

SUPREME COURT OF QUEENSLAND

CITATION: *Re: Wintour* [2002] QSC 173

PARTIES: **IN THE MATTER OF the Status of Children Act 1978
(Section 10)
AND
IN THE MATTER OF an application by MICHELLE
ANN WINTOUR**

FILE NO/S: S540/99

DIVISION: Trial

PROCEEDING: Application for Declaration of Paternity

ORIGINATING COURT: Supreme Court at Townsville

DELIVERED ON: 6 June 2002

DELIVERED AT: Townsville

HEARING DATE: 24 May 2002

JUDGES: Cullinane J

ORDER: **Barry James Burton (deceased) declared to be the father
of Andrew William Wintour.**

CATCHWORDS: DECLARATION OF PATERNITY - OTHER MATTERS -
where deceased sought paternity declaration - where
applicant refused to submit to blood testing - where applicant
swore false affidavits - whether court satisfied that paternity
claim is true.

COUNSEL: W Elliott for the applicant
H Walters for the respondent

SOLICITORS: Bevan and Griffin for the applicant
Suncorp Metway for the respondent

[1] The Applicant seeks a declaration that one Barry James Burton (deceased) is the father of Andrew William Wintour an infant born on 16 January 1991.

[2] It was made clear that the primary motivation for the Application was to facilitate the institution of proceedings on behalf of the child for damages for loss of

dependency against the driver of a vehicle said to be responsible for the death of the deceased. Counsel appeared for the insurer of that vehicle to resist the application.

- [3] The Applicant was born on 19 January 1973.
- [4] The deceased was born on 18 July 1966.
- [5] According to the Applicant, she met the deceased when she was 16. He worked on a trawler which her parents owned and lived for a period in a granny flat downstairs at the family home in Wynnum Central.
- [6] She says that she and the deceased lived in a de facto relationship in a house at Capalaba which was rented by the deceased's sister and the deceased. It was during this time, according to the Applicant, that she became pregnant.
- [7] They then moved to Victoria Point and then Birkdale where they were living at the time of the birth of Andrew. The Applicant says that both the deceased and her mother were present at the time of the child's birth. The deceased was present at his christening and thereafter the Applicant and the deceased lived at Lota before moving back to the Applicant's parents' home. This account is generally supported by the Applicant's mother. For some time the Applicant's parents regarded her as a missing person and with the assistance of police she was traced to the house at Capalaba.
- [8] Some months later the trawler owned by the Applicant's parents commenced to work out of the port of Townsville and the deceased moved to Townsville to work on it. According to the Applicant the deceased commenced a relationship with another woman and the relationship between the Applicant and the deceased broke down in August 1991. The Applicant then went to live with her parents who were then living in Townsville.
- [9] The Applicant's mother swears that the deceased "freely in my company advised other persons that he was the father of Andrew".
- [10] After the separation, the deceased would take Andrew from the home of the Applicant's parents for periods of access and as the child grew he referred to the deceased as his father. The parties, as will be mentioned, became involved in litigation immediately after their break-up and before any arrangements about access were put in place.
- [11] The child's birth was registered in the name of Andrew William Wintour and no information was shown against the entry of the father. The Applicant explains this by saying that she and the deceased believed that the deceased's aunt who had expressed the view that the Applicant was too young to have a child would attempt to take the child away from her. She says that the decision to register the child's name as Wintour was a joint one.
- [12] It is to be noted that the death certificate of the deceased shows the child as a child of the deceased. The informant is shown as the sister of the deceased who is the person with whom the Applicant and the deceased lived for a period in Brisbane.

- [13] A solicitor was appointed as litigation guardian for the estate of the deceased. He waived any right to claim privilege in respect of a file of the Legal Aid Office relating to a dispute between the Applicant and the deceased. It is plain that the Applicant sought to have the contents of this file placed before the court in support of the application. This was because the deceased had made application for legal aid to pursue a claim for access to the child and thus it was said acknowledged his paternity of the child. There is no doubt from the material which is contained in the file and generally that the deceased asserted that the child was his child.
- [14] At this time there was a great deal of animosity between the Applicant and the deceased with serious allegations being made by each.
- [15] The Applicant instituted proceedings against the deceased under the *Domestic Violence (Family Protection) Act 1989* and obtained an order, one of the terms of which was that the deceased should not have contact with her "except during access to the child Andrew Wintour".
- [16] In the course of these disputes the Applicant asserted by her solicitor that the child was not the child of the deceased. Following the making of the order to which I have just referred the Applicant sought a variation of the order, the effect of which would have been to delete any reference to contact between them during access to the child Andrew Wintour. The aim which the Applicant sought to achieve it seems, was to deny access to the child by the deceased. She swore an affidavit in support of this application in which she denied that the deceased was the father of the child and swore that at the time she first met the deceased she had already conceived the child. She says that they lived together from about mid June 1990 and separated in the first week of June 1991. She alleges that the deceased assaulted her a number of times and she claimed that the purpose of the deceased seeking access to the child was to obtain her address and keep in contact with her. She had expressed the desire not to have anything more to do with him and to avoid his becoming aware of her whereabouts.
- [17] Following this a request was made by the solicitors for the deceased to have blood samples taken for the purpose of establishing the deceased's parenthood of the child by DNA analysis. The Applicant by her then solicitors refused saying that the taking of blood made her ill. An appointment had in fact been made for the taking of the blood.
- [18] The correspondence between the representatives of the Applicant and the Respondent seems to have ceased in early 1992.
- [19] There is some evidence that suggests that the deceased may have provided a sample of his blood which was analysed for DNA profiling. However the evidence, which is far from clear, suggests that any sample or results would not now be available. It does not seem that there is any point in considering the making of an order under s.11 and neither party contended for this.
- [20] According to the Applicant the instructions which she gave to her solicitors denying paternity were false and the affidavit which she swore was false. She said that she gave those instructions and swore the affidavit as a means of denying access to the

deceased and for the purposes of obtaining a domestic violence order against him. She said she was concerned she would lose the child. At the time she was very young and she says she was frightened by the thought that the deceased would take the child from her.

- [21] She says however that in the course of the dispute she and the deceased reached an informal agreement the effect of which was that the litigation would not proceed and that he could have regular access to the child whenever he wanted to.
- [22] She says that thereafter the child was sent to Townsville for some of the school holidays where he would spend time with the deceased and sometimes the deceased would come down to see the child in Brisbane. This is accepted by counsel for the insurer who appeared on the application.
- [23] The deceased was killed in a motor vehicle accident at a time when he was going to collect the child for the purposes of having access to him.
- [24] One of the accounts which the Applicant has sworn must be false. Given her preparedness to swear to accounts which suit her purposes at the time it is essential that the court approach her present claim with a good deal of scepticism.
- [25] It was suggested by Thomas J in *Re: Pellitteri* (1991)1 QdR 154 that the court ought not to make a finding of the kind sought here unless it held a “comfortable” satisfaction that the claim of paternity was indeed true. This approach was also taken by White J in *Re: Cressy* (BC9303411 SC Brisbane 2 August 1993 unreported).
- [26] The Applicant was cross-examined. As she pointed out, she refused to take the blood test because she knew that it would establish the paternity of the deceased, something which of course at that time was contrary to where her interests lay. The Applicant was, I thought, very alive to the importance of this point when being cross-examined. Nonetheless it is undoubtedly a valid one.
- [27] There is no evidence of any relationship with any other person. Apart from the period during which the deceased and the Applicant were in conflict they conducted themselves in a way which clearly suggests that the deceased was the father of the child. It is clear that the deceased at all times claimed to be the father of the child.
- [28] The Applicant was, I thought, a convincing witness.
- [29] Notwithstanding the serious question about the veracity of the Applicant raised by what she was prepared to assert and, even more seriously prepared to swear when it suited her on an earlier occasion I am satisfied that the truth lies with her claim that the deceased was the father of the child.
- [30] I declare Barry James Burton (deceased) to be the father of Andrew William Wintour born on 16 January 1991.