WX v WW
[2009] SGHC 70

Case Number : DA 3/2008

Decision Date : 25 March 2009

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : Irving Choh and Stephanie Looi (KhattarWong) for the appellant; Krishnan Nadarajan (Aequitas Law LLP) for the respondent

Parties : WX — WW

Evidence – Proof of evidence – Presumptions – Presumption of legitimacy – Child maintenance sought from biological father when s 114 Evidence Act (Cap 97, 1997 Rev Ed) presumed child as legitimate daughter of another man – What was the purpose of s 114 – Whether biological father could rely on s 114 as defence against duty to pay child maintenance under ss 68 and 69(2) Women's Charter (Cap 353, 1997 Rev Ed)

25 March 2009

Lee Seiu Kin J:

1 This is an appeal against the decision of the District Judge holding that the appellant is liable to pay maintenance for the respondent's daughter ("the Child") pursuant to s 69(2) of the Women's Charter (Cap 353, 1997 Rev Ed)("the Charter") on the ground that the appellant is her father. I dismissed the appeal on 28 August 2008. The appellant subsequently sought leave under s 34(2) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) to appeal to the Court of Appeal on the ground that the part of my decision concerning the interpretation of s 114 of the Evidence Act (Cap 97, 1997 Rev Ed)("the Act") pertains to a point of public interest in that there is no authority on its application to a case such as the present one. I granted leave to appeal and the appellant filed his notice of appeal on 30 October 2008.

2 The background facts are as follows. Prior to meeting the appellant, the respondent had a boyfriend (hereafter called "H") with whom she was intimate. Sometime in 2001 the respondent met the appellant and the respondent claimed that very soon thereafter she had sexual intercourse with him. In February 2002, the respondent went to Australia to further her studies and while she was there, she kept in touch with both men. The respondent claimed that when she returned to Singapore at the end of 2003, she continued dating both men and had sexual intercourse with them. In May 2005, the respondent went to Sydney with the appellant and, according to her, they had sexual intercourse during the trip. In June 2005 the respondent discovered that she was pregnant. Accompanying her at the pregnancy test was H, and he immediately proposed marriage in the belief that the Child was his. They married and the respondent gave birth to the Child on 21 January 2006. Unfortunately for the marriage, it became apparent to H from the blood group of the Child that he was not her biological father. He procured a DNA test to be done which confirmed that he was not the biological father of the Child. H commenced proceedings that eventually resulted in the nullification of the marriage. The respondent thereafter sought child maintenance from the appellant in the District Court pursuant to s 69(2) of the Charter.

3 Before the District Judge, the only fact in dispute was whether the appellant was the father of the Child. The appellant claimed that he never had sexual intercourse with the respondent and

therefore the Child could not be his. However he did not submit to a DNA test that, although it would not prove that there was no sexual intercourse between them, would certainly conclusively show that the Child was not his. Of course it could also quite conclusively show that the Child was his. The respondent on the other hand insisted that she only ever had two sexual partners in her life and they were H and the appellant. The respondent also was adamant that she had sexual intercourse with the appellant while they were in Sydney, a month before she tested positive for pregnancy. At the end of the trial the District Judge found as a fact that the appellant had sexual intercourse with the respondent at the relevant time and further, that he was the biological father of the Child. Accordingly the appellant was ordered to pay maintenance under s 69(2) of the Charter, the quantum of which would be decided after further hearing.

4 Before me, the appellant appealed against the decision of the District Judge. After hearing submissions on both sides, I dismissed the appeal and affirmed the decision of the District Judge. I agreed with the finding of fact of the District Judge at the end of the trial that the appellant was the biological father of the Child and her further finding that he had refused to provide reasonable maintenance. I upheld the District Judge's order for the appellant to pay maintenance to the Child.

5 The appeal pertains to the appellant's submission in respect of s 114 of the Act, which provides as follows:

> **Birth during marriage conclusive proof of legitimacy**
>
> **114**. The fact that any person was born during the continuance of a valid marriage between his mother and any man … shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten. [emphasis in original]

6 The appellant contended that the fact the Child was born during the continuance of a valid marriage between the respondent and H is, by operation of s 114 of the Act, conclusive proof that the Child is the legitimate daughter of H and, *ergo*, the appellant cannot be her father. Attractive as this argument may seem, acceptance of the appellant's submission would mean that s 114, a rule of evidence establishing a presumption, can override the strongest scientific evidence simply on the basis of marital status. The respondent had sexual intercourse with the appellant and H during the period that she was fertile and some nine months later the Child was born. Adopting the appellant's position would mean that, even if the DNA test were to show that the appellant is the biological father, by virtue of the fact that the respondent was married to H at the time of birth, the law would hold that H is the father of the child even though the science has shown otherwise. It is clear that this rule of evidence has for its basis, social policy rather than scientific reality. The appellant's position offends both justice and commonsense, but if the provision were free from ambiguity and clearly applies to the facts of the present case then I would be constrained to make that holding no matter how unsatisfactory the result may be. However in my view, s 114 is not free from ambiguity in relation to the facts of this case. This is because it does not state that the child is conclusively proved to be the biological son of the husband, which is the fact in issue here. In order to divine the exact scope of s 114, it is necessary to consider the background of the provision.

7 The presumption in s 114 of the Act has its origins in the common law presumption of legitimacy, which was introduced to avoid severe penalties levied on a child (such as in the areas of inheritance) as a result of illegitimacy. Section 114 was introduced as part of the Evidence Ordinance 1893 (No 3 of 1893) of the Straits Settlements which was based on the Indian Evidence Act (No 1 of 1872). Sir James Stephen, the draftsman of the Indian Evidence Act essentially codified the common law rule as it stood in the nineteenth century. It should be noted that at that time conclusive proof

of paternity was not available – that is, neither blood nor DNA tests were available to determine the paternity of a child. It is clearly a measure to avoid the bastardising of children. Thus, once the primary facts of s 114 are satisfied, the only method of rebutting the presumption of legitimacy is that of non-access which, at the time, was the means of disproving paternity – *per* Choo Han Teck J in *AD v AE* [2005] 2 SLR 180 where the learned judge said at [8]:

> Section 114 of the Evidence Act was promulgated at a time when it was not contemplated that the paternity of a child could be proved scientifically at a level of confidence beyond 99.9%. It was intended to avoid bastardising children and the social stigma that attached to it, more so in the past than today, perhaps.

8 In *Re L* (an infant) [1967] 3 WLR 1645 ("*Re L*") the English Court of Appeal had to decide whether to order a blood test so that it could be determined whether the husband was the father of a child born during the marriage, or a third party with whom the wife had sexual intercourse at the relevant time. Lord Denning MR expounded the origin of the presumption at 1648:

> The presumption of legitimacy goes back for centuries, long before blood tests. In order to decide the paternity of a child, the courts in those days had to rely upon circumstantial evidence. Illegitimacy was a grave stigma: and carried severe penalties on the child. So the courts raised a presumption of legitimacy. When a married woman bore a child, her husband was presumed to be the father unless the contrary was proved. The presumption was so strong that it could not be rebutted except by proof beyond reasonable doubt that the husband was not the father. That was often unjust to a husband whose wife had committed adultery. The burden on him is not so heavy nowadays. In divorce cases the presumption can be rebutted by showing, on the preponderance of probabilities, that the husband could not be the father: see *Blyth v. Blyth* [1966] AC 643. And logically the position should be the same in legitimacy proceedings or in any proceedings where paternity is in issue. It would be absurd to have a different result in a divorce case from other cases, so that a child would be found legitimate in one and illegitimate in another. Moreover, there is not nearly the same stigma on illegitimacy as there used to be. It can be, and often is, cured by subsequent marriage of the parents. Even when the parents do not marry, the penalties on the child have been largely removed. The sins of the fathers are no longer visited on the children. In this new situation, I think we are at liberty to reconsider the presumption of legitimacy. I am prepared to hold that it can be rebutted on a balance of probabilities. Even so, however, it still has to be rebutted: and the question is, how far it can be done by blood tests.

9 It can be seen from *Re L* that the common law rule has changed in the more than hundred years since s 114 of the Act was frozen in time in our Evidence Act. Be that as it may, the issue is whether the rule as codified in s 114 operates in the manner submitted by counsel for the appellant. In the hearing before the District Judge, the appellant had denied on affidavit that he ever had sexual intercourse with the respondent. This was despite the fact that they had gone together to Sydney on a holiday in May 2005. He even suggested to the respondent in cross-examination that they could not have had intercourse during that holiday because she was having her menstrual period. Yet when the appellant was called to give evidence in his defence, he elected not to testify. I should add that he had also elected not to undergo a DNA test which, if he were speaking the truth, would have ended the matter there and then. In the event the District Judge not only found against him, but found the respondent to be a witness of truth, even though she was not impressed with her moral values. In taking this position, the appellant is attempting to use a presumption established by the judges of the common law for the protection of children to deprive the Child of the right vested in her under s 69(2) of the Charter. It is a position that no court of justice would accede to lightly. But, as I have stated earlier, if the appellant is correct on the operation of s 114, I would have had to allow his

appeal.

10 To distil the exact scope of s 114 of the Act, it is worthwhile to set out again the provision in full:

> The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within 280 days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

11 What s 114 of the Act expressly provides is that the fact that a child was born during the continuance of a valid marriage between his mother and any man, in the absence of evidence of the lack of access, shall be conclusive proof that the child is the legitimate son of that man. It does not say, for instance, that "the son is the issue of that man". Indeed if those words are found in s 114, I would have been constrained to rule in favour of the appellant. But they are not, and the only incontrovertible conclusion is that s 114 is a presumption of legitimacy. The appellant's position requires a further logical step, *ie* that the legitimate child of a person is his issue. But legitimacy is nothing more than a position, or a status. In Words and Phrases Legally Defined (2007) it was defined in the following manner at 38:

> Legitimacy is a status: it is the condition of belonging to a class in society the members of which are regarded as having been begotten in lawful matrimony by men whom the law regards as their fathers.

12 Further evidence that the intention in s 114 of the Act is the conferment of legitimacy as a matter of policy rather than biological reality is the fact that the presumption arises even in circumstances where some person other than the husband is likely to be the biological father. This is because the basis for the presumption is that the child is born during the continuance of a valid marriage. It also operates if the child is born within 280 days of the dissolution of the marriage ("the 280-day presumption"), but only if the mother remains unmarried. This means that if the mother had remarried before birth then the 280-day presumption does not operate in respect of the former husband. Indeed in that situation the presumption operates in respect of the new husband (in the absence of proof that the new husband had no access to the mother at the time the child could have been begotten), as the child was born during the continuance of the second marriage, even though the first husband could well be the biological father.

13 This very situation was faced by the Court of Chancery in *In Re Overbury, Sheppard v Matthews* [1955] 1 Ch 122. The first husband of a woman died in an accident on 26 January 1869, a few months after their marriage. Six months later, on 27 July 1869, the woman married her second husband. She gave birth to a daughter on 24 September 1869. When the daughter died intestate in 1941, to determine the beneficiaries under her intestacy the court had to make a finding on whether she was the lawful daughter of the first or the second husband of her mother. Harman J found that the common law presumptions were in conflict and decided on the facts that "the probabilities point in favour of the first presumption", *ie* that the child was the legitimate daughter of the first husband. That case concerns the common law presumption but what is interesting is the following passage of the judgment at 126:

> There appears to be no authority on this subject, for in Stephen's Digest of the Law of Evidence (1936), 12th ed., I find this note on p. 133: "I am not aware of any decision as to the paternity of a child born, say, six months after the death of one husband, and three months after the

mother's marriage to another husband."

That is precisely the problem which confronts me. In *In re Heath* [1945] Ch 417, 422, Lord Cohen, then a judge of first instance, was in the same position, although he held in a reserved judgment that it was unnecessary to decide that point, for he said, when dealing with counsel's argument: "... Mr. Stranders, for the first defendant, contends, first, that the presumption" - that is, the presumption of legitimacy – "does not apply to posthumous children and, secondly, that it is rebuttable and is rebutted in this case. In my view, his first contention conflicts with the principle on which the rule that a father's or mother's declaration is inadmissible to bastardize the issue born after marriage is based - see *per* Lord Birkenhead L.C., citing *Goodright v. Moss* (1777) 2 Cowp. 591, 592, 594 in *Russell v. Russell* [1924] AC 687, 697 - but it avoids a difficult situation which might arise where a child was born within nine months after the first husband's death but after the widow's remarriage. Unless Mr. Stranders' contention is correct, the presumption of legitimacy would, in such a case, make the child the legitimate child of two fathers. I need not, however, decide whether the presumption applies. ..."

It can be surmised that Sir James Stephen inserted the 280-day presumption in the corresponding provision of the Indian Evidence Act in an attempt to address the "difficult situation" described by Harman J.

14 Section 114 of the Act clearly operates where a person seeks to prove that a child born during the continuance of a valid marriage between his mother and any man is the legitimate child of that man (in the absence of proof that they had no access to each other at the relevant period). This accords with the historical origin of the common law rule. But the appellant is seeking to derive a collateral application to the rule, which would in effect turn a rule established for the purpose of protecting a child in one set of circumstances to deny a child in another set of circumstances of the protection accorded to him under the Charter. In my view the appellant's position is not supported by the words in s 114 nor by any consideration of the policy and historical origin of the rule. For the reasons given above, I concluded that s 114 only applies to confer legitimacy in the circumstances set out in the provision, and not to rebut or invalidate evidence that a man is the biological father of a child.

15 Even if I were wrong in my interpretation of the scope of s 114 of the Act, I would hold that it does not apply in respect of s 69(2) of the Charter for the reasons that follow. Section 69(2) is found in Part VIII of the Charter which contains provisions for the maintenance of wives and children. The first provision of this part is s 68 which provides as follows:

Duty of parents to maintain children

68. Except where an agreement or order of court otherwise provides, it shall be the duty of a parent to maintain or contribute to the maintenance of his or her children, whether they are in his or her custody or the custody of any other person, and whether they are legitimate or illegitimate, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof. [emphasis in original]

This provision establishes a legal duty on the part of a parent to contribute to the maintenance of his children, whether they are in his custody or not and, pertinent to the appeal before me, whether they are his legitimate or illegitimate children.

16 The next provision, s 69 of the Charter, sets out the manner in which the duty in s 68 may be

"enforced". Subsection (1) thereof empowers a court to order the husband of a woman to pay her maintenance. As pertains the child, s 69(2) empowers the court to order a parent to pay maintenance. This subsection states as follows:

> A District Court … may, on due proof that a parent has neglected or refused to provide reasonable maintenance for his child who is unable to maintain himself, order that parent to pay a monthly allowance or a lump sum for the maintenance of that child.

17 Considering s 69(2) of the Charter in the context of the duty in s 68 on a parent to maintain his children, be they legitimate or illegitimate, it would be rather surprising if Parliament had intended that the rights intended to be vested in an illegitimate child *vis-à-vis* his biological father does not extend to the situation where his mother was legally married to another man at the time of his birth. Were that to be the case, even if the mother had divorced her husband or he had died, the child still would not enjoy the protection under s 68 and s 69 *vis-à-vis* his biological father. It is difficult to see how Parliament, in promulgating these provisions more than half a century after s 114 of the Act was enacted, could have intended that this duty be relieved in the case of the biological father of a child whose mother happened to be married to another man at the time of birth.

Conclusion

18 For the above reasons, I was of the view that the appellant could not rely on s 114 of the Act to invalidate the evidence that he is the biological father of the Child and therefore the finding of fact by the District Judge that he is so stands. He must therefore abide by his duty to maintain the Child under s 68 and s 69 of the Charter. Apparently the appellant had gotten married, making it rather awkward for him to have to maintain a child that he had sired by another woman. Nevertheless the law requires – and I should add society expects – that he undertakes some responsibility for his issue.