residual tie could cause distressing problems with no compensating advantages.

The appeal is dismissed.

Solicitors:

Stout, Hewat, Binnie & Howorth, Invercargill, for Appellant
Crown Solicitor, Invercargill, for Respondent