

Family Court of Australia and Contemporary trends in Australian Society

In recent times the Family Court of Australia has dealt with cases involving issues which reflect the changing nature of modern Australian society. 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 directive. These cases include extending the definition of 'parental responsibility', authorisation of treatment for gender dysphoria on an adolescent and ordering the release of children in immigration detention.

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 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 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. An agreement was initially reached whereby the biological father would have limited contact with the child, however relations deteriorated between the parties and the mother and co parent refused the biological father contact.

His Honour Justice Guest found that pursuant to section 60H(3) of the *Family Law Act*, the father was not a parent despite the fact that the child bore his genetic blue print. He was to be considered a "person interested" in the welfare of the child. He was therefore entitled to have certain parental responsibilities conferred upon him within section 61 D (1) of the act. His Honour Justice Guest ruled that it would be in the child's best interest for the biological father to have contact with the child. He made orders to this effect.

Child to Male Homosexual Couple (Re Mark): Parental Responsibility of a Sperm Donor

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.

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. The main issue for the Court was whether Mr X was a parent within the meaning of the *Family Law Act*.

Mr X was recorded on Mark's birth certificate as Mark's father.

Her Honour Justice Brown disagreed with the reasoning of Justice Guest in *Re Patrick*, and made the following comments, qualifying the previous decision:

- » Section 60H(3) of the Act does not provide an exhaustive definition of 'parent' in the context of the *Family Law Act*. Section 60H enlarges rather than restricts the definition of parent.
- » Where not otherwise defined 'parent' can be given its ordinary meaning.
- » The *Family Law Act* should not be read in light of presumptions or definitions arising from State and Territory law.

Her Honour Justice Brown noted that the realities of Mark's life indicated that Mr X was his parent. Furthermore, she suggested that it was open to her to find that Mr X was a parent for the purposes of *the Act*. However, Her Honour Justice Brown refrained from making a positive finding on the issue. Instead, she granted a parenting order on the basis of Mr X's role as a person concerned with Mark's care, welfare and development.

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.

These two cases highlight the need for legislative clarification of the definition of 'parent' in light of changing notions of family structure and the development of various modes of conception, such as artificial insemination.

Recognition of Transsexual Marriage

In *Re Kevin* the Full Court of the Family Court upheld a first instance decision that recognised the right of a transsexual person to marry in Australia. In this case Kevin was a postoperative female to male transsexual who married Jennifer in a civil ceremony. The court found that for the purposes of the Marriage Act the sex of the person wanting to marry is to be determined at the date of the marriage and not at the date of birth. This overturns the longstanding English precedent that the true sex of a person is fixed at birth and that a postoperative transsexual retains their birth sex in despite their sex change procedure. The court further determined that in Australia marriage is not intrinsically linked to procreation. However the court made no findings in respect of the rights of preoperative transsexuals nor the rights of homosexual people wishing to marry.

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 further 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. He further determined that the child in this case did not have sufficient understanding to consent to the treatment on his own right, given the complexities of the issues involved.

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, pursuant to section 67ZC of the *Family Law Act* had jurisdiction to make orders in respect of non citizen children held in immigration detention. The Full Court considered that aspects of the United Nations Convention on the Rights of the Child had been incorporated into the welfare provision (section 67ZC) of the *Family Law Act*. The decision has been appealed to the High Court, but the decision has been reserved.

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