MASSON v PARSONS & ORS (S6/2019)

Court appealed from: Full Court of the Family Court of Australia
[2018] FamCAFC 115

Date of judgment: 28 June 2018

Special leave granted: 19 December 2018

The Respondent mothers were married in New Zealand in 2015. The First Respondent is both the biological and birth mother of two girls, B and C, now aged around 11 and 10. B and C were conceived by artificial insemination. Both girls live with the Respondent mothers, but they have also spent regular time with the Appellant whom they call "Daddy". The Appellant is also B's biological father and is registered on her birth certificate as such. The identity of C's biological father is unknown, but s 60H of the *Family Law Act 1975* (Cth) ("the Federal Act") deems the Second Respondent to be her other "parent". She is shown as such on C's birth certificate.

The Respondent mothers wanted to relocate to New Zealand (with the girls), but that move was opposed by the Appellant. On 3 October 2017Justice Cleary restrained the Respondent mothers from moving overseas. In doing so her Honour applied s 60H(1)(a) of the Federal Act, holding that the Respondent mothers were *not* in a de facto relationship at the time of the artificial conception of B. This had the consequence that the Appellant, not the Second Respondent, was deemed to be her legal parent.

Upon appeal, the main issue concerned whether the Appellant was a "parent" of B within the meaning of the Federal Act. The Respondent mothers submitted that Justice Cleary erred in failing to recognise that s 79 of the *Judiciary Act 1903* (Cth) ("the Judiciary Act") required her Honour to apply the *Status of Children Act 1996* (NSW) ("the State Act"), the effect of which being that the Appellant was conclusively presumed *not* to be B's father. Section 14 of the State Act lays down a series of presumptions of parentage of children born as a result of an artificial conception procedure. Relevantly s 14(2) of that Act states:

If a woman (whether married or unmarried) becomes pregnant by means of a fertilisation procedure using any sperm obtained from a man who is not her husband, that man is presumed not to be the father of any child born as a result of the pregnancy.

Section 14(4) of the State Act then states that such a presumption is considered to be irrebuttable.

On 28 June 2018 the Full Court of the Family Court (Thackray, Murphy & Aldrige JJ) unanimously upheld the Respondent mothers' appeal. Their Honours held that ss 14(2) & 14(4) of the State Act applied, unless a Federal law otherwise provided. They further found that s 14 of the State Act, which determines whether a man can be regarded as the father of a child, must be applied where that question arises in a federal jurisdiction. As the presumption in s 14 is irrebuttable, and as the Appellant was neither married to, nor in a

de-facto relationship with the First Respondent, he was therefore presumed *not* to be B's father. He consequently ought not to have been treated as being her parent for the purposes of the Federal Act. Their Honours also rejected the submission, advanced by the Appellant, that a child is capable of having more than two parents.

On 8 January 2019 the Appellant filed a section 78B Notice in this matter. Both the Attorney-General of the Commonwealth and the Attorney-General of Victoria have filed a notice of intervention.

The grounds of appeal are:

- The Full Court erred in holding that the primary judge failed to apply the relevant law in determining whether the Appellant was a legal parent of the child, B, and in particular, erred in holding that section 14 of the State Act was binding on the primary judge by reason of section 79 of the Judiciary Act.

- The Full Court erred in holding that the primary judge failed to apply the relevant legal principles and/or the relevant legislative pathway in determining the Respondent mothers' application to relocate to New Zealand with both of the children and, in particular, erred in holding that the primary judge proceeded from the erroneous basis that the Appellant was the parent of the child, B.