IN THE SUPREME COURT OF NEW ZEALAND

SC CIV 27/2004
[2005] NZSC 47

BETWEEN	JOHN HEMMES Appellant
AND	JOHN PATRICK YOUNG Respondent

Hearing: 23 June 2005

Court: Elias CJ, Gault, Keith, Blanchard and Tipping JJ

Counsel: C P Browne for Appellant
S W Hughes for Respondent

Judgment: 15 July 2005

JUDGMENT OF THE COURT

A. The appeal is allowed.

B. All orders made below are set aside.

C. The proceeding is struck out.

D. The respondent is to pay costs to the appellant in the total sum of $25,000.00 (to cover all Courts) plus disbursements in each Court to be fixed, if necessary, by the respective Registrars.

REASONS

(Given by Tipping J)

Introduction

[1] The issue in this case is whether an adopted person can obtain a declaration under s 10 of the Status of Children Act 1969 that the relationship of father and child exists between himself and a man whom he claims to be his biological father. The Courts below have all held (the Court of Appeal by a majority) that such a declaration can be sought and obtained. In agreement with O'Regan J, who dissented in the Court of Appeal, we have come to the opposite conclusion.

[2] The issue comes to this Court on an application to strike out a proceeding in which the respondent, Mr John Young, seeks a declaration under s 10 against the appellant, Mr John Hemmes on behalf of himself and his now deceased[1] twin sister. Associate Judge Lang refused to strike the proceeding out.[2] His decision was affirmed on review by Paterson J.[3] An appeal to the Court of Appeal by Mr Hemmes was dismissed (Hammond and William Young JJ; O'Regan J dissenting).[4] Our conclusion is that the proceeding should be struck out on the basis that the High Court cannot in law grant the declaration sought.

[3] Mr Young and his sister were born on 3 November 1953. He contends that Mr Hemmes is their biological father. On 19 December 1958 an adoption order was made under the Adoption Act 1955, pursuant to which Mr Young and his sister were adopted by their biological mother and her husband, Robert Young. We will examine the statutory consequences of the adoption order in more detail later. For the moment it is sufficient to say that, save for presently immaterial exceptions, s 16(2) of the Adoption Act provides that, on the making of an adoption order, the child concerned ceases for all purposes (whether civil, criminal or other) to be the

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1 See the final clause in s 10(1).
2 [2003] NZFLR 1009.
3 [2004] NZFLR 259.
4 [2005] NZFLR 152.

child of his biological parents and becomes for all purposes the child of his adoptive parents. The question is whether, in light of the adoption, the Court has power to make the declarations sought. If there is no such power the proceeding should be struck out because, even if Mr Young proves that Mr Hemmes is the biological father of himself and his sister, the law would not entitle the High Court to grant the declarations he seeks. For simplicity we will henceforth omit reference to Mr Young's sister. The position in her case must be identical to that in his.

The key legislation

[4] As the case turns substantially on the provisions of s 10 of the Status of Children Act and s 16(2) of the Adoption Act, it is convenient to reproduce them here.

> **10 Declaration as to paternity**
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> (1) In this section, eligible person means a person—
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> (a) who is a woman and who alleges that a named person is the father of her child; or
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> (b) who alleges that the relationship of father and child exists between the person and another named person; or
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> (c) who wishes to have it determined whether the relationship of father and child exists between 2 named persons, and has a proper interest in the result.
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> (2) A Family Court or the High Court may make a declaration of paternity (whether the alleged father or the alleged child or both of them are living or dead) if—
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> (a) an eligible person applies to the Court for the declaration; and
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> (b) it is proved to the Court's satisfaction that the relationship exists.
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> (3) A Court considering an application under subsection (2) may, either on its own initiative or on an application for the purpose by a party to the proceedings, make a declaration of non-paternity (whether the alleged father or the alleged child or both of them are living or dead) if it is proved to the Court's satisfaction that the relationship does not exist.
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> (4) If a declaration of paternity under subsection (2) is made after the death of the father or of the child, the Court may, at the same or any later

time, make a declaration determining, for the purposes of section 7(1)(b), whether any of the requirements of section 7(1)(b) have been satisfied.

(5) If an application under subsection (2) is made—

(a) to a Family Court, the provisions of the Family Proceedings Act 1980 (except sections 47 to 50) apply to the application as if it were an application for a paternity order under section 47 of that Act:

(b) to the High Court, the provisions of the Declaratory Judgments Act 1908 apply to the application.

(6) Every question of fact that arises in applying any of subsections (2) to (4) must be decided on a balance of probabilities.

16. Effect of adoption order

…

(2) Upon an adoption order being made, the following paragraphs of this subsection shall have effect for all purposes, whether civil, criminal, or otherwise, but subject to the provisions of any enactment which distinguishes in any way between adopted children and children other than adopted children, namely:

(a) The adopted child shall be deemed to become the child of the adoptive parent, and the adoptive parent shall be deemed to become the parent of the child, as if the child had been born to that parent in lawful wedlock:

Provided that, where the adopted child is adopted by his mother either alone or jointly with her husband, the making of the adoption order shall not prevent the making of an affiliation order or maintenance order, or of an application for an affiliation order or maintenance order, in respect of the child:

(b) The adopted child shall be deemed to cease to be the child of his existing parents (whether his natural parents or his adoptive parents under any previous adoption), and the existing parents of the adopted child shall be deemed to cease to be his parents, and any existing adoption order in respect of the child shall be deemed to be discharged under section 20 of this Act:

Provided that, where the existing parents are the natural parents, the provisions of this paragraph shall not apply for the purposes of any enactment relating to forbidden marriages or civil unions or to the crime of incest:

(c) The relationship to one another of all persons (whether the adopted child, the adoptive parent, the existing parents, or any other persons) shall be determined in accordance with

the foregoing provisions of this subsection so far as they are applicable:

(d) The foregoing provisions of this subsection shall not apply for the purposes of any deed, instrument, will, or intestacy, or affect any vested or contingent right of the adopted child or any other person under any deed, instrument, will, or intestacy, where the adoption order is made after the date of the deed or instrument or after the date of the death of the testator or intestate, as the case may be, unless in the case of a deed, instrument, or will, express provision is made to that effect:

(e) Subject to the Citizenship Act 1977, the adoption order shall not affect the race, nationality, or citizenship of the adopted child:

(f) The adopted child shall acquire the domicile of his adoptive parent or adoptive parents, and the child's domicile shall thereafter be determined as if the child had been born in lawful wedlock to the said parent or parents:

Provided that nothing in this paragraph shall affect the domicile of origin of the child:

(g) In any case where the adoption order was made before the adopted child attained the age of 3 years, the child's domicile of origin shall be deemed to be the domicile which he first acquired under paragraph (f) of this subsection upon the making of the adoption order, but nothing in this Act shall affect the domicile of origin of an adopted child in any other case:"

(h) Any existing appointment as guardian of the adopted child shall cease to have effect:

(i) Any affiliation order or maintenance order in respect of the adopted child and any agreement (not being in the nature of a trust) which provides for payments for the maintenance of the adopted child shall cease to have effect:

Provided that, where the adopted child is adopted by his mother either alone or jointly with her husband, the order or agreement shall not cease to have effect by reason of the making of the adoption order:

Provided also that nothing in this paragraph shall prevent the recovery of any arrears which are due under any order or agreement at the date on which it ceases to have effect as aforesaid.

[5] As can be seen, s 10(2) of the Status of Children Act, as it now stands, provides that on the application of an eligible person the High Court (or a

Family Court) may make a declaration of paternity.[5] Section 10(1) defines eligible person to include a person who alleges that "the relationship of father and child" exists between himself and another named person. The declaration may be made if the necessary relationship is proved to the Court's satisfaction. Hence a declaration of paternity within the meaning of s 10 is concerned with "the relationship of father and child". The Court may declare that such a relationship exists between the parties or, if satisfied of the absence of the asserted relationship, may declare that it does not exist. The latter declaration, which is provided for under subs (3), is called a declaration of non-paternity.

Rival contentions

[6] The difference between the submissions made by the parties can be simply and shortly stated. Mr Browne submitted on behalf of Mr Hemmes that the relationship of which s 10 speaks is confined to the legal relationship of father and child. As that relationship did not exist between the parties the Court could not make any declaration of paternity.

[7] Ms Hughes submitted that the relationship with which s 10 is concerned is, (or, as she seemed at one point to suggest, at least includes), the biological relationship of father and child. Inherent in Ms Hughes' submission is the proposition that despite the legal consequences of Mr Young's adoption, the Court may make a declaration under s 10 to the effect that the biological relationship of father and son exists between the parties. According to this argument the section permits the making of a declaration concerned only with a biological fact and irrespective of whether or not the establishment of that fact is necessary for any legal purpose.

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5 Section 10 was expanded and rearranged from 1 July 2005 by s 12 of the Status of Children Amendment Act 2004; but no substantive change relevant to the present case resulted. For convenience we have reproduced the amended section. The key phrase "relationship of father and child" remains the same.

The meaning of relationship in s 10

[8] In order to determine the meaning of the word "relationship" in the phrase "relationship of father and child" in s 10 of the Status of Children Act, it is necessary to examine the statutory context and, in particular, the meaning of the same word when used elsewhere in the Act. The cornerstone provision in the Act is s 3(1). It provides that:

> for all the purposes of the law of New Zealand the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other, and all other relationships shall be determined accordingly.

[9] The essential purpose of the Act was and is to remove the legal disabilities of children born out of wedlock.[6] The short title to the Act signals that its principal concern is with status, which is a legal concept involving legal relationships and their consequences in law. It is in the context of legal status and removing the disabilities previously attaching to the status of illegitimacy that the reference to the relationship between every person and his mother and father must be understood. The statutory context and purpose, with their focus on status, both clearly suggest that the Act is referring to legal rather than biological relationships. Indeed, the terms of s 3(1) make it perfectly clear that, at least in that section, the word "relationship" must be referring to the legal relationship between the parties. The biological relationship between a person and his father and mother could never have depended on whether the biological parents were married. The biological relationship is an immutable fact in respect of which the marriage or otherwise of the biological parents can make no difference. Hence s 3(1) of the Status of Children Act cannot, contextually or logically, be concerned with biological relationships. The same can be said of the use of the word "relationship" in subss (2) and (3) of s 3.

[10] Section 12(3)(b) of the Act reinforces this focus on status and hence on legal relationships. It expressly provides that, except for presently immaterial purposes, nothing in the Status of Children Act shall limit or affect any of the provisions of the

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6 See now s 2A.

Adoption Act which determine the relationship to any other person of a person who has been adopted. The status resulting from those adoptive relationships must also have been intended to prevail for Status of Children Act purposes. The word "relationship" in s 12(3)(b) clearly signifies a legal rather than a biological relationship. Furthermore, to construe the same word in s 10 as meaning or including a biological relationship would result in an impossible clash. The adopted child would have the status of a child of his adoptive parents for all purposes pursuant to the Adoption Act, and the status of a child of his biological parents for all purposes under the Status of Children Act. Section 12(3)(b) was designed to ensure this could not happen.

[11] By the same token the expressions "relationship of father and child" and "any other relationships" appearing in s 7 of the Status of Children Act must be referring to legal rather than biological relationships. Section 7 is concerned with when the relationship of father and child and other relationships traced through that relationship are to be "recognised". That means recognised for any of the legal purposes, such as succession to property, with which the section deals. A biological relationship between two people either exists or does not exist. There cannot sensibly, in the context of s 7, be any question of recognising the relationship, simply as a biological fact, for some purposes but not others. The clear connotation is that of recognising the relationship as a legal relationship for specified purposes and in specified circumstances.

[12] Section 8 of the Status of Children Act makes birth certificates on which the father is named, acknowledgements signed by the father, and certain court orders, prima facie evidence that the person named as the father therein, is the father of the child. Section 8(4) provides that, subject to s 7(1), a declaration made under s 10 shall, for all purposes, be conclusive proof of the matters contained in it. The fact that s 8(4) is made subject to s 7(1) makes it clear that a declaration under s 10 is concerned with a legal relationship and not a biological relationship or biological fact. If the latter were the case there would have been no need to make s 8(4) subject to s 7(1) and no logic in doing so.

[13] Furthermore, the fact that s 8(4) makes a declaration of paternity under s 10 conclusive proof of the matters contained in it, subject only to s 7(1), would create a major clash with the relevant Adoption Act provisions unless s 10 is concerned only with legal relationships. A s 10 declaration states that the relationship of father and child exists between the parties. It is conclusive proof of that matter for all purposes. Were the relationship of which s 10 speaks a biological one, and Mr Young could prove that biologically Mr Hemmes is his father, a s 10 declaration would entitle Mr Young to be treated as Mr Hemmes' child for all purposes. He would, for example, fulfil the description of child should Mr Hemmes die leaving any property governed by New Zealand law to "all my children equally". That result, which would follow if s 10 were concerned with biological relationships, would be totally inconsistent with s 16(2) of the Adoption Act and cannot be what was intended by those who framed the Status of Children Act.

[14] Against that background, consistency of terminology makes it clear that the reference in s 10 to the relationship of father and child must mean the legal relationship of father and child. When a child has been adopted, the child's adoptive father becomes the child's father for all purposes in the eyes of the law. Acceptance of Ms Hughes' submission would have two consequences. If s 10 is confined to biological relationships an adopted child could get no declaration that the relationship of father and child existed between him and a person he asserts to be his adoptive father. While the need for such a declaration might seldom arise, the inability of the adopted child to obtain a declaration under s 10 as regards his adopted father would entirely cut across the relevant purposes and provisions of the Adoption Act.

[15] If s 10 is construed as applying to both legal and biological relationships, the adopted child could get two declarations under s 10; one that the relationship of father and child exists between him and his adoptive father and another that the relationship of father and child exists between him and his biological father. Both declarations would be expressed in identical terms but as regards different fathers. Clearly such a conclusion would be quite untenable.

[16] All these points demonstrate that s 10 is not designed to be a vehicle for declaring biological relationships or biological facts. That is not to say that the fact of a biological relationship is irrelevant for the purposes of s 10. Proof of that fact will in most cases justify a declaration that the legal relationship of father and child exists; but the biological fact does not lead to that conclusion when there has been an adoption, unless the biological father is also the adoptive father.[7] After the making of an adoption order the legal relationship between father and son which existed at birth is terminated and replaced with the new legal relationship effected by the order.

[17] At paragraph [34] of his judgment Hammond J, when examining s 10, expressed the view that:

> The ordinary meaning of the word "relationship" between a father and child has connotations of parentage, not the artificial construct which is necessary for legal purposes, of "status".

[18] On the basis of that construction the Judge moved on to consider whether the phrase "for all purposes" under s 16(2) of the Adoption Act should be read literally. The word "relationship" must not, however, be construed in the abstract. The critical question is what meaning the word bears in its statutory context. In legislation dealing with questions of legal status one might have thought, at least prima facie, that the word "relationship" was intended to have a meaning consistent with that context, ie the meaning of legal relationship. As we have shown, that prima facie meaning is reinforced, indeed unequivocally confirmed, when reference is made to its use in other places in the Act. There can be no reasonable basis for giving the word "relationship" in s 10 a wholly different meaning from its clear meaning elsewhere in the Act.

The effect of an adoption

[19] We turn then to examine what the Adoption Act says about relationships following the making of an adoption order. The key provision is s 16(2). It says that

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[7] As in *K v F* [1983] 2 NZFLR 1. To the extent that Vautier J may in that case, at 13, have suggested that s 10 confers a power to declare the existence of a biological relationship we cannot agree.

the specified consequences of an adoption order are to "have effect for all purposes, whether civil, criminal or otherwise", save where any other enactment provides otherwise. The primary consequences are threefold, as set out in paragraphs (a), (b) and (c) of the subsection which, for convenience, we repeat:[8]

> (a) The adopted child shall be deemed to become the child of the adoptive parent, and the adoptive parent shall be deemed to become the parent of the child, as if the child had been born to that parent in lawful wedlock:
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> …
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> (b) The adopted child shall be deemed to cease to be the child of his existing parents (whether his natural parents or his adoptive parents under any previous adoption), and the existing parents of the adopted child shall be deemed to cease to be his parents, and any existing adoption order in respect of the child shall be deemed to be discharged under section 20 of this Act:
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> …
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> (c) The relationship to one another of all persons (whether the adopted child, the adoptive parent, the existing parents, or any other persons) shall be determined in accordance with the foregoing provisions of this subsection so far as they are applicable:

[20] In short, upon the making of an adoption order, the relationship of parent and child between the child and its biological parents ceases for all legal purposes other than those expressly excepted such as the crime of incest and forbidden marriages or civil unions.[9] None of the excepted purposes is relevant in the present case. A new relationship of parent and child is created between the child and its adoptive parent(s). Not only is a new legal relationship created but that relationship is equated with the legal relationship that would have existed had the child been born to the adoptive parent(s) in lawful wedlock. The new relationship created by the adoption order therefore relates back to the moment of the child's birth.

[21] Once it is recognised that s 10 of the Status of Children Act, in its use of the word "relationship", is referring to the legal relationship of father and child and that the legal relationships created by the Adoption Act are the applicable ones for Status of Children Act purposes, it must follow that Mr Young cannot in law obtain a declaration under s 10 that the legal relationship of father and child exists between

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8 Omitting the provisos to paragraphs (a) and (b).

9 See the proviso to s 16(2)(b).

himself and Mr Hemmes. The order for his adoption brought that relationship, if it existed, to an end and substituted the new relationship of father and child between him and his adoptive father from his birth. That new relationship was substituted for all legal purposes. It is, in any event, a relationship which s 12(3)(b) of the Status of Children Act says is not to be limited or affected by any provision of that Act.

[22] It is for these reasons that we cannot accept the argument advanced by Ms Hughes and must respectfully differ from the conclusion reached by the majority of the Court of Appeal. It is implicit in our reasoning that we do not consider the determining issue relates to the scope of the phrase "for all purposes" in s 16(2) of the Adoption Act. We have no difficulty in reading that phrase as meaning for all legal purposes as Ms Hughes suggested. But that meaning does not assist Mr Young. It is a legal purpose with which s 10 of the Status of Children Act is concerned. The essential issue has been to identify the nature of the relationship of father and child to which s 10 of the Status of Children Act refers. We do not consider the case turns on any change there may have been in the way the subject of adoption is viewed in society. Nor is s 6 of the New Zealand Bill of Rights Act 1990 engaged. Other points aside, there is no tenable alternative meaning which can be given to the concept of relationship for the purposes of s 10.

[23] Ms Hughes expressly disclaimed any attempt to argue that a paternity order under s 10 could and should be equated with an affiliation order as referred to in the proviso to s 16(2)(a) of the Adoption Act. In any event, with respect to William Young J's tentative suggestions in that respect, we do not regard that proposition as valid. As O'Regan J pointed out, the proviso to s 16(2)(a) makes it clear that in general terms the making of an adoption order precluded the making of an affiliation order against the natural father. Such orders could be made only in the limited circumstances set out in the proviso and, in any event, within specified times from the child's birth. Ordinarily the time limit was six years from birth. William Young J himself acknowledged that there were substantial arguments against the approach which he tentatively favoured. In our view there is no justification for equating a paternity order under s 10 with an affiliation order as referred to in the proviso to s16(2)(a).

A rider

[24] The issue in this case has concerned s 10 of the Status of Children Act. Our judgment relates only to the compass of that section. The conclusion we have reached does not prevent an adopted person from seeking to prove that another person is his biological parent if proof of that fact is necessary for some legal purpose such as in proceedings for a declaration of right under the Declaratory Judgments Act 1908[10] or in proceedings otherwise properly constituted in which the determination of fact is necessary.

Result

[25] In the light of our conclusions we allow the appeal, set aside the orders made below and order that the proceeding be struck out.

Solicitors:
Wilson Harle, Auckland for Appellant
Govett Quilliam, New Plymouth for Respondent

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[10] See ss 2 and 3 thereof.