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4TH WORLD CONGRESS ON FAMILY LAW AND CHILDREN'S RIGHTS

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- Recently, the Family Court of Australia has had to deal with some particularly cutting-edge issues that go right to the fabric of modern society today.
- When the legislature or parliament has not yet caught up with some of these social developments, then the Family Court, because of its broad welfare jurisdiction, is often confronted to make decisions and policy in respect of issues relating to, what is a parent, relating to gender confusion and also the increasing trend of same sex couples not undergoing legislative approved IVF but actually creating families by consent.
- Some of the cases have called for legislative reform and some have relied upon and referred to international human rights treaties to assist in determination, given the absence of legislative direction.

“Parens Patriae “ - the ancient welfare jurisdiction in contemporary scenarios

section 67Z(1) of the Family Law Act confers jurisdiction on courts to make orders relating to the welfare of children. This gives courts a power that is virtually equivalent to the traditional parens patriae power of the State and territorial Courts. This jurisdiction derives from that formerly exercised by the Court of Chancery in England. Parens Patriae is a doctrine which dates back to the 16th Century and derives from the prerogative of the Crown as literally “parents of the country” to look after classes of subjects who cannot look after themselves including infants.

Generally, all biological parents of children in Australia have common law guardianship rights to be responsible for long-term decisions affecting children’s welfare including their residence and medical treatment. The *Family Law Act 1975* (Cth) (*Family Law Act*) was amended in 1995 to recognise long-term decision making responsibility for all parents notwithstanding “custody and access” arrangements.¹ Other examples exist where it is considered appropriate for the Family Court to determine applications promoting children’s welfare notwithstanding lack of parental consent. For example, a line of case law has developed confirming the power of the Family Court, relying upon its welfare jurisdiction, to deal with matters characterised as specialised medical treatment. In 1992, in *Marion’s Case* the High Court confirmed the welfare power extended to applications to

¹ See *Family Law Act* pt VII, div 2.

sterilise minors with serious intellectual disabilities.² In 1999 a single Judge of the Family Court determined that the welfare jurisdiction extended to a child wishing to undergo a sex change operation notwithstanding the consent of the parents.³

Parental Rights of Homosexual Couples recognised by the Family Court

Child to Lesbian Couple (Re Patrick): A child's right to a relationship with his biological father

In the recent case of *Re Patrick; An Application Concerning Contact* His Honour Justice Guest considered whether a man who donated sperm to a lesbian couple could be considered a parent under the Family Law Act, ("the Act"). The lesbian couple had entered into an agreement with the man prior to insemination that they would be to all intents and purposes, the parents of the child. The lesbian couple placed an advertisement in the local gay press seeking a male willing to provide genetic material to artificially inseminate the mother. The parties met and agreed to commence the process. For the first few months after insemination the parties proceeded amicably, however prior to the birth the parties' relationship became difficult as the role of the biological father would play in the child's life became contested. The mother and co parent withdrew all communication from the father and did not inform him of the birth. The father instituted court proceedings and by agreement he commenced contact with the child, Patrick. Over a period of approximately one year the relationship between the parties further deteriorated until the mother and co parent unilaterally withdrew contact. The father recommenced proceedings at the Family Court of Australia seeking regular graduated contact and the mother and co parent cross applied seeking that the father have no contact with Patrick.

The hearing of this matter ran for 9 days and Justice Guest heard evidence from all parties. He generally preferred the evidence of the father and found the mother to be irrational in her evidence. The major issue of contention was the terms of the agreement entered into by the parties when first discussing the insemination process. Justice Guest preferred the father's evidence that he informed the mother that he wanted to be involved with the child's life for one or two days per week. The father deposed that he had always wanted to be a father and to be involved in the care and support of the child. His evidence was that the mother and co parent agreed to this arrangement. Justice Guest accepted the father's evidence that the parties agreed on this arrangement.

In determining this case Justice Guest called for legislative reform he stated at 653 "It is time that the legislature considered some of the matters raised, including the nature of parenthood, the meaning of family, and the role of the law in regulating arrangements within the gay and lesbian community. The child at the centre of this dispute is part of a new and rapidly increasing generation of children being conceived and raised by gay and lesbian parents. However, under the current legislative regime, Patrick's biological and social reality remains unrecognised. Whilst the legislature may face unique challenges in drafting reform that acknowledges and protects children such as Patrick and the family units to which they belong, this is not a reason for inaction."

at 651 "Gay and lesbian families are a relatively newly recognised, and it seems a growing phenomenon in Australian society. While they represent a minority of families, surveys of lesbian women in NSW have found that approximately 20% have children and over 40% are considering having children in the future.: see V Barbeler "The Young Lesbian Report: A Study of Attitudes

2 *Secretary, Department of Health & Community Services v JWB* [1992] 175 CLR, 218 ('*Marion's Case*').

3 *In Re A* (1993) 16 Fam LR 715.

and Behaviours of Adolscnt Lesbians today.” Twenty Ten Association ,Sydney 1992; Lesbians on the Loose, 1995 Readership Survey, vol 7(3) , p9.

Although gay and lesbian families are increasing they cannot be homogenised into one group for they may take many forms. Children conceived via artificial insemination may have only 2 mothers ,others such as Patrick may have 2 mothers and a father, and others may have 2 mothers and two fathers. Within each of these family forms there may be a variety of involvement in the child’s life.

Justice Guest considered section 68F(1) of the Act, which outlines factors to consider when determining the best interests of the child. He found that the child had a loving relationship with the mother and co parent as his primary carers and found that the child was familiar with his father and had developed a relationship with him. He further determined that all parties had the capacity to care for Patrick. He found that the mother and co parent had an obligation to facilitate contact with the father.

Justice Guest found that the father was not a parent as defined pursuant to the Act despite the fact that the child bore his genetic blue print. He determined that section 60H(3) of the Act provides that a child born of a sperm donor is to be regarded as the child of the biological father and the biological father as parent only if there is specific State law which expressly confers that status on a sperm donor. There are no prescribed laws in any state or territory to that effect. The father in this case therefore fell outside the scope of the definition of parent pursuant to the Act.

Justice Guest found that the mother and co parent were Patrick’s parents. However, Justice Guest found that given the father’s active role in the child’s life, he should be considered a “person interested” in the welfare of the child. He was therefore entitled to have certain parental responsibilities conferred upon him, including regular contact with the child.

Justice Guest identified the need for State laws to be enacted to make available to lesbian women and their known donors a well regulated artificial insemination scheme with all the medical safeguards available to heterosexual couples. He further suggests that section 60(H) be amended to safeguard the interests of co parents and known “sperm donors” in contested residency and parenting cases.

The case entitled: Child to Male Homosexual Couple (Re Mark): Parental Responsibility of a Sperm Donor was heard after Re: Patrick by a single Judge of the Family Court

At issue in *Re Mark; An Application Relating to Parental Responsibilities* was who should have responsibility for the care, welfare and development of Mark, a one year old child born in the United States. The applicants, Mr X and Mr Y, were a gay couple who travelled to the United States to arrange a surrogate agreement with Mr and Ms S. In 1992 Ms S gave birth to Mark, who was conceived from a donor egg from an anonymous donor and the sperm of Mr X pursuant to the surrogate agreement. Mr X was listed as the child’s father on his birth certificate with Ms S as the child’s mother. Pursuant to the surrogacy agreement Ms S and her husband Mr S agreed to relinquish all their rights as parents of the child. This agreement is not legally recognised in Australia.

Her Honour Justice Brown found that Mr Y was clearly not a parent of the child, but rather was a person concerned with Mark's care, welfare and development. Her Honour Justice Brown disagreed with Justice Guest's reasoning in *Re Patrick* that the definition of 'parent' is dependent on State legislation recognising the parental role of sperm donors. She determined that the definition of 'parent' within the Act is broad. Although Her Honour suggested it was open to her to find Mr X a parent she refrained from doing so. She did this on the basis that the case before her was uncontested and she did not hear any arguments opposing such a finding. In circumstances when determining that Mr X was the parents of the child could impact on the rights of sperm donors in general she elected not to make such a finding.

Her Honour Justice Brown noted that the realities of Mark's life indicated that Mr X was his parent. Her Honour granted a parenting order on the basis of Mr X's role as a person concerned with Mark's care, welfare and development. She made orders that both men be responsible for the long term welfare of the child.

The reluctance of Her Honour Justice Brown to find that Mr X was a 'parent' of Mark under the *Family Law Act* appears to have been influenced by the impact that such a finding would have on sperm donors and people involved in artificial conception procedures, and the responsibilities or entitlements that could be imposed on them as a result. Her Honour Justice Brown was of the view that given the social and legal complexity of the matter, it was inappropriate for it to be the subject of judicial development. Like Justice Guest, she also recommended that this area of law be reconsidered by the legislature.

Authorisation for teenager to commence treatment for gender dysphoria

In the recent case of *Re Alex*, Chief Justice Nicholson ruled that a 13 year old biological girl was able to commence treatment for gender dysphoria, or 'transsexualism'. In this case the child had always identified as a male, wore male clothes, used the male toilets and otherwise presented as a male. The Chief Justice found that the child was able to enrol at school using a male name, and commence administration of the oral contraceptive pill to stop menstruation immediately. He further ordered that the child, in consultation with his treating medical practitioners was able to commence irreversible hormonal treatment at a later date but prior to his 18th birthday. The proposed treatment would stimulate facial hair growth, masculinization of his voice and physique and lengthening of the clitoris.

The Chief Justice determined that this type of medical treatment fell outside the scope of parental authority and that it is necessary to obtain court approval before commencing such treatment on a child. This decision extends the category of 'special medical procedure' cases which have traditionally focused on proposed non-therapeutic sterilization of intellectually disabled girls. In considering whether to approve the proposed treatment the court must consider a number of factors as follows:

- The particular condition of the child or young person which requires the procedure or treatment.
- The nature of the procedure or treatment proposed.
- The reasons for which it is proposed that the procedure or treatment be carried out.
- The alternative courses of treatment that are available in relation to that condition.

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- The desirability of an effect of authorising the procedure for treatment proposed rather than available alternative.
 - The physical effects on the child or young person and the psychological and social implications for the child or young person of authorising the proposed procedure or treatment or not authorising the proposed procedure or treatment.
 - The nature and degree of any risk to the child or young person of authorising the proposed procedure or treatment or not authorising the proposed procedure or treatment.
 - The views (if any) expressed by the guardian(s) of the child or young person, a person who is entitled to the custody of the child or young person, a person who is responsible for the daily care and control of the child or young person, and the child or young person himself, to the proposed procedure or treatment and to any alternative procedure or treatment.

In considering these factors the Court will determine each fact or situation individually with a focus on the best interests of the particular child. After considering evidence from the child's medical practitioners including psychiatric reports the Chief Justice determined that it was in the child's best interests to undergo the procedure. The medical evidence suggested that the child was at risk of self harm if the treatment was not commenced. The Chief Justice ordered that the treatment be approached in two stages, with the irreversible treatment to take place after the child turned 16. This would allow time for the child to undergo continuing psychiatric treatment and therapy and to ensure that the child was ready to commence the irreversible treatment process.

This decision highlights the ability of the Family Court to consider sensitive issues with a focus on the rights of the child in the particular factual circumstances. This decision is very fact specific and does not support the proposition that the court will allow all children wishing to undergo gender realignment treatment to commence the procedure. Rather, the court will consider each individual case on the merits.

Parens Patriae and Children in Detention

In the case of *B and B "Children in Immigration Detention"*, the Full Court of the Family Court determined that the Family Court of Australia, had jurisdiction to make orders in respect of non citizen children held in immigration detention as part of a general discretionary welfare over all children. The Full Court considered that the welfare provisions of the Family Law Act incorporated specific articles of the United Nations Convention on the Rights of the Child to which Australia is a signatory. This meant that the detention of children was counter to the welfare provisions of the Family Law Act, as the detention breached several articles of the Convention.

This decision was then appealed to the High Court by the Attorney General. The High Court rejected the Full Court's analysis that the inherent welfare power overrode any or all other powers over children such as to detain them in immigration detention centres. The High Court determined that the Australian Constitution did not confer jurisdiction on the Family Court to make 'parenting' orders against a third party with no parenting nexus to the children. In this case, the Department of Immigration, Multicultural and Indigenous Affairs was not the guardian of the children and could not be considered to be exercising parenting powers in

detaining children in immigration detention. In his minority decision Justice Kirby found that whilst international human rights treaties do form part of Australia law, they cannot override the express intention of the legislature. In this case the legislature expressly provided for the detention of children in the provisions of the Migration Act.

The High Court' decision has limited the scope of the Family Court to make orders concerning the general welfare of children. The Family Law Act only has jurisdiction over third parties who can be classified as exercising "parenting" responsibilities over the child. In real terms it remains to be seen whether this decision will have any practical effect on the majority of cases before the court.

Conclusion

These cases are a small example of the range of matters dealt with by the Family Court on a regular basis. Central to the cases is the emphasis on the best interests of the child in making decisions concerning children's welfare and calling upon ironically, a 16th century inherent power to deal with developments in modern society including determining what is a parent in the changing concept what is a family.. The Family Court has been presented with situations which are 'ahead' of legislation and therefore require careful analysis and determination of the likely effect of the decision on Australian Society at large. Being able to respond to the changing nature of Australian Society is a strength of the Family Court. It would be against the interests of all Australian children to limit the jurisdiction of the Family Law Act.