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IN THE HIGH COURT OF NEW ZEALAND
TIMARU REGISTRY

GR.121/83

1708

BETWEEN R PADDON

Appellant

A N D V PULFORD

Respondent

Hearing: 27 November 1984

Counsel: T.M. Gresson for Appellant
J.R. McGlashan for Respondent

Judgment: 21st December 1984

JUDGMENT OF HARDIE BOYS J

This is an appeal against a paternity order made against the appellant on 26 October 1983.

Miss Pulford gave birth to her daughter T on 1982, the evidence being that conception took place about 1982. Mr Paddon did not give evidence at the hearing, and there was no challenge to Miss Pulford's evidence that she had associated with him for some six months commencing late in and ending early in when she told him of her pregnancy. She said that sexual intercourse first took place within a couple of weeks of their meeting, and continued at frequent intervals, and in a variety of places, throughout their association. She described three occasions in particular, perhaps because other

people were said to have been there at the time.

Corroborative evidence was given by a Mrs Wi a friend who had been present on two of those occasions: on one she saw Miss Pulford and Mr Paddon in bed together; and on the other she saw them go into one of the bedrooms together and knew they stayed there some time. Mr Gresson did not suggest that that evidence, if accepted, was not adequate corroboration of Miss Pulford's evidence for the purposes of s 52(2) of the Family Proceedings Act 1980.

The defence was an attack on the credibility of Miss Pulford and Mrs Wi designed to demonstrate not so much that it was unsafe to conclude that Miss Pulford and Mr Paddon had had intercourse, but rather that it was unsafe to conclude that the possibility of some other man being the father had been excluded. And the appeal was advanced on the basis that the District Court Judge was wrong in his conclusion that the case had from this point of view been proved to the requisite standard: as to which see ss. 51(1) and 167 of the Family Proceedings Act 1980, and Hall v Vail [1972] NZLR 95.

Miss Pulford had had an association with another man prior to the commencement of her association with Mr Pulford. That association had, she said, come to an end before she met Mr Pulford. She had had intercourse with that man, and there was some confusion as she was cross-examined about this as to when the last occasion was. In re-examination, in answer to a very leading question, she clarified the matter by saying it was two months before she met Mr Pulford. And she said that during her association with Mr Pulford she did not go out with any other man. Her cross-examination elicited the fact that

she was currently working on a casual basis at a health and fitness centre, where she assisted with therapy in the form of "manipulating the body", an activity which she denied involved anything sexual. She had been engaged in this work since July 1983; and although she had gone to the premises with her parents for saunas prior to meeting Mr Paddon, she had not visited them during her association with him.

As Mr Gresson quite properly submitted, it was clear from the evidence of what occurred before and after Miss Pulford's association with Mr Paddon, as well as during it, that she could by no means be regarded as a young woman of chaste disposition. The Judge therefore had to be most circumspect in considering her contention, fundamental to her case, that she had been faithful to Mr Paddon during her association with him for he was unlikely to be able to challenge it. The reliability of her evidence in other respects was therefore of great importance. In at least two of those respects, Mr Gresson submitted, she was clearly not truthful. In the first place, she was, according to the record, reluctant if not evasive when cross-examined about her earnings at the health and fitness centre. Secondly, there was a clear conflict between what she told the Court about Mr Paddon's reaction to the announcement of her pregnancy, and what she told her solicitor - if a letter he wrote at the time correctly represented what he had been told.

The Judge did not refer to either of these matters in his judgment. It was however an oral judgment delivered ex tempore, and he was not required to refer expressly to every point. His task was to assess the credibility of the

applicant, and in that he had the very great advantage of seeing her as she gave her evidence. The weight to be given to the two matters I have referred to depended very much on the quality of her responses to them as they were put to her in cross-examination, and the transcript cannot convey that at all adequately. The second matter could well have been the result of misunderstanding. Miss Pulford did not under oath assert that Mr Paddon had made the admission that the solicitor's letter alleged he had made, and so her credibility was much less at risk than if it had been the other way about. Indeed the very fact that she did not repeat the allegation herself tends to confirm her truthfulness in this respect. So far as the first matter is concerned, it certainly appears that Miss Pulford at first wished the Court to think she received no payment, but later when pressed she acknowledged that she was paid, although she ought to have been able to be more specific as to amount than she was. One has the impression that she was on the defensive because of the possible implications for her domestic purposes benefit, and therefore it is necessary to exercise care against too readily assuming that evasiveness on this peripheral issue necessarily involves a lack of credibility on the central issue. In any event, these were matters for the trial Judge to assess in his overall determination of Miss Pulford's credibility and I am quite unable to conclude that they ought to have persuaded him to a view contrary to that which he took in that regard.

Mr Gresson next submitted that there was an inconsistency within Mrs W evidence, and another between her evidence and that of Miss Pulford. The latter

may be explicable purely on a time basis. The Judge referred to the former, and did not place any store by it. He was entitled to take that view. Inconsistencies such as these are to be expected. If the two women gave identical accounts, they would be open to accusation of collusion. The Judge considered that the matter must be looked at broadly, and correctly pointed out that it was the totality of the evidence that had to be examined. He concluded, and I agree, that the inconsistencies were not such as to discredit Mrs W evidence as corroborative of that of Miss Pulford in its essential features, namely that she was involved in an intimate relationship with Mr Paddon both before and after the time at which conception took place. They might have had greater significance had the fact of intercourse between Miss Pulford and Mr Paddon been more strongly in issue. But with the emphasis being rather on the possibility of another man being the father, they do not in my opinion have any great relevance in the case. And again this was a question of credibility, which the trial Judge was the much better placed to determine.

On an appeal such as this, the conclusions of the Judge below on questions of fact ought to be accepted unless it is clear that he was wrong. Far from thinking that he was wrong, once allowance is made for his advantage in seeing and hearing the witnesses, the evidence, even allowing for its weaknesses, natural enough in the circumstances, could in my view have led to no other conclusion.

Mrs W pinpointed the date of the second occasion to which her corroborative evidence related by referring to her employment at that time, in a way that strongly suggested she

worked at the . Mr Gresson has tendered a letter from that institution stating that she was not working there on the day in question. Whether the letter is in fact contradictory of her evidence is open to argument, depending on the interpretation to be given to certain passages in that evidence. Even if it transpires that Mrs W was wrong about the date, her evidence as to what took place both on that and the earlier occasion may still be capable of acceptance. Those however are not questions that can be determined on this appeal. The first might require further evidence from Mrs W . The second can be answered only by the trial Judge. And so the letter would not on its own constitute grounds for allowing the appeal and dismissing the suit. At best, it would afford grounds for a rehearing. No doubt the discovery of further evidence may entitle this Court on appeal to order a rehearing; but generally it is the Court of trial that ought in the first instance to be approached, for if the Judge there is satisfied that the fresh evidence would have made no difference, a rehearing would be a waste of time. Section 173 of the Act enables a party to apply for a rehearing, and there is no time limit. This matter in my view should be pursued under that section, for I think it inappropriate for me to deal with it on the appeal.

The final point Mr Gresson raised relates to the way in which the Judge dealt with the claim for birth expenses. The claim was for $840, and although the major items were listed by Miss Pulford she produced no receipts. The Judge commented that the amount was perhaps higher than usual, but did not reject it. He said he thought Miss Pulford should pay part,

and that were it not for the case of Bell v Drake (1982 1 NZFLR 479) he would order Mr Paddon to pay $500, and he continued:

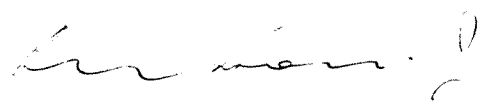
> " However because of the fact of the decision in Bell v Drake I propose to record at this point that in my view the claim for $840.00 for birth expenses is substantiated, and that I propose to adjourn the question of the payment of this sum sine die at this stage, but to note that should Mr Paddon pay the sum of $500.00 to Miss Pulford on account of birth expenses of his own volition I would not be disposed to re-open the question of birth expenses at a later stage."

In Bell v Drake Judge Bisphan held that an order for the payment of birth expenses is a maintenance order for the purposes of s 27J of the Social Security Amendment Act 1980 and so is suspended and unenforceable whilst the mother is in receipt of a benefit. That most unsatisfactory result was accepted by counsel to be correct, and clearly the Judge in this case was attempting to escape it in a practical way by allowing Mr Paddon to make a voluntary payment. Not being disposed to accept his paternal responsibilities, he is unlikely to do so because if he does not he cannot be required to pay by the sanction of an order whilst Miss Pulford remains a beneficiary.

Mr Gresson submitted that no order should be made at all, because it could not be immediately effective. But that cannot be right. The Social Security Amendment Act does not impliedly repeal the Family Proceedings Act. The case ought to be disposed of now, not left in the air. And Miss Pulford could come off the benefit at any time. Mr Gresson also submitted that the effect of what the Judge did was to impose a penalty which of course is not authorised by the statute. If

the Judge meant to say that $500 was the proper amount for an order, and that if $500 were not paid voluntarily he would order $840, then Mr Gresson may have a point. But I am not sure that that is what the Judge meant. And in any event he has not made an order at all. Mr Paddon not having made the payment, no harm has been done, and the Judge ought now to make the order. Mr Gresson submitted that it could not be for $840, because the proof is deficient. If the Judge gives effect to his expressed view that Miss Pulford should share the cost, then it will not be $840, but $500. If he concludes that Mr Paddon should pay the full cost, then I consider that he is entitled to accept Miss Pulford's evidence as to the accuracy of her list.

For these reasons the appeal is dismissed. I understand that it may be pointless to make an order for costs, even though the respondent is on legal aid, and accordingly reserve the question.



Solicitors:

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