NZLR

NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

AP 74/95

BETWEEN HUDSON of Napier,
Medical Practitioner

Appellant

A N D COMMISSIONER OF INLAND REVENUE

Respondent

Hearing: 29 May 1996

Counsel: G R J Thornton for Appellant
R J Collins for Respondent

Judgment: 31 May 1996

JUDGMENT OF ROBERTSON J

Solicitors
Carlile Dowling, Napier for Appellant
Crown Solicitor, Napier for Respondent

This is an appeal from a decision of Judge Lowe delivered in the District Court at Napier on 18 December 1995 following a hearing on 5 October of that year.

On the appeal the sole issue for the Court is the proper application of parts of the Child Support Act 1991 to the circumstances of the appellant, his former wife and their child. However, in human terms one cannot ignore the effect of insensitive behaviour which in my judgment has contributed substantially to the position which has arisen.

Doctor Hudson and his former wife Ms Waite separated in 1981. The two daughters of the marriage were in the custody of Ms Waite. At some stage in the intervening period they moved from Napier to Christchurch. Until the beginning of July 1993 she was in receipt of a Domestic Purposes benefit which meant that Dr Hudson was assessed as a liable parent under the earlier legislation. From 1 July 1992 a child support assessment was made in respect of the younger child.

On 1 July 1993, the appellant received a letter from his former wife dated 28 June 1993 which was as follows :

> "Dear
>
> This letter is to let you know that I shall be leaving Christchurch for Sydney, en route to England, on Friday 2 July. I may be away for up to twelve months.
>
> R did not want to leave Christchurch - her work, schooling or flying. I have therefore arranged for her to board with a couple near to school. They are :
>
> Hillsborough, Christchurch 2,

It is clear from the evidence available that Dr Hudson was outraged that his position as a guardian of R was being ignored, that any rights he had were being overlooked and an assumption was being made that he would simply continue to provide support. I have not heard from Ms Waite. It is clear that communication between the parents has not been good for some period. Dr Hudson is entitled to some sympathy. It is too often forgotten that there is a marked difference between custody and guardianship. Important decisions about where a young person should live and what they will be doing are matters upon which both guardians are entitled to have an input. The accommodation of a child and arrangements for her care while the parent who has had custody goes abroad for a substantial time is in that category. One of course cannot overlook the fact that the child was 16 days off her 17th birthday when this bombshell was dropped. At that age and stage she undoubtedly was going to vote with her feet. But that is not a reason to ignore the position of the other guardian.

In the very heated dispute which thereafter arose about maintenance there was initially some suggestion that the daughter was no longer dependant. That aspect was not advanced in the District Court and has not been an issue before me. She was financially dependant. In terms of the philosophy and objects of the Child Support Act her parents had prime responsibility for her maintenance.

There was a hint of criticism of Dr Hudson in the judgment under appeal on the basis that he was seeking to avoid responsibility for contributing financially towards his daughter's support for the relevant period. In an informal way I spoke with Dr Hudson before commencing the appeal hearing. That discussion confirmed my reading of the evidence that this was a very angry and frustrated man feeling totally powerless and reacting accordingly. Balance and

moderation can be casualties in such a situation and battles about issues of principle sometimes lose perspective.

The Commissioner by letter dated 16 July 1993 wrote to Dr Hudson in the following terms :

> "I refer to the telephone call of 1 July 1993 regarding your child support liability for R
>
> An investigation has been held into Waite's entitlement to receive child support for R
>
> On the basis of the information obtained by the Child Support Agency, Waite is a qualifying custodian in terms of section 12(b) of the Child Support Act 1991."

The learned District Court Judge in some places appears to have treated the case as if s 86 of the Child Support Act had application. I am persuaded that Mr Thornton is correct on this issue. Ms Waite having ceased to be in receipt of a benefit, the question of entitlement fell to be treated as a new stand alone matter. As at that date the statutory regime had to be applied to the existing circumstances.

Judge Lowe said at page 4 :

> *"The appeal has been apparently regarded as being made under s 100 of the Child Support Act. Section 100 provides for appeals against decisions to accept applications for formula assessment under s 17 of the Act. In this case the objection was not to an application for formula assessment being accepted but to the Commissioner's decision to continue levying support after he learned of the custodial parent's overseas travel."*

Both counsel accepted before me that passage does not encapsulate the basis upon which the matter was argued in the District Court. Ms Waite having

gone off benefit there was a need to establish a new regime. It was not a case of deciding whether the changed circumstance meant that there was a continuing entitlement. The objection filed on 26 July 1993 by Dr Hudson was on the basis of new eligibility and that is how it was eventually dealt with within the Commissioner's office.

The Judge held on page 5 :

> *"The question is then whether Ms Waite as eligible custodian ceased to be the sole or principal provider of ongoing daily care. There is no disagreement that before travelling overseas Ms Waite was the principal provider of ongoing daily care; the dispute is whether her extended absence from R meant that she ceased to be the principal provider of ongoing daily care. If Ms Waite had attended Auckland University instead of an English University the same issue would arise."*

I do not think the matter is in that form. The question is what was the regime of entitlement and obligation applicable to the circumstances after Ms Waite went off benefit.

A qualifying child is defined in s 5 of this Act. It provides :

> *"**Children who qualify for child support** - A child qualifies for child support if he or she -*
> *(a) Is under 19 years of age; and*
> *(b) Is not a married person; and*
> *(c) Is not financially independent; and*
> *(d) Is a New Zealand citizen or is ordinarily resident in New Zealand."*

R falls within that definition.

I found helpful the analysis suggested by Mr Collins, namely a trail through the relevant definitions in the Act.

In s 2 "eligible applicant" is defined "in relation to a qualifying child as meaning a person who is entitled to apply for a formula assessment of child support under s 8 or s 10 of the Act".

Section 8 provides :

> *"8. Custodian may apply for formula assessment - (1) A person -*
> *(a) Who seeks payment of child support from a parent of a qualifying child; and*
> *(b) Who is an eligible custodian in respect of that child, - may apply for a formula assessment of child support.*
>
> *(2) A person is an eligible custodian of a child if that person -*
>
> *(a) Is the sole or principal provider of ongoing daily care for the child or shares ongoing daily care of the child substantially equally with another person; and*
> *(b) Is not living with the person from whom payment of child support is sought as the legal spouse of that person or in a relationship in the nature of marriage.*
>
> *(3) Notwithstanding subsection (2) of this section, where a child is a child in respect of whom payments are being made under section 363 of the Children, Young Persons, and Their Families Act 1989, the only eligible custodian in relation to that child shall be the person with the duty under that Act to make those payments, being one of the following:*
>
> *(a) The Director-General of Social Welfare; or*
> *(b) A body or organisation approved under section 396 of that Act.*
>
> *(4) Where, pursuant to subsection (2) of this section, 2 or more people who live together are both eligible custodians in relation to a child, then notwithstanding that subsection,-*
>
> *(a) Only one of those people shall be the eligible custodian in relation to that child;; and*
> *(b) Where one of those people is a parent of the child, that parent shall be the eligible custodian."*

The "principal provider of ongoing daily care" as defined in s 2 in respect of a child has the meaning given to it by ss 11 and 12 of the Act.

Section 11 of the Act provides :

> *"11. Person who is principal provider of care for child - For the purposes of this Act, the person who has the greatest responsibility for a child shall be the person who is the principal provider of ongoing daily care for the child."*

I agree with Mr Collins that it is helpful at that point to stop and to apply those definitions to the circumstances in this case. R was not living with her father and had not done so for some time. She had been living with her mother. Her mother had made arrangements for her daily care while she was away. Her mother had in place a mechanism for paying for her board and care in the initial stages because there was going to be a hiatus in receiving payments from Dr Hudson after she had come off benefit. She had undoubtedly put back-stop arrangements in place if his funds did not materialise thereafter.

The position of Dr Hudson in this Court was that it is to do violence to the plain words of the English language to suggest that a person was the sole or principal provider of ongoing daily care for a child (and therefore an eligible custodian) when that person was on the other side of the world 12,000 miles away. In my judgment that approach ignores the clear words of s 11. The issue is who had the greatest responsibility for the child.

At one stage in the dispute Dr Hudson persuaded the officers of the Commissioner that the mother could not be in that position. His objection was upheld. A further assessment was made on the basis which had been suggested by Dr Hudson, that the woman of the house where R was then boarding

was the responsible custodian. Dr Hudson then objected to that person being nominated as the responsible custodian. So did Ms Waite when she returned to New Zealand. The Commissioner eventually reviewed his decision and finally decided that Ms Waite was and always had been the eligible custodian despite the absence overseas.

This decision making process was not finally settled until 17 October 1994 - more than 15 months after the unilateral actions of Ms Waite. It was against the Commissioner's final decision of October 1994 that the appeal was lodged in the District Court.

I note for completeness that estoppel was raised as an issue in the District Court but it has not been pursued before me.

After Ms Waite returned to New Zealand on 25 May 1994 R returned to be with her mother.

The sole issue is whether the Commissioner was correct in determining that Ms Waite was in terms of the statutory framework, the principal provider of care between 2 July 1993 and 25 May 1994, such that a formula assessment made against Dr Hudson could not properly be objected to on the basis that Ms Waite was not an eligible applicant.

Like the Commissioner in his 16 July 1993 letter, the District Court Judge appears to have placed substantial emphasis on the provisions of s 12 of the Act. It provides :

> *"12. Provision where no agreement as to who is principal provider of care - Where there is disagreement as to who is the*

principal provider of ongoing daily care for a child, the following guidelines shall apply :

(a) Where the Director-General of Social Welfare determines that a person has primary responsibility for the child under section 70B of the Social Security Act 1964, that person shall be regarded as having the greatest responsibility for the child:

(b) Where paragraph (a) of this section does not apply, the Commissioner shall have regard primarily to the periods the child is in the care of each person, and then to the following factors:

(i) How the responsibility for decisions about the daily activities of the child is shared; and

(ii) Who is responsible for taking the child to and from school and supervising that child's leisure activities; and

(iii) How decisions about the education or health care of the child are made; and

(iv) The financial arrangements for the child's material support; and

(v) Which parent pays for which expenses of the child."

This section only has application if there is a dispute as to who is the principal provider of care. In reality I am of the view that this section has only minimal application. There was no real dispute about who was the principal provider of care as between the mother and the father. The possibility of the people with whom R I was boarding being the principal provider of care was I am satisfied, a non issue under the statutory scheme. This arose because of the frustration of Dr Hudson about the way he perceived himself as being ignored.

To the extent that s 12 could have any application, it is important to note that "responsibility" is a critical factor in its form.

I have been assisted by the decision of Judge Ellis in ***Hemmingsen v Commissioner of Inland Revenue*** (FP 45/94, Taumarunui Family Court, 3 May 1995) where the learned Judge reviewed the statutory scheme and

adopted an analysis similar to that referred to above. His approach was consistent with that of Judge Bisphan in ***Hilgendorf v Hilgendorf*** [1993] 1 NZFLR 177 and Judge Inglis QC in ***Bettleheim v Bettleheim*** (CS 081 054 92, Waipukurau Family Court, 27 November 1992).

Having referred to those two later decisions in the instant case, Judge Lowe said at page 8 :

> *"For the period 2 July 1993 to 25 May 1994 she assumed the greatest responsibility for her daughter financially, and was also responsible for making at least the first boarding arrangement for R and was no doubt consulted about subsequent boarding arrangements for her. Such information as the parties have provided can only lead to the conclusion that Ms Waite continued to assume the greatest responsibility financially for R while they were apart. She never ceased to provide ongoing daily care in that sense. That sense is sufficient for the purposes of the Act, bearing in mind R age, and must lead to the conclusion that Ms Waite was the principal provider of ongoing daily care for R*
>
> *This view gives effect to the objects of the Act. Those objects say nothing if they do not say that a parent in Dr Hudson's position should be paying child support. As to whom he should be paying it to (and the object at s.4(k) says nothing about this, it is being directed to the establishment of a system for collecting payments), payments should go to the person who met the child's needs financially. This is Ms Waite."*

In my judgment that part of his decision is unimpeachable.

On that basis I am therefore of the view that the decision in the Court below is correct and there is no legal basis to challenge the outcome.

In all the circumstances I have concluded, that although the time has now been reached when Dr Hudson must come to terms with his economic responsibility to his daughter while she was dependent, the background of the matter and the

vacillations of the Commissioner are sufficient to make it contrary to the interests of justice to award any costs.

The appeal is dismissed.

J.