3978

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP No. 430/91

SECTION 27A GUARDIANSHIP ACT APPLIES. FURTHER, PUBLICATION OF ALL NAMES OF PARTIES IS PROHIBITED

UNDER The Guardianship Act 1968

AND

IN THE MATTER of [redacted] S

BETWEEN [redacted], Carpenter, and [redacted] his wife, both of Wellington

Plaintiffs

AND [redacted] and [redacted] S

Defendants

Date of Hearing: 15 July 1991

Date of Ruling: 16 July 1991

Counsel: S.J. Brown for Plaintiffs
J.W. Gendall for Shaleana Samy
J.D. Howman for Jahidul Islam

REASONS FOR RULING AND FURTHER RULINGS OF NEAZOR J

This is an application for the first named defendant to be placed under the guardianship of the Court, under s 9 of the Guardianship Act 1968. The application is made by the parents of the young woman who is just over 16 years of age,

and was until the events giving rise to the application, a secondary school student.

The father has deposed that the young woman ran away from home with the second named defendant who is 25 years of age, leaving a note saying that she was pregnant to him and intended to marry him. Quite apart from other considerations there are religious differences between the two which give rise, at this stage at least, to intense opposition by the young woman's family to their marriage. It is alleged by the father that the question of marriage is raised by the male defendant to improve his position as an immigrant.

In the guardianship application subsidiary orders were sought requiring that the female defendant be returned to her parents' custody, that her passport be surrendered to the Court, (which was ordered) and that the male defendant be directed not to communicate with the young woman.

Counsel was appointed last week by the Court for the young woman. Mr Gendall has filed a memorandum in which he has indicated that she:

(1) does not wish to marry the male defendant, nor to have any further contact with him and seeks the protection of the Court from his contact;

(2) wishes to obtain lawful termination of her pregnancy provided that the provisions of the Contraception Sterilisation and Abortion Act are met.

I was advised by counsel that she has been through procedures associated with the Contraception Sterilisation and Abortion Act and that a certificate has been given under the Act by two certifying consultants.

Mr Gendall indicated that whether there should be a termination of pregnancy was by reason of the elapsed period of gestation one of urgency, and that there was a question whether the Court's consent was required either because a guardianship order would be made, or by virtue of s 9(3) of the Guardianship Act, an application for a guardianship order having been made.

Mr Gendall put the matter on two possible bases:

(a) that by reason of s 25A of the Guardianship Act, the Court does not acquire parental jurisdiction to give or withhold consent to an abortion in relation to a person under guardianship, at least where that person is able to give an informed consent;

(b) that if the Court's consent was required, regard should be had to s 23(1) of the Act which makes the welfare of the child (which is not the same as the wishes of the child) the first and paramount consideration, to the young woman's wishes as expressed through her counsel, and to the fact that practitioners charged under the Contraception Sterilisation and Abortion Act with determining that an abortion was within the requirements of the law had done so. Mr Gendall submitted that before the Court would review such a decision from the point of view of the welfare of the child, it would have to be satisfied that the conclusions of the medical practitioners as to the requirements of the law being met were not validly based. Mr Gendall submitted that in the absence of any suggestion of bad faith on the part of the medical people involved the Court could not superimpose its judgment as to the welfare of the child on theirs.

Mr Gendall advised me, because of a concern I raised about the female defendant's freedom and ability to communicate her wishes, that he had interviewed her himself and that she was in his view intelligent and as able to communicate her own views as well as any other teenager.

Counsel referred me to overseas authorities on matters which have some bearing on the issues in this case. They indicate inter alia that the Court has no jurisdiction to make an unborn child a ward of Court (In re F (in utero) [1988] 2

All ER 193 (C.A.), that the Court could not and in any event probably should not intervene to prevent an abortion on the application of a woman's husband (Paton v Trustees of BPAS [1978] 2 All ER 987) or by a putative father (C v S [1987] 1 All ER 1230) under the relevant English abortion legislation.

More directly in point is Wall v Livingston [1982] 1 NZLR 734, where the Court of Appeal held that a doctor had no status to pursue judicial review of two certifying consultants who had authorised an abortion for a teenage girl. In the course of that judgment the Court said that it would be inconsistent with the whole scheme and purpose of the Contraception Sterilisation and Abortion Act if it were possible to introduce into the process of certification which may lead to the performance of an abortion anybody other than the woman herself and those very few persons who have been given the statutory responsibilities for screening her request for an abortion.

None of these matters are in themselves determinative of the question which arises in this case, which is whether the Court's consent is required when the young woman concerned is under the protection of the Court by reason of a guardianship order.

The only reference I have to any case where such an issue has been decided is in the article "Wardship and Abortion" in 1980 NLJ 813. The writer referred to the proposition of Cross J in In re S (Infants) [1967] 1 All ER 202 that "when a child is made a ward no important step in the child's life can be taken without the Court's consent". The writer, Mr Tony Radevsky, referred to a suggestion that abortion performed on a ward did not fall within Cross J's important step proposition, and continued:

> "It is submitted, however, that this is not the correct approach, at least in so far as

> it applies to an abortion, which may well be one of the most important steps in the ward's life. To be on the safe side the Court should always be asked to give its consent, since it guards its wardship jurisdiction jealously; if, for any reason, the decision to abort was questionable and this subsequently came to light, the Court would doubtless demand to know why it had not been involved in the decision making process. This safer procedure is exemplified in a recent unreported case In re R (a minor) (1979), where Eastham J gave his consent for the local authority to arrange an abortion for a 14 year old ward who was in their care. The girl had been allowed to live with her mother during the school summer holidays and had absconded to the West End of London, where she lived promiscuously and ended up pregnant. It was agreed by all concerned (including the girl herself, who was represented by the Official Solicitor) that an abortion was the best course to take. Nevertheless, the local authority (rightly, it is submitted) wished to obtain the Court's consent before proceeding to arrange the operation."

In a later reply 131 NLJ 561 it was argued that it was necessary to seek the Court's consent in such cases unless there was uncertainty or dispute in the particular instance.

In New Zealand it seems to me that the issue must be considered in light of s 25A of the Guardianship Act which was enacted in 1977 on the same date as the Contraception Sterilisation and Abortion Act 1977. That section is in terms:

> "25A. Consents to abortions - Notwithstanding anything in section 25 of this Act a female child (of whatever age) may -
>
> (a) Consent to the carrying out on her of any medical or surgical procedure for the purpose of terminating her pregnancy by a person professionally qualified to carry it out; or

(b) Refuse her consent to the carrying out on her of any such procedure, -

and her consent or refusal to consent shall have the same effect as if she were of full age."

Section 25 does not affect the matter: it relates (with similar effect) to consent by a child of or over the age of 16 to any surgical or medical procedure to be carried out for his or her benefit.

Whether the effect of s 25A is that the Court would never have jurisdiction to consider whether an abortion should be performed on someone under the age of 20 who is the subject of a guardianship order is something which I do not think I need to decide. I need go no further than to say that in my view where there is no suggestion that the person under protection has not given consent or cannot give an informed consent, there is no power in the Court in effect to override s 25A by directing that an abortion cannot take place. In the absence of any suggestion that the consent might be suspect, in my view the effect of that section must be that the reality and voluntariness of the young woman's consent and whether the case is within the law in accordance with the Contraception Sterilisation and Abortion Act 1977 and the Crimes Act 1961 must be held to lie in the hands of the members of the medical profession concerned.

I indicated to counsel after some consideration that if consent was necessary I could not on the material before me make an order consenting to an abortion, there being nothing before me on which I could make an informed judgment that it would be lawful or for the welfare of the child; nor however did I consider I had power, in face of s 25A of the Act and the intimation that the young woman consented, to direct that an abortion should not take place. The reasons for the latter decision I have given above.

Whether the Court would, or should, treat the certificate of two consultants under the Contraception Sterilisation and Abortion Act as definitive of where the welfare of the young woman lay in a case where the merits of the decision might be open notwithstanding s 25A of the Guardianship Act, I leave open. Their function is directed primarily to the lawfulness of what is proposed, which may or may not amount to the same issue.

In respect of the application for a guardianship order, I think that is appropriate and an order is made accordingly. I direct that the young woman continue in the custody of her parents, the plaintiffs, as agents of the Court. An order was sought directing that the young woman not marry the male defendant, Mr Islam. I make that order on an interim basis.

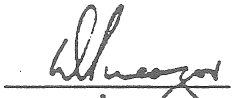
An interlocutory order was made that the young woman's passport should be surrendered to the Court at a time when it was thought she might leave New Zealand with Mr Islam. It was submitted for the parents that that order should now be rescinded. I do not agree; whilst the young woman is under the protection of the Court her possible movement out of the jurisdiction at anyone's instigation should be controlled. Her passport will remain in Court until an order releasing it for some good reason is made.

The male defendant originally sought on a cross-application that the young woman should be made a ward of the Court. He sought orders that agents of the Court appointed to implement guardianship should include someone other than members of her family, orders directing terms on which he should have contact with the young woman, the time and circumstances in which he might marry her and any orders the Court might see fit in order to advance her welfare and that of the unborn child.

When the matter was called, through counsel, he indicated that he wished to be heard only on his application seeking

that he should be allowed to have contact with the young woman since he hoped for a process of conciliation with her family. He undertook not to associate with the young woman or her family except by arrangement with her parents. An order is made accordingly to incorporate that undertaking: that the male defendant is not to associate with the female defendant or her family except by arrangement with her parents. That order will have effect for three months when it will be reviewed on the application of any party.

The restraints on publication set out at the head of this judgment will apply.



D.P. Neazor J

Solicitors: Morrison Morpeth, Wellington for Plaintiffs

J.W. Gendall, Wellington for Shaleana Samy

Simpson Grierson Butler White, Wellington for Jahidul Islam