CASE NOTES

BLOOD TESTS — A RETREAT FROM PARENS PATRIAE?

The recent English cases of *S. v. McC.* and *W. v. W.* heard and reported together in [1972] A.C. 24 represent something of a landmark in the United Kingdom family law field. Their relevance to New Zealand is, arguably, of even greater significance. In both cases the House of Lords was confronted with the issue of whether the High Court had inherent jurisdiction to order a blood test of a child whose paternity was in dispute when the result of that test might bastardise the child. In returning an affirmative answer to this question, the House of Lords appears to have elevated the concept of the interests of justice above that of the welfare of the child.

The facts of both cases can be shortly stated. In *S.* v. *McC.* a wife gave birth to a child in December 1965. The husband denied paternity and filed a petition for divorce on the ground of the wife's adultery with one M. from July 1965, and with an unknown person during a period covering the probable date of conception. The wife admitted adultery with M. but claimed her husband was the father. The Commissioner ordered the issue of legitimacy to be tried. The husband applied for an order that the child be given a blood test. This order was granted by the judge. The Official Solicitor who had earlier been appointed guardian ad litem of the child, appealed against this order to the Court of Appeal, which dismissed the appeal.

In *W.* v. *W.* the wife and her husband had intercourse throughout the period of the conception of a child born in December 1963. In February 1964 she petitioned for divorce on the basis of cruelty. In 1966, upon receiving a photograph of the child which showed a great difference in facial characteristics and skin pigmentation between it and older children of the parties, the husband disclaimed paternity. The issue of paternity was ordered to be tried. The husband sought an order that the child be blood tested. This order was refused. His appeal was unsuccessful. The Official Solicitor had been appointed guardian ad litem in these proceedings as well.

As a preliminary point, it is interesting and illuminating to note the marked divergence of opinion in the Court of Appeal in these two sets of proceedings. In *S.* v. *McC.* the Court (Denning M.R. and Karminski L.J., Sachs L.J. dissenting) upheld the order requiring the child to be tested on two grounds. First, both majority judges suggested that on the facts it was in the child's best interests that the question of her parentage be answered as truthfully as possible. Secondly, in the words of Lord Denning, "over and above the interests of the child, there is one overriding interest which must be considered. It is the interests of justice. Should it come to the crunch, then the interests of justice must take first place." ([1970] 1 W.L.R. 672 at

676.) Karminski L.J. also felt that the interests of justice were a weighty consideration, though somewhat inconsistent with the tenor of the rest of his judgment, he referred to them as being "subordinate to the interests of [the] infant". (at 682) Sachs L.J. considered himself bound to allow the appeal on the basis of the majority approach in *W.* v. *W.* [1970] 1 W.L.R. 682. In his view the parens patriae jurisdiction, intended to protect the infant, could only sanction an order directing a blood test of a child if it was for the infant's advantage, or, at the very least, not to its disadvantage. On the facts the Lord Justice found no such advantage.

The approach of the majority of the Court of Appeal in *W.* v. *W.* was that relied upon by Sachs L.J. in *S.* v *McC.* On the facts neither Winn nor Cross L.JJ. was satisfied that it was in the best interests of the child to order him to submit to a blood test. If the test showed the husband not to be the father, the child "would be left in the position of having no identifiable father at all and would sooner or later realise that his mother had been lying when she told him that her husband was his father." (per Cross L.J. at 687) Dissenting, Denning M.R. enunciated basically the same opinions as those he expressed in *S.* v. *McC.*

The divergence in the approach of the various Court of Appeal judges is not simply one of the weight to be given to the criterion of "the child's welfare is the first and paramount consideration" in paternity proceedings as distinct from custody disputes. In addition, it is a fundamental difference in approach to the issue of what *is* in the best interests of a child — whether it is better that a child know his true parentage whatever the cost, or whether the risk of being declared a bastard (and also forfeiting the greater financial security that legitimate status often confers) is too great a price to pay for the somewhat intangible benefits resulting. The judgments in the House of Lords settle the first of these questions; they further confuse the second.

Although the House of Lords unanimously held that blood tests should be ordered in both proceedings, somewhat different reasons were advanced by members of the Court. Lord Reid, with whom Lord Guest agreed, appears to have taken the same approach as Lord Denning in the *S.* v. *McC.* case. In his view, the interests of justice demanded that a husband be allowed to call all available evidence to prove his allegations. He went on to assert that legitimacy disputes should be regarded in a different light from custody cases, where the paramount question is what is in the best interests of the child and "no competing question of the general public interest arises" (at p. 44). Yet, despite this latter conclusion, Lord Reid obviously thought it arguable that it was in any event in the best interests of a child whose paternity was in dispute to submit to a test. While admitting that recent legislative changes had not totally removed the disadvantages attendant on illegitimacy, he provided at least three reasons why it might be in the child's interest to take a test. First, "it is not really

protecting the child to ban a blood test on some vague and shadowy conjecture that it may turn out to its disadvantage: it may equally well turn out to be for its advantage or at least do it no harm" (at p. 45). Secondly, adopting a remark of Lord Evershed in *In re K.* [1965] A.C. 201, he stated that if a husband is refused the order he may suffer from a sense of grievance and refuse to do more for the child than the law compels him; however, if a test is taken which does not disprove the husband's paternity, it is reasonable to hope that the husband would accept the decision and treat the child as his own. Thirdly, a reason related to the first, it is better for the child that the truth should out than the child should go through life with "a lurking doubt as to the validity of a decision when evidence, which would very likely have disclosed the truth, has been suppressed" (at p. 42).

Lord MacDermott commenced his decision by drawing a distinction between the Courts "protective" jurisdiction in relation to infants, and its ancillary jurisdiction, which he illustrated by reference to the power to make an order to promote a fair and satisfactory trial. The first, he decided, could not provide a reason for refusing a blood test order since the essence of the protective jurisdiction was to ensure the infant's equality with others, not to place it in a superior position. Obviously unimpressed by the argument that the "welfare of the child" concept applied to paternity disputes as well as custody ones, he commented "a question of paternity is not a question of guardianship", and concluded that it would be a retrograde step to apply it as the final criterion in paternity cases when the result would be that questions of fact were not decided on the best available evidence. It is interesting to note that Lord MacDermott obviously had serious doubts about the validity of the arguments that this approach was in any event in the best interests of the child. His decision that the Court need not be satisfied that the test will be for the child's benefit was prefaced by the comment "to ascertain whether [a test will] be in the best interests of the infant must by its very nature be so difficult and conjectural as to become an impossible task more often than not" (at p. 51).

The judgment of Lord Morris contains the most emphatic statement that the interests of the child are best served by determining the truth about its parentage. Although he felt that in view of s. 26 of the Family Law Reform Act 1969 (which allows the presumption of legitimacy to be rebutted on the balance of probabilities) the results of blood tests would seldom be of vital significance, he maintained that it was in the best interests of both justice and the child that blood tests be taken. In addition to the arguments more tentatively suggested by Lord Reid in support of the latter view, he suggested that it would not be in the child's best interests if relatives and friends felt that "the big doubt" surrounding its parentage had been left unresolved by the law.

Lord Hodson's approach is similar to that of Lord MacDermott.

He held that the Court's protective or custodial jurisdiction could not be employed so as to place the infant in a position of superiority over the other parties to the litigation. The fact that the rights of persons other than the child are involved in paternity proceedings distinguishes them from custody disputes: and justice as between all the parties requires that tests take place. There are some indications in the judgment of Lord Hodson that he too thought it arguable that the child's best interests would be served by removing the doubt surrounding its parentage, but these "speculative questions" he put to one side in reaching his decision.

In order to appreciate the full significance of the decisions in these two cases it is important to note that as a result of them a husband will be able to obtain an order directing the child to be blood tested in the vast majority of paternity cases. In the Court of Appeal in *S.* v. *McC.* Sachs L.J. saw this as an inevitable result of the approach taken by Denning M.R. (at p. 677). In the House of Lords the tenor of all the judgments supports this observation. While recognising that in some cases blood tests should not be ordered — Lord MacDermott suggested as possible grounds a prejudicial effect on the child's health and cases where the application was in the nature of a "fishing ploy" — the judges agreed that a refusal to make an order would be "rare" or "the exception rather than the rule". This must inevitably be so if the risk of bastardising the child is not a ground for refusal. It is also necessary for full understanding of the decisions to note that the assertions of those judges who held that it was in the best interests of the child to learn his true parentage were made generally with reference to all paternity cases. The reasons advanced by Lords Reid (with whom Lord Guest agreed, as has been noted) and Morris were obviously intended to cover widely divergent cases. At one extreme, they apply to cases where the identity of the mother's lover is known and when he is ready and able to provide financial and other security for the child should the tests show it to be his; at the other extreme to cases where the same person's whereabouts is unknown and where the evidence reveals he is unlikely, even if located, to do anything for the child at all. This latter situation is more common, and both the *S.* v. *McC.* and *W.* v. *W.* fact situations fall within it. Nevertheless, a majority of the House of Lords would say it was positively in the child's best interests to risk being bastardised in these circumstances also.

It seems to the writer that neither of the two grounds advanced to support the decisions is free from criticism. The principal ground, upon which all five judgments were at least in part based, was that the interests of justice demanded that a husband be able to call the best possible evidence. To uphold the husband's rights in these circumstances involved, as has been seen, a rejection of the notion that the "welfare of the child" concept as applied in custody cases was the paramount consideration in paternity proceedings. While it is true that paternity proceedings do raise questions of "broader public

interest" than custody cases in the sense that the issue in them is not *solely* one of the child's best interests, there is an inherent and underlying absurdity in the assertion that to refuse a husband the order sought is to elevate the rights of a child into a position of superiority vis a vis the husband. This underlying absurdity is that the child, or his guardians, could not compel the husband, or any other person for that matter, to submit to a blood test. Despite the suggestion of Lord MacDermott to the contrary effect (at p. 47) a majority of the Court rejected the notion that the Court had such a power. Consequently, a husband may come before the Court practically assured of securing the order he seeks in his attempt to prove the child to be illegitimate, yet in different circumstances himself arbitrarily and capriciously refuse a test. These "different circumstances" are not difficult to envisage. In the United Kingdom the presumption of legitimacy may now be rebutted on the balance of probabilities: the husband may meet this standard on evidence other than blood tests: the child's guardian, to prevent the child being bastardised may request blood tests. In circumstances where the other possible candidate for fatherhood has disappeared blood tests may be the infant's last chance to prove parenthood and accordingly receive maintenance. Yet the husband can refuse if he feels it is not in his best interests to take the test, i.e. he is home and dry on the circumstantial evidence. Seen in this light it is submitted that the decision of the House of Lords places children in an inferior and subordinate position. Husbands will almost always be able to test the child: the child will, potentially, never be able to test the father. The husband, as a matter of justice, is given permission to call the best evidence: the child refused it. While one might agree that as a matter of justice the husband and child should be put in a position of equality one is justified in asserting that as long as persons *sui juris* can refuse an order at will, this equality will only be preserved if the Court insists upon proof that no possible detriment can result to the child if the order is made. There will be some cases in this latter category — they are referred to in a different context in the judgment of Sachs L.J. in *S.* v. *McC.*

Although the argument advanced by the writer in the above paragraph was not referred to in any of the judgments of the House of Lords, it may have been to counter it that Lords Reid and Morris put forward their assertions that in any event it is in the best interests of a child whose paternity is in dispute to take a blood test. As previously noted, these judges were speaking generally, without reference to any particular, or any class of paternity, dispute. Answering their arguments on an equally broad basis one may justifiably commence with a comment made by Lord Reid himself: that despite the changes in the consequences of being declared illegitimate effected by legislation it is still on balance a considerable disadvantage to be an illegitimate child. In this writer's opinion, this amounts to a recognition that, prima facie at least, it is not in the child's best interest to be illegitimate and that therefore any order which raises the possibility

of this result being brought about is also not in the child's best interest. Starting from this position, whether the counterbalancing considerations which in the opinions of Lords Reid and Morris tipped the scales of benefit the other way were in fact sufficiently weighty to do so must be a matter of serious doubt. There is a somewhat false ring, for instance, to the claim that it is better for the child to be declared illegitimate than have the husband "doing no more for him than the law strictly requires" because he suffers from a sense of grievance at being denied a blood test order, when the alternative is probably to be both illegitimate and the recipient of no maintenance from anyone. The same type of criticism can be levelled against all of the counterbalancing arguments put forward. One is inclined to agree with Lord Hodson, who termed these arguments "speculative". They do not provide a very happy or convincing basis for what appears to be a rather remarkable assertion.

In addition there appears to be a further but related criticism to be made of the "best interests to take a test" conclusion. As previously implied there may be some situations where it undoubtedly *is* in the child's interests to take a test and force others to do the same. Equally, it is submitted that there may be some cases where it is beyond doubt that it is not in the child's best interest. To take a situation which recognises that there may be some force in the views of Lords Reid and Morris. A child is born a mongol, and thus will not feel "the vague and shadowy conjecture" the paternity dispute causes; there are no relatives who feel "the big doubt" the case raises should be disposed of in the most satisfactory way. The wife's lover is penniless and in any event has disappeared; the husband is well off and can afford to pay substantial maintenance if the paternity dispute is resolved against him. It is submitted that there is no doubt that it is in the child's interests to have to refuse an order. The less weight one ascribes to the views of Lords Reid and Morris, the less extreme the example will be. But the short point to be drawn from this illustration is that it is obviously unsatisfactory to argue that in all cases (other than cases of prejudicial effect on health and the like) it is in the child's interest to take a test; indeed it is quite impossible to do so unless all children have ascribed to them an overriding love of seeing justice done whatever the personal disadvantage, an assertion of a ludicrous nature. In the writer's submission generalisations such as those of Lords Reid and Morris are unsatisfactory. A more proper approach is that adopted by Winn, Cross and Sachs L.JJ. in the Court of Appeal; those Lord Justices had regard to the actual fact situations before them in determining the question of the child's best interest. Although to some extent elements of subjectivity are evident in their analysis — such as the statement of Cross L.J. in *W.* v. *W.* that it was not in a child's best interests to discover that its mother had been lying to it in regard to its parentage — the overall approach is, in the writer's view, manifestly superior to that of the majority of the House of Lords. Factors such as whether the mother had told

her child the identity of its father; whether the lover is identified or his whereabouts known; whether the lover is financially well shod and many others must be relevant to the "child's best interest" inquiry. To decide this inquiry without reference to these factors would, prior to the House of Lords decision, have seemed a certain ground for a successful appeal.

To the New Zealand lawyer the most important question arising from the decision is that of its application to paternity disputes in this country. In this regard it is important to note that the House of Lords based its decision upon the inherent jurisdiction of the superior courts and not upon statute. The New Zealand Supreme Court has essentially the same inherent jurisdiction. In *J. v. J.* (unreported, Supreme Court, Wellington) Beattie J. held that s. 36(1) of the Guardianship Act 1968 removed the Court's inherent power over infants; however it is respectfully suggested that at least for the purposes of ordering blood tests s. 33(3) retains it, since presumably this is a matter "not provided for" by the Guardianship Act. A further point is that despite the fact that most of the children in the succession of cases prior to *S. v. McC.* and *W. v. W.* were wards of court, the power exercised by the House of Lords is not limited to children who are in fact wards. This was settled in one of the earlier Court of Appeal cases dealing with an analogous question, *In re L.* [1968] P. 119, and this decision was accepted by the House of Lords. It should also be noted that although both *S.* v. *McC.* and *W.* v. *W.* concerned refusals to consent by guardians ad litem appointed under the Matrimonial Causes Rules 1968, the principle of the decisions is not limited to cases where such guardians are parties to the proceedings. They were treated as being in the same position as natural guardians.

Consequently, there appears to be no reason why the rules laid down by the House of Lords should not apply to legitimacy — or to be strictly correct — parenthood — proceedings under the Status of Children Act 1969. Indeed, the interests of justice in allowing a husband the chance to call the best available evidence to prove his allegations arguably operate more strongly in favour of a compulsory test of the child in this country than the United Kingdom. As previously noted, s. 26 of the Family Law Reform Act (U.K.) allows the presumption of legitimacy to be rebutted on the balance of probabilities. Thus the requisite standard will often be met by an "innocent" husband without the results of blood tests. However, if the view that s. 5 of the Status of Children Act (N.Z.) reserves the common law standard of beyond reasonable doubt is accepted by the courts, together with the stringent principles developed by the common law in relation to it, then in this country a husband who is not in fact the father will usually have an opportunity of disproving paternity only if blood tests are made available to him. Though off the point, it is worth noting that in *In re L.* Lord Denning put forward a suggestion which is now of more relevance in New Zealand than the United Kingdom. He stated that in the light of changing

social attitudes to illegitimate children a reconsideration of the presumption of legitimacy was required, and concluded, "I am prepared to hold that it can be rebutted on a balance of probabilities" (at p. 153). This suggestion may have some weight when the neutrally worded (insofar as standards are concerned) s. 5 of the Status of Children Act comes before the courts for determination. Whichever interpretation is placed on that provision, however, it will probably be to the House of Lords that a husband found not to be the father will look with appreciation. The child in dispute will have to find solace in the fact that the vague and shadowy conjecture surrounding it has been removed. If the New Zealand courts opt for the lower standard in relation to s. 5, it is to be hoped for the sake of a fair percentage of children involved in these disputes that modern technology quickly makes this solace an edible commodity.

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