

It reminds you of a tricky exam question. An unmarried couple with two children separated in mid-1994 shortly after one partner received an inheritance. In addition to a contested dispute over property issues which met with negligible success, there was a Supreme Court trial over the purported promise of one partner to provide financial support for the children who were aged about six and four years at the time of judgment. The claimant with care of the children was awarded a lump sum of \$151,125 towards the cost of maintaining the children until they reached 18 years of age. The amount was determined with reference to a report prepared for the

case by Professor Peter McDonald based on the Expenditure Survey Approach (Lee Scale) to the costs of children, a measure used in child maintenance cases.¹ The trial Judge expressed a tentative view that the defendant should pay the applicant's costs, a matter that was the subject of further submissions at the time of writing.

Why did the existence of a promise matter? Why didn't the Child Support (Assessment) Act 1989 (Cth) or the Family Law Act 1975 (Cth) apply? These issues and their implications are discussed in this casenote on *W v G*, an as yet unreported decision of Justice Hodgson in the Supreme Court of New South Wales, handed down on 2 February 1996.

The Parties and the Nature of the Claim

Both parties are women who had been living together in a lesbian relationship for most of the time since March 1986. The money was sought by W in relation to children she had conceived by administering the sperm of a donor known to the women, while she was living with G. The donor agreed to provide

Paying for the Promise of Co-Parenting

A Case of Child Maintenance in Disguise?

DANNY SANDOR analyses a surprising recent decision of the New South Wales Supreme Court where a mother of two children received over \$150,000 'compensation' from her partner because the partner broke a promise to provide financial support for the children

the sperm on the basis that he would have no involvement with or responsibility for the children. G went to Canada after the separation and W had sole care of the children.

W brought an action for compensation in the Equity Jurisdiction of the Supreme Court. This is a jurisdiction that has the discretion to fill gaps in the common law and statute by providing remedies that recognise deeds done in good faith, even when there is no formal legal right to be enforced.

In this case, W convinced Hodgson J of the necessary elements to a cause of action called 'promissory estoppel' – a promise that G should not be allowed to walk away from. The Judge found the necessary elements of that cause of action were proven: G had promised to accept the role of a parent in a financial way; relying on G's promise, W had decided to have the children; G had known or intended that W would do so on the basis of that promise; W has and will suffer detriment in that she is now faced with the expensive and onerous task of raising the children alone; and G should now be required to fulfil her promise by making a financial contribution towards the children's support.

The Child Support (Assessment) Act

The financial support of children is the subject of specific Commonwealth Government legislation covering children of a marriage and, save for Western Australia, ex-nuptial children whose parents have separated. The Child Support (Assessment) Act establishes the pre-eminent scheme and it applies in relation to children born after 1 October 1989 and parents who separated after that date. The Act basically enables a person who has equal or substantial care of the child (whether biologically related to the child or not) to seek child

support from a 'parent' using an administrative process rather than litigation. A parent for these purposes is defined in the Act by its ordinary (biological) meaning and includes an adoptive parent.

The other mother

G does not come within the legal category of a parent and W cannot seek a child support assessment against her.

Varying the facts of *W v G* illustrates some odd results. If G instead of W had been left to care for the children, W as the biological mother would have been a 'liable parent' within reach of the Child Support Scheme. This would have been so regardless of the reasons for W having conceived and given birth to the children. No legal costs would have had to be incurred unless, perhaps, the child support assessment was disputed. W's biological relationship with the children would have been the determining factor for child support liability and G's caregiving role, of itself and unrelated to any previous relationship with W, would have enabled her to apply.

If G had been a male lover living with W, and the children had been conceived by W

using the same private arrangement with a sperm donor, G would legally be the parent, in the absence of a Court finding proof that G did not consent to the procedure.

However, if G had been a male lover, who had never lived with W, and the children had been conceived by W in the same circumstances, G would be immune from liability under the Child Support Scheme, as would the sperm donor, and W would have to seek some other remedy.

The sperm donor

The child support legislation purports to take account of circumstances where the child has been conceived through artificial insemination. In such cases, the Family Law Act and any State or Territory legislation becomes relevant.

In *W v G*, Hodgson J was referred to the Artificial Conception Act 1984 (NSW) which contains a conclusive legal presumption that where a woman becomes pregnant by means of artificial insemination, 'for all purposes' the sperm donor is not the father of the child unless he is the legal husband or 'living with' the mother on a 'bona fide defacto basis'. There is no definition of 'artificial insemination' in the New South Wales Act, nor for that matter in the relevant Acts of other jurisdictions, and the parties in this case apparently were in agreement that the procedure here amounted to 'artificial insemination' (at p.34 of the judgment). His Honour rejected public policy arguments on behalf of G that this presumption should not apply where the donor is known.

An implication of the decision is that even a known donor, in New South Wales at least, has no liability under the Child Support (Assessment) Act, provided the method is 'artificial insemination'. This begs the question of what is 'natural' as well as what is 'artificial' (Millbank (1996) notes that many women prefer to call the process 'alternative insemination'), and the likely surge in discussion on the subject as a result of this case will make for interesting reading.

For women who would prefer to conceive with the assistance of a known sperm donor² rather than using anonymous sperm or a one-night stand, the decision may be welcomed as improving the willingness of such men to provide 'no-strings-attached' assistance. But relying on the ruling would be brave.

Legally, Hodgson J's approach to the immunity of a known sperm donor is unlikely to be followed. If the matter arose again, a concession between the parties may not be so easily made. A different view would probably also be taken about public policy considerations and the Commonwealth Attorney-General might be expected to intervene. It would be contrary to government policy for men effectively to be able to 'contract out' of child support obligations where insemination occurs other than as a result of intercourse. Courts would face the absurdity of paternity disputes raising contested matters of fact as to the circumstances of insemination.

The Family Law Act

Just because W could not resort to the Child Support Scheme does not mean that relief was necessarily confined to the Equity Jurisdiction of the Supreme Court.

Could an application have been brought?

There appears to have been no argument in *W v G* that an application could, and perhaps should, have been brought under the Family Law Act, which enables orders for the maintenance of a child, including lump sum maintenance, where the Child Support (Assessment) Act does not apply.

Although the definition of parent is affected by similar considerations to those noted for the Child Support (Assessment) Act, child maintenance under the Family Law Act can be sought from a person other than a 'parent'. This is because the relevant provisions of the Act merely refer to 'applicants' and 'respondents' to an application; parental status is not expressly required.

The Family Law Act does not define the concept of 'maintenance', and the objectives of child maintenance provisions are not exhaustive in relation to who may be required to provide maintenance. On one hand, the relevant legislation states the principle that the parents of a child have the primary duty to maintain a child and that step-parents have a secondary duty. On the other hand, the Family Law Act does not expressly exclude a duty on other people to contribute and allows the Court to make such order as is 'proper'. Nothing in the recent amendments introduced by the Family Law Reform Act 1995 alters this position.

No reported cases of an order against someone who is legally not a parent could be found in researching this casenote, but the issue of claiming from a person who cannot be regarded as a legal 'parent' was no more of a decided matter under the Family Law Act than under the law of promissory estoppel sought by W. Moreover, the reasons of Hodgson J do not indicate that he was asked to consider the question of any obligation by another party, such as G, in relation to the arguably relevant sections of the Family Law Act. There was, however, a question of inconsistency identified by Hodgson J between the Family Law Act and the Artificial Conception Act about which his Honour decided submissions were not necessary.

Should an application have been brought?

If the Family Law Act covers the circumstances in *W v G*, three important matters arise and strongly discourage further Supreme Court cases like this one, in preference of applications under the Family Law Act.

First, there is a strong argument that child maintenance was the substance if not the form of the proceedings in *W v G*, and that W's application was really child maintenance in disguise. (For a different illustration of this see *Hayne and Hayne* (1994) FLC 92-512 per Mullane J, not cited in *W v G*.)

If W's application is seen as a maintenance application then it should, not just could, have been brought under the Family Law Act. This is because the Commonwealth Government has legislated to 'cover the field', and section 63A of the Family Law Act requires that proceedings for the financial support of a child must only be brought under the Family Law Act if the Child Support (Assessment) Act does not apply.

Second, an application under the child maintenance provisions of the Family Law Act in the Family Court would attract the use of the Court's dispute resolution services such as conciliation and mediation. These services often have success in settling the dispute and/or reducing the hostility between parties. If the matter went to trial, and the ambit of the dispute were narrower, lower total legal costs would probably result. While perhaps less of a consideration in this case because of G's inheritance, costs have the potential to severely reduce the resources available for redistribution.

W could also have applied to have the property proceedings decided in the Family Court. Cross-vesting laws enable the various superior courts of Australia (such as the Family Court and the State and Territory Supreme Courts) to exercise each other's jurisdiction to avoid the extra costs of having to go to different courts for the resolution of related disputes.³ Significant recent examples include cross-vested claims for damages arising from spousal abuse and child sexual assault.⁴

The final and particularly profound consideration is the socio-legal construction of children. As a child maintenance application under the Family Law Act, the case would probably have been argued with a more child-centred focus on the proper needs of the children and the financial contributions that ought to be made by the parties.⁵ Instead, the application as brought by W relied on proving an unconscionable dishonoured deal between adults alone to the detriment of one of the adults.

Such a characterisation is unacceptable in two major ways.

First, the 'deal' under examination is couched in terms that only incidentally concern children as individuals within a network of relationships. As a matter of law, the promise between the women themselves, and its consequences, could just as well have been about the purchase of buildings by a couple planning a joint development project – a commodity, a financial or property commitment. In making this point, it is not suggested that Hodgson J approached the matter from such a perspective, but rather that this was the branch of law he was asked to apply.

Second, in relation to finding the element of 'detriment', courts are at risk of being asked to undertake an inappropriate inquiry for which they are not equipped. It was submitted for G that it was contrary to public policy to hold that a woman has acted to her detriment in allowing a normal pregnancy to continue. Hodgson J may be seen to have taken a sensible and pragmatic approach when he said that he considered it was not necessary in the case 'to find that the plaintiff is worse off having had the children than she would have been if she had not had them, all things considered; thereby raising both difficult public policy issues as well as difficult issues of balancing benefits and detriments' (at pp. 43–44 of the judgment).⁶

Conclusion

Contrary to the emphasis in press coverage of the case,⁷ the sexual orientation of the parties *per se* did not determine the courses of action available. This is not to discount the force of analyses highlighting the discriminatory consequences of heterosexist 'family' definitions for lesbian and gay families which may impose liabilities without rights (Millbank 1996; Nicholson 1995; Katzen 1994; Lesbian and Gay Rights Service 1993). The number of such families is not known but one recent Australian poll indicates that 19 per

cent of the 732 lesbians surveyed were already mothers and a further 12 per cent of childless lesbians said they planned to have children within the next five years.⁸

This casenote highlights the ways in which *W v G* has additional dimensions and implications, particularly with respect to what 'artificial insemination' means in law. To the extent that falling outside the administrative provisions of the Child Support Scheme is seen as a disadvantage (Alexander 1995; Graycar 1989), the case highlights the access to justice anomalies that arise from having children through insemination arrangements. Whether and (if so) how the Child Support Scheme should provide a mechanism that avoids court-based litigation and the inconsistencies highlighted above is a matter that includes and extends beyond lesbian and gay families.

Whatever the merits of the strategy used for W, and the justice of the case as seen by Hodgson J, the form of action in this case does not encourage the socio-legal recognition of lesbian and gay *families*, or other family forms where the circumstances of procreation do not reflect the associated relationships. *W v G* is a case about the law of enforceable promise, developed in relation to economic loss. It extends the reach of promises to undertakings that concern children but, in doing so, it treats them legally, as merely a further class of objects which lead to financial detriment.

It is also questionable whether the case was correctly brought or the meaning of 'artificial insemination' was correctly decided. *W v G* should neither inspire similarly framed cases in the Equity jurisdiction of the Supreme Court, nor prompt men to offer to be private sperm donors.

Prima facie, cases such as this and other financial support claims against those who are legally 'non-parents' ought to be decided under the Family Law Act. Neither law nor social policy suggests otherwise. Any uncertainty about the Family Law Act's binding

jurisdiction with respect to financial contribution towards the costs of children where the Child Support (Assessment) Act does not apply should be clarified at the earliest possible opportunity.

In any future application or an appeal, Hodgson J's view of the meaning of 'artificial insemination', the non-liability of known sperm donors, and public policy considerations need not be followed. It would be valuable to hear from women who view the decision in *W v G* favourably in terms of being more able to persuade a man they know to donate sperm. A representative organisation granted leave to intervene would risk an order for costs against them, and their submission would have to compete with a rather fierce government policy oriented towards protecting the public purse by preventing exemption from support obligations.

References

Alexander L. (1995), 'Australia's Child Support Scheme: much promised, little delivered?', *Family Matters*, no. 42, pp. 6-11, Spring/Summer.

Graycar, R. (1989), 'Family law and social security in Australia', *Australian Journal of Family Law*, vol. 3, no. 1, pp. 70-92 at 86-87.

Katzen, H. (1994), 'The bride wore pink', in *Congress Papers of the First World Congress on Family Law and Children's Rights*, pp. 721-731, Sydney.

Lesbian and Gay Rights Service (1993), 'The bride wore pink: legal recognition of our relationships: a discussion paper', Lesbian and Gay Rights Service, Sydney.

Millbank, J. (1996), 'The parent trap', *The Weekend Australian*, p. 20, 10-11 February.

Nicholson, A. (1995), 'Perceptions of the Australian family', *St Mark's Review*, pp. 11-16, Summer.

Notes

¹ The Lee and Lovering scales and their differences were discussed by the Full Court of the Family Court in *Streets and Streets* (1994) FLC 92-509. Updated costs of children figures appear regularly in *Family Matters*.

² For those who seek access to clinical methods, identification as a lesbian often excludes access.

³ See the decisions of the Family Court of Australia in *Chapman v Jansen* (1990) FLC 92-139, and *Kenda v Johnson* (1992) FLC 92-331, as to the approach in deciding such applications.

⁴ See recent first instance cases in the Family Court of Australia, such as *Marsb v Marsb* (1994) FLC 92-443 per Coleman J; *W v W*; *R and G* (1994) FLC 92-475 per Brown J; and *Schmidt and Schmidt* (1995) FLC 92-613 per Murray J.

⁵ The general approach is described by the Full Court of the Family Court in *Mee and Ferguson* (1986) FLC 91-716.

⁶ In comparison, see *Cooke v Cooke* (1986) DFC 95-039 per Southwell J in the Supreme Court of Victoria where the defacto wife claimed that she changed her mind about having an abortion after her defacto husband gave certain financial assurances. Even though his Honour found on the facts this argument could not succeed, he stated, without further basis, that if it were necessary to do so, he would accept the submission that it would be contrary to public policy to hold that a woman acted to her detriment in deciding to allow a normal pregnancy to continue (at p. 75,443).

⁷ See, for example, 'Two mums few rights', in *The Australian*, 20 February 1996, pp. 15-16.

⁸ 'Lesbians plan children', citing figures released by Significant Others marketing consultancy, in *The Australian*, 22 February 1996, p. 3.

Danny Sandor is the Legal Associate to the Chief Justice of the Family Court of Australia.

JOINT ADOPTION BY SAME SEX SPOUSES IN CANADA

The Ontario Court of Justice has expanded the meaning of 'spouses' for the purposes of adoption applications to include same sex couples in a 'conjugal relationship'. In *Re K 15* (4th) 129, there were applications by four lesbian couples, each seeking to adopt children conceived by one of the partners of each couple, using insemination methods.

The local law permitted an adoption application by 'one individual' or 'jointly by two individuals who are spouses of one another'. There was no bar to unmarried heterosexual couples or an individual lesbian (or gay man) applying for adoption, but the practical problem here was that the non-birth mother could not apply as an

individual without extinguishing the birth mother's legal connection to the child.

The nub of the case was whether same sex couples should have the right to *ask* for joint adoption. The trial Judge decided that they should. The expert social science evidence laid before the Court emphatically rejected any suggestion that the sexual orientation of a couple in itself has any bearing on the capacity to meet the best interests of a child. The Court found that to restrict the meaning of 'spouse' to heterosexual relationships was unconstitutional discrimination and infringed the *Canadian Charter of Rights and Freedoms* (see Wilcox 1993 for a general discussion of the Charter). Their applications went on to be

determined on the basis of whether, for each of the children in question, joint adoption was in the child's best interest.

A tantalising matter which was briefly mentioned in the judgment is whether a spousal relationship should necessarily underlie a joint adoption application. Aside from customary law issues, the question challenges our assumptions and the law's traditional reliance on sexual relationships and cohabitation as the foundation for an environment which nurtures children positively.

Reference

Wilcox, The Hon. Justice Murray (1993), *An Australian Charter of Rights?*, Law Book Company, Sydney.

— DANNY SANDOR