

BETWEEN

**JOHN HEMMES**

Appellant

AND

**JOHN PATRICK YOUNG**

Respondent

Hearing 23 June 2005

Coram Elias CJ  
Gault J  
Keith J  
Blanchard J  
Tipping J

Counsel C P Browne for Appellant  
S Hughes for Respondent

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**CIVIL APPEAL**

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10.02 am

Browne May it please the Court, my name is Browne, I appear for the appellant.

Elias CJ Yes Mr Browne, thank you.

Hughes May it please the Court, my name is Hughes and I appear for the respondent.

Elias CJ Yes Mrs Hughes, thank you. Yes Mr Browne.

Browne Your Honours have a fairly comprehensive written submission from me and because the issue, which is one of statutory interpretation is essentially a short but possibly difficult matter of point, my submission has been a fairly comprehensive set out of the argument. I'm happy to go through that with the Court if that would assist Your Honours and

perhaps highlight matters or I could simply move to I suppose a short presentation of what I consider to be the principal differences between my submissions and my learned friend's submissions.

Elias CJ Well we have read your submissions Mr Browne so if there's anything you want to develop please do, otherwise perhaps you could move on as you suggest.

Browne I'm happy I think to leave the submission as it is on the basis that it's read because for me to take it, I'll simply be taking time to take you to points of that in any great detail. What I may do I think is come back to highlight points of it in terms of an outline I'll now do about what I think are the differences. The principal focus of the appellant's submission ... stripped of legal status and by doing so have removed in effect the conflict between the two. For my part I say that I simply see no words in the Act to justify that. The Act which we are looking at is one about legal status, not about biological facts. And the use of the same phrase at various junctures through the Act indicates the starting position would normally be that when you use the phrase within an Act, it means the same thing every time you use it. This would require for example a different meaning in s.10 to the one in s.7, because it seems common ground that s.7 isn't going to apply to give the rights of inheritance and succession because of the intervention of the Adoption Act. So we are immediately saying the same words in this Act mean two different things in 7 and 10.

And the second thing I think is that it, by adopting, what it amounts to doing I think is reading in the word "bloodline" or something like that by a sort of implied insertion. And by doing that one then also I think conflicts with both s.16(2) of the Adoption Act and 12(3)(b) because it is in effect creating a further exception to s.16(2) when that Act doesn't permit it and s.12(3)(b).

Elias CJ Sorry, could you say that again?

Browne It amounts to creating a further exception to s.16(2), to the phrase "for all purposes" whether civil, criminal or otherwise. This would say, well for all purposes except a declaration under s.10 of the Status of Children Act. So I think both of those are just, in terms of looking at the statutory language, objections to that insertion, implied insertion of the word bloodline.

Elias CJ You started off by acknowledging that establishment of biological fact could be accomplished in properly constituted proceedings. And your argument really has been mainly to persuade us that these are not properly constituted proceedings under s.10 of the Status of Children Act. It is the case isn't it that the natural relationship, the biological relationship, does give rise under various enactments to legal consequences. So that is itself a status recognised by law.

Browne Yes and I think that's, I don't disagree with that proposition.

Elias CJ Yes.

Browne I think, my response to it is it relates to what s.10 is about and what those other legal processes are. For example my learned friend's submissions refer to the domestic violence case that's in the materials there.

Elias CJ Yes.

Browne Where the phrase in the section used the word "blood" and on analysis as the first instance but I think the analysis is absolutely right.

Elias CJ Yes.

Browne The Adoption Act had severed the relationship, the parental relationship, so the person was no longer the parent but they were still related by blood. Now there is no need for a s.10 declaration here. That fact can be established within the confines of that particular inquiry, for the purposes of that particular inquiry, to see whether the Domestic Violence Act applies in the situation. So I'm not suggesting that the blood relationship is never relevant.

Elias CJ No.

Browne But when it is, the law can determine that relationship in whatever context and within whatever proceeding it is relevant.

Elias CJ Why can't the context, given some of the consequences in law, be the context of a claim for declaration of biological connection?

Browne I think if s.10 were worded so that it was so limited, in other words it was simply an inquiry into biological connection. And one could conceive of circumstances in which the legislature might in fact provide for compulsory DNA testing and so on so as to remove all doubt if it were thought important to have a record of or established genetic connection between individuals. But in my submission that's not what s.10 does. And.

Elias CJ No, I'm not really talking about s.10. I'm just putting to you whether a declaration could be obtained through an action to obtain a declaration of biological connection. Because we're talking about strike-out here.

Browne Mm.

Elias CJ And the Court has to be astute to consider whether the proceedings could be put into proper form. What I'm putting to you is whether you would accept that an action to establish biological connection might be available.

Gault J            Could be available under the Declaratory Judgments Act if it is within the purposes of that Act for interpretation of a document, will or trust or something like that.

Browne            I think that's the.

Gault J            You wouldn't need s.10.

Browne            Yes I hadn't thought of the proposition until Your Honour put it to me. I think the issue there would come down to standing and whether or not you could fit it within somewhere else.

Elias CJ           Mm.

Tipping J          Would it, under that approach, be a declaration simplicitor or would it not be the finding of a fact which led to the making of a declaration of some entitlement.

Browne            I think it's probably the latter. Because again I can't see that the Court would have jurisdiction simply to inquire into a sort of free-form fact and make a declaration about it when it was unconnected with any legal rights or consequences.

Elias CJ           Well, but there are consequences in law because I mean I actually happened to tune into Parliament last night and they were debating an Iwi settlement legislation and there was an issue as to whether an adopted child would come within the form of the legislation. And of course there are the examples of consanguinity and incest in the legislation that we're looking at.

Browne            Yes.

Elias CJ           And indeed the Adult Adoption Information Act talks about, I think it's birth parents. Now in the case where a parent is noted on a birth certificate, establishing the fact is probably not critical to obtaining information under that Act. We don't have much in the way of facts before us in this case. But it seems safe to assume that there is no father entered on the original birth certificate in this case. If that's so, there's a substantial gap in the scheme that the legislature has provided unless you're able to somehow establish birth connection through correction of the original register.

Browne            The way that the records operate post-adoption is in effect to completely cover up and disguise the fact of adoption. And the inquiry that Your Honour's made, the answer is I can't tell you.

Elias CJ           Yes.

Browne            And the reason for this is I cannot get access to the birth records.

Elias CJ Well no but the.

Browne And there is a legal protection to prevent exactly that inquiry. To go behind the face of the current record which shows the adoptive father as the father.

Elias CJ I think that's not quite right. I think you can apply and what you get is an edited version with identification removed if a block has been put on it.

Browne Yes.

Elias CJ And that would disclose whether there is a father on the original birth certificate. It's not a matter before us. But if you have the case where the birth father was not entered on the birth certificate and you have the Adult Adoption Information Act which only permits a delay in accessing information, because after the death of a blocking birth parent the child can get that information, then you have great disadvantage for a child whose birth father wasn't entered on the register.

Browne And the nature of that disadvantage?

Elias CJ The nature.

Browne Is it simply knowledge or is it a legal status issue?

Elias CJ Well, when he or she applies there will be no information there. And the point I'm putting to you is that that is a question of legal status recognised by the Adult Information Act in terms of biological connection which might be arguably sufficient to grant an application to determine biological parentage.

Browne I think the answer to that is that the Adult Adoption Information Act is simply concerned with allowing people access to the recorded information. If the information is recorded then, subject to the steps taken to preserve the rights of birth parents who may wish to remain anonymous for periods of time, then the child has access to whatever information is in the record.

Elias CJ Yes.

Browne This will be a situation I'm quite sure in which there is no information at point. However that sort of information, if one is simply talking about information, that information is available from other sources and in this particular case Mr Young for example has been given the information by his mother who's told him the circumstances of his birth as she understands them to be. Now the issue here is not whether he has information, because he has information. The information here

is to whether or not he's entitled to have the legal determination of the accuracy or otherwise of that information where it is disputed by Mr Hemmes.

- Elias CJ Mm.
- Browne Now that, so it moves from access to public information to a right of access to a Court to have the matter determined in circumstances where I say that is a judgement in ... under the Status of Children Act which is attempting to be used for this purpose. It is to settle an effective dispute which does not have legal relevance in terms of the Status of Children Act.
- Keith J Or in any other way, are you saying?
- Browne Or in any other way.
- Keith J Mm.
- Browne At large in the legal system.
- Keith J It's possible.
- Browne If there were circumstances in which it did have legal relevance then there are mechanisms within each of those to make the necessary inquiry for determining whatever it is.
- Keith J So if the natural father prepared a document which conferred rights on all his natural children, didn't make it clear whether adopted or not, then in the context of a dispute about the application of that document, that fact would have to be determined.
- Browne Yes.
- Keith J It would be determined under.
- Browne And it's, if in the rare circumstances where it is necessary for the Court to make a biological inquiry behind an adoption, it can always do so within the legal process which has made that relevant.
- Keith J Yes, yes.
- Browne It's quite a different thing to say that one can access, because of this possibility in individual cases, one can then access s.10 as a general right at any time and place to bring these matters up before the Courts and to obtain not just knowledge but a judicial determination of a matter of legal status where that will conflict with the legal status which the Adoption Act says it has conferred for all purposes at law.

Elias CJ A declaration of biological connection does not conflict with the legal status conferred under the Adoption Act however does it?

Browne Yes but I don't think you can say that s.10 is so limited.

Elias CJ But no, no I'm just speaking more generally.

Browne Yes I think that could be, one could construct circumstances in which that were separated out.

Elias CJ Yes.

Browne But I think s.10 doesn't allow that because of the word relationship of father and child.

Keith J So it's about legal relationships.

Browne Yes.

Keith J There's the word "legal", for what it's worth, in the title to the Act as well isn't there, the "to remove legal disabilities".

Browne In the purpose, that's right, to remove legal disability.

Keith J Mm.

Browne So in my submission that whole Act is about legal status. And removing disability relating to it.

Tipping J I wonder Mr Browne whether there's perhaps inadvertent slippage in the discussion that's just been proceeding between you and the Chief Justice, if I may respectfully suggest it. The idea that there is a status inherent in the biological relationship seems to me with respect to be a little bit slippery. What is inherent is a fact, which may have legal consequences. And I suspect that any formulation which suggests that there is a status, which the law recognises, of biological relationship is a potentially rather difficult use of the word "status".

Elias CJ If it's legal, if it has legal consequences, it's status. That would be the point I would make.

Browne I wasn't.

Tipping J Yes, so it really depends, it's circular.

Browne It is.

Tipping J It depends on whether it has legal consequences. If it has legal consequences I'd with respect still tend to see it as a fact, having legal consequences, not a legal status having legal consequences.

Browne I much prefer your formulation I must say. And if I've used the word "status" there, I've done so loosely.

Tipping J You seem to be adopting it, inadvertently perhaps. But I just wondered whether you were in fact, and you're not I don't think, conceding that it's a status.

Browne I'm saying that it can be a relevant fact.

Tipping J Yes.

Browne In different junctures. And there are always ways of making that inquiry.

Keith J Mm, and it's an inquiry into a fact with legal consequence.

Elias CJ Mm.

Browne Yes. And that, because it's the legal consequence, that produces the inquiry. It doesn't, as s.10 does, sit better on its own able to be generated at any time.

Elias CJ Mm.

Browne I suspect that I have now covered quite a lot of what I was otherwise going to cover.

Elias CJ Yes, well it's been very helpful, thank you.

Browne I should just check to see whether there isn't. Do any of Your Honours have any further questions just at the moment?

Tipping J I wondered if there was anything you could usefully say, and maybe not beyond your written submissions, about the fact that in 1985 was it, when they passed the Adult Adoption Information Act, it seemed to be quite clear that there was no understanding if you like that the secrecy that they were thereby intending to preserve in part could be easily outflanked by an application under s.10. Because if that were the case, then all that discussion would have tended to have been rather unnecessary. Admittedly you've got to get, you've made the valid point, you've got to get the information before you can ask for a declaration. But it just seems to me that it's a reasonably strong argument that the whole premise of the Adult Information Adoption legislation, which was 16 years later than the Status of Children Act, would at least implicitly on the premise that what the Status of Children Act was referring to was the legal relationship, not the biological relationship. Because if it were the latter then it wouldn't make sense.



Browne Your Honour has, I think that's a fair summary of what I've said in the submissions.

Tipping J Yes.

Browne And that of course.

Tipping J Is there anything in the course of the passage of that legislation that we can properly notice that would tend to reinforce or not the impression that I've just put to you?

Browne I was unable to find anything in the debates that highlighted that issue sufficiently to bring forward.

Keith J Well all the restrictions that were written into that Bill, and it had a very long process didn't it, would suggest there was no general available remedy already which would apply, though only to the father wouldn't it?

Tipping J Yes, not to the mother.

Browne Yes and that point is.

Tipping J The mother was always on the birth certificate, wasn't she?

Browne Yes. And that point is made in Justice O'Regan's judgment in the Court below.

Elias CJ Yes, it's a curious use of it though because there is, there's no need for reciprocity because the mother, except in quite exceptional circumstances of abandonment and concealment and so on, is always on the birth certificate. And it's that lack of symmetry that is bothering. For myself I see the Adult Adoption Information Act as being concerned to protect confidential information in the hands of the State. And not really engaged in these sort of circumstances at all.

Browne I think that's fair to say. It wasn't, that particular Act wasn't in the submissions of either me or my learned friend in the Court below.

Elias CJ No

Browne And it was something that in effect came up in argument and therefore got used.

Elias CJ Yes.

Browne And it's now got into my submissions. And I think I put it in there for no greater weight than to say that 16 years later Parliament did revisit the area of adoption and so on and it did so in a way which may have proved careful as to how it saw the balance between these things. And

there does seem to be an underlying assumption that things are in accordance with my submission. But it doesn't deal directly with the issues that are before the Court.

Elias CJ No.

Keith J No.

Browne So I don't think it carries enormous weight.

Elias CJ Except that it does at least underscore the developing notion of the importance of biological connection in the provision of the secure way of accessing medical information. So that's a developing consciousness perhaps in the legislation.

Browne Yes I think that one can see that and one can see for example that there are policy reasons underlying that opening up of adoption and by the provision of that information. But it was also clear in my submission that Parliament thought this was a matter that had to be done very carefully and step by step.

Elias CJ Yes.

Keith J Yes, mm.

Browne And didn't amount to sort of unravelling everything that had gone before in a single gesture.

Elias CJ But this is not a case where protection of confidential information is an issue.

Browne No because I think if one goes back one will find a gap as opposed to there being something that someone's trying to get at.

Elias CJ Yes.

Tipping J Well at the very least, all it shows really is the then understood compass or anticipated compass of s.10. If it had been thought that s.10 had the wider compass that is now argued for, then certain aspects of the subject we've been discussing would not really make much sense.

Browne Yes I think if that assumption had been adopted then the, I suppose the extent of the change that Parliament thought it was bringing into effect in 1985 would be much more. And there wouldn't have been the need for that debate and that level of concern that things were going to be opened up, if it was thought that they were already that open.

Keith J Mr Browne, I noticed a reference somewhere to an article by Cameron and I assume that's B J Cameron of Justice in the Law Journal in 1969

about the Status of Children Act. Is that useful? I would expect that it is.

Browne I don't think that it was material that I put before the Court. It may be a reference.

Keith J I saw a reference to it somewhere, I can't remember where it was.

Browne It may be within some of the materials that I've put before the Court but I haven't, I actually haven't looked at that myself.

Keith J I know there's a real danger in pursuing some of that material but he was at the heart of a lot of that reform, so.

Browne There's probably one other, another thing, my learned friend's submissions deal with a number of cases that are not mentioned in my submission. And the only one I think that is is the **K v F** case (**K v F** [1983] 2 NZLR 267). There are a number of others. In the Court below I handed up a short submission there which just deals with each of those and explains why they're not relevant to the issue before the Court. I have here, it's about two pages long, it's more to save writing than anything else, if the Court would be assisted by that, I'd be happy to hand that up.

Elias CJ That would be helpful thank you (handed up) Mr Browne, also the Status of Children Act has been amended hasn't it? Do the amendments, are the amendments of any interest? I think it takes effect from 1 July. One of the things for example that goes is the title.

Keith J Mm, that's right.

Elias CJ Which may be a bit of a shame. It takes away your legal impediments.

Keith J It's not turned into a purpose provision.

Elias CJ No it's not.

Tipping J What's it going to become?

Keith J Well the title.

Elias CJ It's just the Status of Children Act.

Keith J There are no longer titles in Acts.

Tipping J Oh, you mean it's.

Keith J It's just the Status of Children Act.

Tipping J Oh I see.

Browne Yes and I must confess I haven't looked at the new Act.

Elias CJ Yes.

Browne I know that this comes to an end, there will be an end.

Elias CJ You can make application to the family Court and the High Court, I noticed that. And if it's to the High Court the provisions of the Declaratory Judgments Act apply I think, I seem to recall reading that.

Browne I have to say I haven't looked at the Bill.

Elias CJ Yes.

Browne Before it's come in. I've kept my attention on the one we already have. I think the Court have my written submissions, they are quite detailed. The points are best summarised in the summary at the outset. Essentially I'm submitting to you that the approach by Justice O'Regan in the Court below is the correct one. And that this is a situation in which the words are tolerably clear and to read in the bloodline or mere biological fact approach which has been adopted in the Courts below is not warranted in terms of the structure or purpose of the Act in which this particular section finds itself and then brings it into unnecessary conflict with the Adoption Act. Whereas to adopt the view that I put forward, that there is only one relationship of father and child, the one in the Adoption Act is the same one when you come to look at it in the Status of Children Act. That works because it fulfils all of the requirements of the Status of Children Act. There is no need to read it any wider than that. And it saves confusion and the need to then try and cope with two different declarations of a relationship when everyone understands there can only be one. Is there anything further I can help the Court with?

Elias CJ No thank you Mr Browne, that was very helpful. Yes Mrs Hughes.

10.50 am

Hughes Thank you Your Honour. The appellant's submission is entirely predicated on the basis that the two pieces of legislation can't be read together. That the only way to deal with such a matter as an adoptee is to regard the Adoption Act as predominant and therefore render any kind of application under s.10 of the Status of Children Act inaccessible to such a person. It's my submission that the two can live comfortably together. That it is not a case that you have a single relationship of father and son. That there are a multiplicity of such relationships. In modern adoption experience of course the mother giving up the child will chose the adoptive parents that she wishes to take the child. That it's never a secret now. We've got to deal with what was historically a secret in the way that matters would be dealt

with today. It is not an uncommon thing to have a birth parent and an adoptive parent. It is not uncommon to have step-parents. There are a number of relationships and particularly the relationship of an adoptive parent and a blood parent can exist perfectly comfortably side by side. They have different legal consequences but the facts are the facts.

Much is made of s.5D of the Acts Interpretation Act or the Interpretation Act I beg your pardon. Section 6 I mean. Which is that an enactment applies to circumstances, but you must consider of course s.6, an enactment applies to circumstances as they arise. This circumstance hasn't previously arisen. There hasn't been an application before the Court for a decision of paternity by an adoptive person before.

Tipping J      Could you just pause. You introduced this by saying that there was no single relationship of father and son as I noted you.

Hughes          Yes Sir.

Tipping J      There were a multiplicity of such relationships.

Hughes          Yes.

Tipping J      Now it would help me to understand, as you're developing this, what you actually mean by that. Do you mean in legal terms or do you mean, surely in factual terms there can only be one such relationship. So you must be meaning in legal terms there's a multiplicity of relationships of father and son. Now I find that very hard to grasp. Would it be helpful or not for you to.

Hughes          Certainly Sir, I think it is helpful to develop it. I mean there's obviously the biological relationship.

Tipping J      Well there's only one such isn't there?

Hughes          Correct. There can only be one biological relationship. I accept that.

Tipping J      Yes.

Hughes          There can be more than one adoptive relationship. It is possible of course to be sequentially adopted.

Tipping J      Oh in succession yes, but not concurrent.

Hughes          Not concurrently. Albeit I'm not clear with, and I haven't thought it through, whether in a gay relationship you can effectively have two fathers. Now whether there's any possibility. I understand there's no impediment to gay people adopting, so arguably you could have more than one father at the same time in the adoptive sense, for instance.

Tipping J Well that may or may not be right. But it doesn't actually help me very much to understand what you mean in aid of this particular case.

Hughes I think what, if I've understood my friend correctly Sir, that what he is saying is the only relationship that exists is the adoptive relationship. In the legal sense.

Tipping J No he's not saying that. He's saying that the relationship which s.10 is focused on is the relationship which the law currently recognises. I think that's a fair encapsulation of what he is submitting.

Hughes Yes but that of course cannot, all that the Adoption Act does is deem someone to be your parent. It cannot make it so. Section 10 of the Status of Children Act deals with what is in fact the case, who is in fact your parent.

Gault J Doesn't it make it so for the purposes of the law?

Hughes It makes it so for the purposes of the law but it cannot deny the existence of the other relationship. The two must live together.

Gault J Nobody's suggesting as a matter of fact that there isn't a difference.

Hughes No.

Gault J Between biological parentage and adoptive parentage. Where does that take us? We're focusing on legal status are we not?

Hughes Yes but there is no, the two Acts do not have to be read excluding one from the other. It is possible, I submit, to have a declaration as to paternity at the same time as being an adoptive child. The decisions in the Courts below interpret the question of relationship, the Associate Judge's decision at paragraph [9] and, I beg your pardon, Justice Paterson's decision, the Master gave the term relationship of father and child as it appears in s.7(1) of the Act its ordinary and natural meaning. He concluded that it referred to the actual blood relationship between a father and a child and not the legal fiction which is created by s.16(2) of the Adoption Act.

Keith J So you read that as meaning just a simple finding of fact?

Hughes Yes Sir.

Keith J That s.10 enables a simple finding of fact and nothing more.

Hughes Yes Sir.

Keith J Mm.

Hughes And that was again adopted by Justice Hammond in the Court of Appeal at paragraphs [34] through to [36]: as a matter of textural analysis words are to be given their natural and ordinary meaning. 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. If that is correct the critical issue in this case is this, is the expression for all purposes unequivocal. Is it to be taken literally as meaning everything or without straining the language can it be appropriately read as referring, as the Judges in the High Court did, to all purposes of legal status but no more. Paragraph [36], to the extent that there is a useful authority on the construction of the statutory language in issue in this case, it leans in favour of the respondent. Thus in **K v F** Justice Vautier held that although an adoption order is conclusive as to its status, it is not conclusive as to the facts on which it was based. Hence the adoption order does not prevent a later application under s.10 of the Status of Children Act for a declaration of paternity.

Keith J So there too you read Justice Hammond as saying that the Courts under s.10, with the help of the Declaratory Judgments Act, can find simple questions of fact, determine simple questions of fact.

Hughes Yes Sir.

Keith J Whether Bob Deans scored at Cardiff in 1905 was yesterday's example.

Hughes Um, I mean obviously that wouldn't be a matter that would trouble the Courts I shouldn't think. But this is one that does.

Keith J Well sorry, you said it's not a matter that would matter, a fact that would matter.

Hughes I don't know the example you give.

Keith J Mm.

Elias CJ Well it's a fact that doesn't have legal consequences is probably the right.

Keith J Yes, mm. But you're not arguing for legal consequences here are you? And you're interpreting these passages as simply meaning that the Court can state that a blood relationship exists, full stop.

Hughes And the sole legal consequence is that it prevents Mr Hemmes from further denying his fatherhood of Mr Young. I mean at this time, given the.

Blanchard J Is that a legal consequence?

Hughes           It is inasmuch as the only other step that Mr Young could ever take to prove that he is the son of Mr Hemmes I suppose is some kind of defamation proceeding possibly, I don't know.

Blanchard J      What's the legal consequence? I can understand it's got factual consequences. But what legal consequence flows from that?

Hughes           To be direct, it is difficult to see that there is a significant or indeed any legal consequence, so that it becomes a matter of pure fact, I agree. I mean it is possible but I can't develop anything else.

Blanchard J      At most Mr Hemmes could no longer deny that fact.

Hughes           Yes Sir.

Blanchard J      But it doesn't have any legal consequences.

Hughes           It doesn't give John Young access to his father's estate or anything of that sort. So it has no consequence in dollar terms for instance.

Gault J           I wonder about that. Let us assume that the declaration for paternity were made and Mr Hemmes may die, leaving a will in favour of his children. When we look at the Status of Children Act it says that for the purposes of succession etc if a declaration of paternity is made and the declaration under 8(4) is conclusive, that would rather suggest that the declaration could then be pointed to as qualifying as a beneficiary under the will which would be in direct conflict, would it not, with the consequences of an adoption order?

Hughes           If that were taken to be the case. I mean the Courts below have accepted my submission that because of the adoption order he in fact could have no access to his natural father's estate.

Gault J           Well that's an assertion. I'm putting you what seems to be the consequence of interpreting the Act.

Hughes           What you say of course is correct if you interpret the Act in a vacuum and don't consider the Adoption Act. I think the Adoption Act deals with that issue.

Gault J           Well the Adoption Act overrides this Act. Is that what you're accepting?

Hughes           I accept that the Adoption Act deals with matters of inheritance, status and the like. It can't.

Gault J           So does the Status of Children Act.



Hughes Of course, what the Status of Children Act allows is a declaration of paternity which recognises the reality of the situation, the facts of the situation, the blood. All the Adoption Act can do.

Gault J Well that's just begging the question.

Hughes Beg your pardon?

Gault J That's just begging the question.

Hughes With respect Sir, I don't accept that that is so. The Adoption Act creates a legal fiction. It deems something to be so that is not in fact so.

Gault J No, it makes it so for the purposes of the law.

Elias CJ Yes I must say this emphasis on legal fiction has me a little twitchy because it's a legal determination.

Tipping J It's a legal reality, not a fiction.

Elias CJ Yes, yes.

Tipping J Completely the wrong word to use.

Elias CJ Yes.

Tipping J One point that troubles me that just arises from the exchange you've just had Mrs Hughes, and you may be able to help me, is this. Let's assume that your client were to get the declaration he seeks. The letter of the declaration would be, the Court hereby orders and declares that the relationship of father and child exists between the plaintiff and the defendant.

Hughes Yes.

Tipping J Or between the named people. It would say no less and no more.

Hughes Yes.

Tipping J Now wouldn't that be entirely misleading for all legal purposes?

Hughes No.

Tipping J Because there's no capacity for it to make, it can't say, PS this actually means blood relationship. And it doesn't actually mean that they are legally related as you might think. Because actually there's been an adoption. You'd have to put that notional PS on the back of it wouldn't you?

Hughes No I don't believe you would. Because it's only in a blood relationship that an application would be made under s.10. I mean there's no evidence of any application, nor indeed do I believe you could sensibly make an application, saying that I am an adoptive child of so and so and I wish to establish that.

Tipping J But it would say that it exists, not that it once existed. There was for a time a relationship between the two of father and son, no question about that, from the moment of birth to the time of the adoption.

Hughes Yes.

Tipping J But after the adoption in the eyes of the law, and the Court is the eyes of the law, that relationship came to an end and the new one was created. Now if the Court makes a current, present tense, declaration that the relationship of father and child exists between these two, I'm assuming the biological facts are established, and your client can show this around to everybody, won't it be grossly misleading?

Hughes Well no because it declares the fact of.

Tipping J It won't say that.

Hughes It may not say that but that is the reality of it. In the same way that an adoption can be shown around as if that is proof positive of parentage as well. That's not necessarily the case. I mean in what circumstances would it be shown around? What would be the basis for doing that, for behaving in that way?

Tipping J But if Parliament had meant the relationship, the word relationship to make the fact, in the light of its use elsewhere in the Act and in the light of the similar use in the Adoption Act, the concept of relationship, would they not undoubtedly have said who alleges that a blood relationship of father and child exists between the person and another person may?

Hughes No I don't believe so because I think that that is the only basis upon which s.10 and the other sections that follow therefrom can be read. That it can't apply to any other relationship other than a blood relationship. Because it's the proof of consanguinity that predicates any application under s.10.

Elias CJ But the argument really you have to meet is that it doesn't apply to adopted people.

Hughes Yes.

Elias CJ Because they're not illegitimate. And so they're excluded. So, yes, in cases where people are eligible to bring claims under s.10, the only

issue will be the biological connection. But in the case of an adopted person, you just don't have the standing to bring the application.

Hughes Well it's my submission Ma'am, and one that has been successful up to now anyway, so I've got four or five currently running against me, that in fact the two pieces of legislation can be read together. That you don't have to change the law to in fact. I mean I appreciate it's uncomfortable but there is an expectation that the law will move with the time, that it will respond to changing circumstances. In the 1950's an application such as this would have been inconceivable.

Tipping J Are you saying that this reading that's been put to you would have been okay in 1969 but it's no longer okay? Is that really what you're saying?

Hughes I'm not saying, I'm saying that circumstances have changed, that an application such as this wouldn't have been made in 1969 but it is being made in 2005.

Tipping J No, but are you saying effectively that whereas the reading that we've been putting to you is the likely meaning in '69 but we should revise it because of social changes?

Hughes I'm not saying that it requires revision, I'm saying that the first time the Court's been asked to consider it is now. I don't believe in '69 it's an excluded interpretation. It is just that the world has moved on and consideration of these sorts of applications has changed. And that, without straining the language, the two can coexist quite comfortably. That it is possible to be an adopted child and to know your natural parents. And in this instance had Mr Hemmes acknowledged that he was the natural parent of Mr Young, then he wouldn't make this application. It's an unusual situation where you have identified your natural parent and your natural parent denies that they are your natural parent, even though there is no financial consequence that runs from that acknowledgement for instance. I mean it's a sense of desperation that drives John Young to take this step. And because things can't be measured in money terms doesn't make them valueless. I mean much has been said for instance of the matrix surrounding the Adult Information Act, Adoptive Information Act, about how there's an ability to put a block on information. Well that never stopped people finding their blood parents. It made it easier and of course that piece of legislation wasn't necessary for John Young to find his father. So to suggest that the matrix around that somehow or other provides some sort of impediment to this kind of application and had this application ever been considered back then it would have been addressed simply isn't correct. I mean what that legislation shows you is that in an incremental sense, that Parliament was telling us that the whole issue of adoption needed to be relaxed. That people didn't, shouldn't be kept in the dark and secrets shouldn't be maintained.

Elias CJ Well there is no secret here though. I was not putting the Adult Adoption Information Act as an impediment. I don't think that the secrecy provisions of adoption really have any application here because this isn't someone who has given a child up for adoption and who therefore the legislature has been concerned to protect.

Hughes Mm, mm.

Elias CJ And I think really I'm sympathetic to the point that you're making, that it is an indication of acceptance of that information matters.

Hughes Mm.

Elias CJ But I wonder why all of this is going on under the Status of Children Act. Because it's the consistency of the language that's used, it's the s.16 Status of Children Act preservation of the effect of the adoption order, it's the fact that it's a bald declaration of paternity.

Hughes Yes.

Elias CJ Which takes place for all effect. Why not a direct approach to obtain a finding of biological reality as fact or status?

Hughes But how else could you achieve that objective but through the agency of this Act?

Elias CJ Well it seems to me arguable that one could simply apply for a declaration from the Court but not under this legislation. Others might not, might see more impediment to that. But certainly it's been accepted that if it arose as a fact in properly constituted proceedings, the Court would be able to make a determination.

Hughes And it may be that this piece of pleading could be amended to reflect that possibility. But there is, the way I've dealt with it up 'til now at least anyway is there's a specific piece of legislation that provides for a bare declaration to be made and that is all that is sought, is a bare declaration of the fact of paternity. If it is better directed to a generic piece of legislation such as the Declaratory Judgments Act well then that's another route that can be explored if necessary.

Gault J There are problems with that because of the limits on the jurisdiction conferred by that Act and the affidavit that your client has made.

Hughes Mm.

Gault J Indicating that there is no legal interest, there's simply a factual interest.

Hughes Mm. Well I'm not sure what more I could sensibly add to the discussion unless any of you have any further questions.

Tipping J Do you wish in any way to attempt to take up Justice William Young's suggestion that this is a sort of surrogate affiliation order that you're seeking.

Hughes To be perfectly honest Sir, I never understood His Honour's argument. And whilst I found it not wise to disagree with a Judge who thinks you might be right, even for reasons you don't understand, it's not an argument that I can sensibly advance now given I don't understand it.

Tipping J Well frankly I think it would be hopeless.

Hughes Well that's how it seemed to me but I mean.

Tipping J That's very candid of you.

Hughes But as I say, it's not wise to generally disagree with Judges who agree with you.

Tipping J No, well I just wanted to clear the point away.

Hughes I just wish he was here now. It might even the odds.

Elias CJ Perhaps the significance of it is that it's yet another piece of legislation which indicates that the fact of biological connection can have legal consequences. So it indicates that issues of status do arise. They don't apply to your client because he's more than six years old or whatever.

Hughes Mm.

Elias CJ But again it shows that the legislature has not been as dogmatic about the fact of biology as might have been thought.

Hughes Mm, yes Ma'am.

Elias CJ Right, thank you. Now Mr Browne, was there anything arising out of that that you want to be heard on?

11.13 am

Browne One point Your Honour. And that relates to the issue that Your Honour just raised about the possibility of a declaration not under the Status of Children Act but under the general jurisdiction or Declaratory Judgments Act. This was a point I raised and dealt with in the Courts below really by way of I suppose exemplifying that the law does not generally allow declarations for no legal purpose. But if one were to step outside s.10 and look at the Declaratory Judgments Act, in my submission that would be faced with the sort of objections that one sees from a case like **Chase** where the Court there said that declaratory powers don't exist to determine matters of fact or law in some sort of

vacuum. There has to be a proper legal right requiring protection, enforcement or judicial recognition. And I don't think that this would, for the reasons that we've gone through, that that would meet the test in that situation either.

Blanchard J Well the Declaratory Judgments Act actually talks about binding declarations of right.

Browne Yes. And so I don't think, again, absent legal consequence and legal right, I don't think the solution to the application can be to take it out of the Status of Children Act and try and make it stand-alone in the general jurisdiction.

Keith J Your case is easier than **Chase** probably isn't it? Because there were arguments there that there were some legal consequences.

Browne Yes, yes. That was the only point I wished to make. Thank you Your Honours.

Elias CJ Yes, alright we'll take time to consider our decision in this matter. Thank you Counsel for your assistance and for the economical way in which you developed your arguments today.

Court adjourns 11.15 am