

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

NOTE: ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE

<https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/>

**IN THE FAMILY COURT
AT BLENHEIM**

**I TE KŌTI WHĀNAU
KI TE WAIHARA KEKE**

**FAM-2019-006-000076
[2020] NZFC 3072**

IN THE MATTER OF THE STATUS OF CHILDREN ACT 1969

BETWEEN [KEVIN MOSS]
Applicant

AND [JILLIAN PAUL]
Respondent

Hearing: 7 May 2020

Appearances: N Vallance for the Applicant
No appearance by or for the Respondent

Judgment: 7 May 2020

**ORAL JUDGMENT OF JUDGE R J RUSSELL
[as to a declaration of non-paternity under s 10 Status of Children Act 1969]**

Introduction and background

[1] These are proceedings under the Status of Children Act 1969 between [Kevin Moss] and [Jillian Paul]. In particular, it is an application under s 10 of the Act by Mr [Moss] for a declaration of non-paternity in respect of the child [Amy Paul] born [date deleted] January 2002, now aged almost 18 and a half years. The application was served on [Amy]'s mother, Ms [Jillian Paul], who took steps to defend the application. She filed a notice of defence and an affidavit from herself and also from [Amy].

[2] A recommendation under s 54 Family Proceedings Act 1980 was made by Judge Goodwin on 10 September 2019 to undertake paternity testing. While Mr [Moss] was prepared to undergo the DNA paternity tests and was prepared to fund the tests for all parties, the testing has not been able to be carried out because [Amy] does not wish to supply her DNA specimen. Because she has refused to supply a DNA specimen, I am not in those circumstances able to draw an adverse inference against Ms [Paul] for the non-completion of the testing which had been recommended.

[3] The proceedings were set down for hearing on 25 March 2020 for today, 7 May for two hours commencing at 11.00 am. A fixture notice was sent to Ms [Paul]'s address by email on 29 April by the registrar. Today is in the period of COVID-19 level 3 restrictions. The registrar said in her email that the requisite physical distances were able to be complied with and masks, gloves and hand sanitisers are provided. At the outset of the hearing this morning Ms [Paul] has not appeared. I have had the security guard check the Court precincts three times, including outside the Court building. Ms [Paul] is neither in the Court precincts nor waiting outside the Court. Her non-attendance is not able to be explained. I have had my registrar try and telephone her on the only available number which is on file to ascertain her whereabouts and whether she wished to attend the hearing, but no contact has been made.

[4] I need to record that the Court received an email from [Amy] on 3 May in which she reconfirmed her affidavit evidence that she does not wish to supply her

DNA specimen. She is critical of Mr [Moss] for not following through the DNA paternity testing issue when the paternity issue was raised after her birth.

[5] Counsel for Mr [Moss], Ms Vallance, submitted I proceed with the hearing as scheduled and I have agreed to this.

The evidence

[6] Mr [Moss] has filed two affidavits and given evidence today. He has confirmed the contents of his affidavits as being true and correct, apart from alterations to paragraphs 8 and 9 of his first affidavit which he now discounts in the light of evidence subsequently obtained. In summary, he first met Ms [Paul] when he was 16 years of age. She was four years older than him. They commenced an on again off again type relationship from 1999 onwards. In February 2000 their [son] was born. [Their son] subsequently left his parents' care and has been raised by his paternal grandparents.

[7] Mr [Moss] recounts the various incidents and events which occurred following [their son] moving to the care of his grandmother. Clearly these were difficult times for both himself and Ms [Paul], punctuated by arguments, offending, extra-relationship affairs with others and violence. The parties finally separated in June 2002, some six months after [Amy] was born. Mr [Moss] later married, has two further children and his evidence is that his life became much more stable than it was during his relationship with Ms [Paul].

[8] Mr [Moss] said he has always doubted he is [Amy]'s biological father. He considered there was a high possibility that a [Steven Herring], who was a former friend of his, was [Amy]'s father. Notwithstanding these concerns, when he was approached by Ms [Paul] in April 2005 to sign an IRD acknowledgement of paternity, he did so. His evidence is that Ms [Paul] approached him to sign this document as her benefit was being discounted because [Amy]'s biological father had not been identified. Mr [Moss] said he believed Ms [Paul] when she told him he was [Amy]'s father. He accepted he did not follow through on DNA testing arrangements that were apparently offered at that time, citing the cost of completing the tests was "overwhelming" for him.

[9] Mr [Moss] has now reached the point where he wants to know once and for all whether [Amy] is his biological child. He has his [son] and his two further children and wants to know whether to include [Amy] in his biological family for estate planning purposes. He also wants to know whether his other children are biologically related to [Amy]. He has not seen [Amy] since she was about seven years of age.

[10] In his second affidavit Mr [Moss] analyses the medical information that was supplied by Ms [Paul] in her affidavit evidence and undertakes a pregnancy calculation using an internet Pregnancy Test On-line Calculator. [Amy] was born on [date deleted] January 2002. Maternity scans estimate [Amy]'s due date of birth to be 12 or 13 January. Mr [Moss] calculated that the most probable date of conception was between 19 and 23 April 2001. It seems [Amy] was born some two weeks premature.

[11] Mr [Moss]'s evidence is that he was arrested for offending against Ms [Paul] on 19 April of that year and was subject to bail conditions, one of which was to have no contact with her. He said in evidence today that he followed these bail conditions and was not subject to any breach action. He was ultimately sentenced to a community-based sentence for the assault on Ms [Paul] which had occurred.

[12] In answer to questions from me, Mr [Moss] said he did not have sexual intercourse with Ms [Paul] for a period of 3-4 weeks prior to his being arrested for this assault. He said this was because he spent a week in late March/early April on holiday with a friend of his. For the next two-week period prior to his arrest on 19 April, he lived at his home and Ms [Paul] was residing with Mr [Herring] at his property nearby. He said Ms [Paul] did not sleep overnight at his home at any time during this period. In his affidavit evidence, Mr [Moss] goes on to compare photographs that he has obtained of [Amy] and Mr [Herring]'s child and his own children, and does not consider there are similar facial features. I attach little weight to this. I consider the evidence on this point to be unreliable.

[13] In her affidavit evidence Ms [Paul] annexes [Amy]'s birth certificate. Clearly Mr [Moss] is not named on it. She also attaches medical information she obtained in relation to her pregnancy with [Amy]. She disputes parts of the affidavit evidence filed by Mr [Moss], but does say in paragraph 4(k) of her evidence:

I had doubts as to who the father was. [Kevin] knew he was not on [Amy]'s birth certificate because I told him I am not putting his name in it due to [Kevin] not doing a DNA test.

And further:

[Kevin] and I got back together when [Amy] was about two months and then separated finally when [Amy] was six months old.

[14] She attaches to her affidavit the police case summary report showing the offending against her which occurred on 19 April 2001. Ms [Paul]'s evidence is that [Amy] was conceived somewhere between 9 and 21 April 2001.

[15] As I have recorded, [Amy] filed an affidavit. She is now almost 18 and a half years of age. In paragraph 6 of her affidavit she says this:

I have known that [Kevin Moss] might not be my father. Mum has always been open about that.

The law

[16] Section 10 of the Act provides that an eligible person, in this case Mr [Moss], may apply to the Court for a declaration of paternity, or a declaration of non-paternity. The onus of proof is on Mr [Moss] to show that it is more likely than not that he is not [Amy]'s biological father. It is relevant that he has signed the acknowledgement of paternity in April 2005 in which he accepts that he is [Amy]'s biological father and child support payments have been made by him since that time.

[17] Other factors in Mr [Moss]'s favour, however, is the evidence which has now been provided which I have summarised in this judgment. It seems clear that [Amy] was born two weeks prior to the mid-wife's estimate. Using the pregnancy calculator, it seems that [Amy] was conceived in mid-April 2001. From 19 April onwards after Ms [Paul] was assaulted and Mr [Moss] was subject to police charges and bail conditions with non-association clauses, I accept his evidence that sexual intercourse did not occur.

[18] I also accept Mr [Moss]'s evidence that he spent a holiday for a week in early April with a friend and the following approximate two-week period was spent in

difficult circumstances where Ms [Paul] was spending all her time, including overnight periods, in the home of Mr [Moss]'s former friend, Mr [Herring]. I accept sexual intercourse between himself and Ms [Paul] did not take place during this period in April. This evidence is supported to an extent by Ms [Paul]'s own evidence that she is not sure as to who [Amy]'s father is, which is something she has been upfront with [Amy] about as [Amy]'s affidavit evidence shows.

[19] In all of these circumstances I am satisfied that Ms [Moss] has satisfied the onus of proof which is on him and has shown it is more likely than not that he is not the biological father of [Amy]. I am therefore prepared to make the declaration sought under s 10 of the Act.

Outcome and orders

[20] I make a declaration that [Kevin Moss] is not the biological father of [Amy Paul] born [date deleted] January 2002.

[21] Costs are reserved. If sought memoranda is to be filed within 21 days with a right of reply within a further 14 days. The memoranda are then to be referred back to me in chambers for decision.

Judge RJ Russell
Family Court Judge

Date of authentication: 12/05/2020

In an electronic form, authenticated pursuant to Rule 206A Family Court Rules 2002.