Deg. of failings of s.60H of Family Law Act

FAMILY COURT OF AUSTRALIA

KEMBLE & EBNER *[2008] FamCA CAF461/06*

FAMILY LAW – CONSENT ORDERS – Same-sex couple had two children by artificial reproductive technology – Ms Ebner gave birth to the two children – the first born child was conceived using the ovum of Ms Kemble whereas the second born child, H, was conceived with the ovum of Ms Ebner – upon breakdown of the relationship a deed of agreement was entered into that Ms Kemble be recognised and fulfil the obligations of a parent to the children – whether the presumptions of parentage in the *Family Law Act 1975* enable the Family Court of Australia to declare a same-sex de facto partner to be a parent – whether the Family Court of Australia in Canberra exercising its cross-vested jurisdiction from the Supreme Court of the Australian Capital Territory can apply the presumptions of parentage in the *Parentage Act 2004* (ACT) – Orders made declaring that Ms Kemble is a parent under the *Parentage Act 2004* – Accordingly the children's birth certificates must be altered under the *Births, Deaths and Marriages Registration Act 1997* (ACT) – Accordingly the parties may apply for an administrative assessment under the *Child Support (Assessment) Act 1989*

Family Law Act 1975 ss 69R, 60H, 65G, 65D
Child Support (Assessment) Act 1989 ss 25, 29
Parentage Act 2004 (ACT) s 19
Births, Deaths and Marriages Registration Act 1997 (ACT) s16

B & J (1996) FLC 92-716
In the Marriage of Tobin (1999) FLC 92-848
Re Mark (2003) FLC 93-173
H & J and Anor (2006) 36 Fam LR 316
Re Patrick (2002) FLC 93-096
Stone v Bowman, unreported, 28 February 2000

APPLICANT:	C Kemble
RESPONDENT:	G L Ebner
FILE NUMBER:	CAF 461 of 2006
DATE DELIVERED:	29 May 2008
PLACE DELIVERED:	Canberra
PLACE HEARD:	Canberra
JUDGMENT OF:	Faulks DCJ

Tabled paper:
Inquiry into the Provisions of the Family Law Amendment (Defacto Financial Matters and Other Measures Bill) 2008

Tabled by NSW Gay and Lesbian Rights Lobby, Sydney, 5 August 2008

Cite as: *Kemble & Ebner, [2008] FamCA CAF461/06*

HEARING DATE: 29 May 2008

REPRESENTATION

COUNSEL FOR THE APPLICANT: Mr Howard

SOLICITOR FOR THE APPLICANT:

COUNSEL FOR THE RESPONDENT: Ms Proctor

SOLICITOR FOR THE RESPONDENT:

IT IS ORDERED BY CONSENT THAT:

1. The respondent G L Ebner ('the respondent') and the Applicant C Kemble ('the Applicant') have equal shared parental responsibility for L M Kemble-Ebner born June 2003 ('L') and H N Kemble-Ebner born August 2005 ('H').
2. Pursuant to Section 19 of the *Parentage Act 2004* (ACT), the Applicant C Kemble, born August 1967, be declared a parent of L and of H.
3. Pursuant to Section 16 of the *Births, Deaths and Marriages Registration Act 1997* (ACT), the Registrar General Births, Deaths and Marriages amend the register in respect of the birth of L M Kemble-Ebner born June 2003 to include the Applicant, as a parent of the said child.
4. Pursuant to Section 16 of the *Births, Deaths and Marriages Registration Act 1997* (ACT), the Registrar General Births, Deaths and Marriages amend the register in respect of the birth of H N Kemble-Ebner born August 2005 to include the Applicant, as a parent of the said child.
5. In addition the Applicant and the Respondent each pay half of the pre-school and school fees payable in respect of L and H, including half of all enrolment fees, school fees, school camp charges, costs of uniforms and building fund donations voluntary or otherwise, and in addition half of the pre-school and school expenses including expenses for music, sport and

other activities as required by the school as part of their curriculum which are agreed to by the parties in writing.

6. Both the Respondent and the Applicant be permitted to take L and/or H out of the Commonwealth of Australia and travel overseas during any school holiday period in which the children are living with or spending time with the Respondent or Applicant as the case may be, provided that the party wishing to travel with the child or children provides the other with copies of return tickets for the child or children and a detailed itinerary providing addresses and phone numbers for the accommodation in which the child or children will be staying, at least 14 days prior to departure.

7. In addition to the overseas school holiday travel outlined in Order 6 above, the Respondent and the Applicant may take L and/or H out of the Commonwealth of Australia and travel with them overseas at any time with the written consent of the other party or by Court order.

8. The Respondent will hold the children's passports and will provide them to the Applicant for overseas travel in accordance with Orders 6 and 7 as requested, and the Applicant will return them to the Respondent when the child or children first returns to live with the Respondent after the overseas travel has concluded.

9. Subject to both parties mutually agreeing in writing to change pre-school or school for L and/or H, L and H shall attend B G C School until the end of Year 4 respectively, and shall then attend R College for the balance of their schooling. If a different pre-school or school is agreed to by both parties for either or both children, or a different pre-school or school must be chosen because of inability to enrol L and/or H in the desired pre-school or schools, the parties will each pay half of that other mutually agreed pre-school or school's fees.

10. The Respondent shall request each pre-school and school provide the Applicant with copies of all notices, reports and accounts, and in the event that the pre-school or school will not provide copies of these documents to

the Applicant then the Respondent shall provide copies of these documents to the Applicant as soon as practicable thereafter.

11. I find pursuant to the provisions of the *Child Support (Assessment) Act 1989* that C Kemble is a parent of the children L M Kemble-Ebner born June 2003 and H N Kemble-Ebner born August 2005.

12. The matter be removed from the pending cases list.

IT IS NOTED THAT:

13. The finding in Order 11 is made as a Federal Court pursuant to the provisions of the *Parentage Act (ACT) 2004*.

14. The parties have reached agreement about the level of child support that will be paid by Ms Kemble to Ms Ebner in relation to the children and that neither party proposes that there should be any variation to those amounts or to the basis for payment of those amounts as agreed at this point.

15. Ms Kemble's Counsel conceded that the orders that have been made here today, are within the terms of the agreement are in "substantially the same" terms as set out in Annexure A to that deed.

IT IS NOTED that publication of this judgment under the pseudonym *Kemble & Ebner* is approved pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth)

FAMILY COURT OF AUSTRALIA AT CANBERRA

FILE NUMBER: CAF 461 of 2006

C KEMBLE
Applicant

And

G L EBNER
Respondent

REASONS FOR JUDGMENT

1. In essence, the Australian Capital Territory presents a unique opportunity, if that is the correct word, for making orders of the sort that are being asked for, because of the fact that the ACT Supreme Court jurisdiction could still be cross-vested to this Court.

2. It seems to me that I am able to make orders in relation to the *Parentage Act 2004* (ACT) which would have the effect of declaring Ms Kemble to be a parent.

3. In my opinion the definition of "parent" as it is with one exception under the *Family Law Act 1975* would not include parents of a same-sex relationship. The case law relating to that matter includes *B & J* (1996) FLC 92-716, *In the Marriage of Tobin* (1999) FLC 92-848, *Re Mark* (2003) FLC 93-173, *H & J and Anor* (2006) 36 Fam LR 316, *Re Patrick* (2002) FLC 93-096 and, to the extent that it is relevant, *Stone v Bowman*, which is one of my decisions, unreported, 28 February 2000.

4. As I interpret it the effect of those decisions is that "parent" under the *Family Law Act* means a man and woman rather than a same-sex couple. An exception to that proposition [possibly] exists under s 69R which provides that if a person's name is entered as a parent of a child in a register of births or parentage information kept under a law of the Commonwealth or of the State, Territory or prescribed overseas jurisdiction, the person is presumed to be a parent of a child.

5. If I were to make a declaration under the s 19 of the *Parentage Act 2004,* this would amount to a finding under the *Births, Deaths and Marriages Registration Act 1997* (ACT) that Ms Kemble was a parent. The register would then have to be amended under s 16 of the *Births, Deaths and Marriages*

Registration Act, thus bringing about a situation where Ms Kemble would be registered as a parent. This in turn would mean the presumption under s 69R of the *Family Law Act* would [or could] apply, namely that she is a parent for the purposes of the *Family Law Act*.

6. Those would be orders that I would make as a Federal Court exercising the jurisdiction of the Territory Supreme Court and would have effect for the purposes of the ACT, not otherwise.

7. The first order sought in the minutes I have been given is that the respondent G L Ebner, the respondent, and the applicant C Kemble, have equal shared parental responsibility for L May Kemble-Ebner, born June 2003, L, and H N Kemble-Ebner, born August 2005, H. That is an order which I am able to make under the *Family Law Act* in respect of Ms Ebner because she is a parent according to s 69R and s 60H(2)(b). Ms Ebner is a person who is a parent pursuant to s 69R of the *Family Law Act* because she is registered as the parent on the children's birth certificates. In addition, under s 60H she is a parent because the children were born as a consequence of artificial conception procedures within the terms of 60H(2)(b).

8. The difficulty is that it is not feasible within the definition under s 60H for Ms Kemble to be a "parent" because it specifically refers to a man. Whether that was logical or not, that is what was enacted in the legislation. However, she is nevertheless a person who is entitled under the Act to apply for a parenting order because she is **a person interested in the welfare of the children** and that is sufficient to generate jurisdiction.

9. I am able to make an order which would confer parental responsibility in whatever proportions, (in this case equally) upon both of the agreed parents, without there being any further reference to counselling as would ordinarily be the case because one of the parties is a parent and therefore the exemption under s 65G of the Act applies.

10. If in fact these proceedings had occurred in two stages, and if there had been a declaration under the *Parentage Act* and a declaration or a direction under s 16 of the *Births, Deaths and Marriages Registration Act* then I might have been able to deal with the matter on the basis that Ms Kemble and Ms Ebner were **both** parents. However, it seems to me that I do not need to come to that finding for the purposes of making the order sought.

11. I am somewhat more perplexed, if I can put it that way, about what order I might make in relation to child support. If there is one piece of legislation which is even more convoluted and dense than the *Family Law Act*, (apart from the *Income Tax Assessment Act 1997)* it is the *Child Support (Assessment) Act 1989*. Under the *Child Support (Assessment) Act 1989* the definitions are somewhat circular, but Ms Ebner is a person who within the terms of the Act is an eligible carer who can then apply for an administrative assessment under

s 25. If that is so, then the Registrar would ordinarily be obliged to accept that application under s 29 if the Registrar was satisfied that Ms Kemble were a parent within the terms of that section. Section 29(2) includes s 29(2)(c). That section provides as follows:

> *If the application is a carer application, the Registrar is to be satisfied that a person is a parent of a child only if the Registrar is satisfied:*
>
> ...
>
> *(c) that, whether before or after the commencement of this Act, a Federal Court, a Court of a State or Territory or a Court of a prescribed overseas jurisdiction has:*
>
> *(i) found expressly that the person is a parent of the child; or*
>
> *(ii) made a finding that it could not have made unless the person was a parent of the child;*
>
> *and the finding has not been altered, set aside or reversed;*

12. In these circumstances I could not under the terms of the *Family Law Act* find at the moment that Ms Kemble was a parent of either of the children. On the other hand, I can as a Judge of a Federal Court in the ACT exercising cross-vested jurisdiction of the Supreme Court of the ACT, make a declaration and finding pursuant to the terms of the *Parentage Act* which would then constitute for the purposes of the *Child Support (Assessment) Act* a finding by a Federal Court, albeit exercising State or Territory jurisdiction, that Ms Kemble is a parent of the child.

13. *The Child Support (Assessment) Act* does not require that I make a finding as a **federal court** pursuant to **federal law.** This means that it would only be in the Australian Capital Territory and the Northern Territory that a Federal Court could make a declaration of the kind that is being sought in this case. So this does not set a precedent for other Courts in other jurisdictions to do the same thing.

14. But on that basis my declaration under the *Parentage Act*, would in my opinion properly qualify as an order or a finding under s 29(2) of the *Child Support (Assessment) Act.* This would have the effect of grounding an appropriate application for an administrative assessment.

15. The material before me, it suggested that the parties were not sure that could be accomplished and therefore wanted to find it in a different way, that is, to find that it was a child maintenance application or its equivalent. I am not sure what it could be if it were not a child maintenance application and in any event it

seems to me that if, as I believe to be the case, my interpretation of s 29(2)(c) is correct, if I made the finding I was asked to make generally, then the parties would be precluded from seeking an application for maintenance because there would be an opportunity properly to apply under the *Child Support (Assessment) Act*.

16. Accordingly, in this extraordinary situation, under s 61D, s 69R, s 19 *Parentage Act*, s 16 *Births, Deaths and Marriages Registration Act*] I make orders which I believe would substantively accord with the orders sought, except that by omitting the child maintenance order I provide an opportunity for a more appropriate way of dealing with the child support question because it would simply bring the matter within what I might loosely term, mainstream child support provisions.

I certify that the preceding sixteen (16) paragraphs are a true copy of the reasons for judgment of the Honourable Deputy Chief Justice Faulks

Associate:

Date: