Family Court of Australia

Talbot & Norman [2012] FamCA 96 (24 February 2012)

Last Updated: 28 March 2012

FAMILY COURT OF AUSTRALIA

TALBOT & NORMAN ***[2012] FamCA 96***

FAMILY LAW – CHILDREN – urgent Application for an injunction restraining the mother from terminating her pregnancy – whether the Court has jurisdiction – where mother gave evidence that she did not intend to terminate the pregnancy and there was thus no factual basis for the Application – whether the Court would, in any event, have jurisdiction to make the order sought – where parties are not married – where the Court has jurisdiction over ex-nuptial children in Queensland – whether a foetus is a "child" for the purposes of the *Family Law Act 1975* – where no definition of "child" in the Act – whether the common law "born alive rule" prevails – where a foetus cannot be a child unless it is born alive.

Commonwealth Powers (Family Law – Children) Act 1990 (Qld)
Family Law Act 1975 (Cth)

Attorney General (Queensland); (Ex rel Kerr) v T (1983) 46 ALR 275
Barrett v Coroner's Court of South Australia [2010] SASCFC 70
Barrett v Coroner's Court of South Australia [2011] HCATrans 166
In the Marriage of F (1989) FLC 92-031
K v T [1983] 1Qd R 396
In *Minister for Immigration and Multicultural and Indigenous Affairs v B* [2004] HCA 20; (2004) 219 CLR 365
Paton v The British Pregnancy Advisory Service [1979] 1 QB 276
Re Iby [2005] NSWCCA 178; (2005) 63 NSWLR 278

APPLICANT: Mr Talbot

RESPONDENT: Ms Norman

FILE NUMBER: BRC 1568 of 2012

DATE DELIVERED:	24 February 2012
PLACE DELIVERED:	Brisbane
PLACE HEARD:	Brisbane
JUDGMENT OF:	Murphy J
HEARING DATE:	24 February 2012

REPRESENTATION

FOR THE APPLICANT:	In person
FOR THE RESPONDENT:	In person

ORDERS

IT IS ORDERED THAT:

(1) The Initiating Application filed by the father on 23 February 2012 be dismissed.

IT IS NOTED that publication of this judgment by this Court under the pseudonym *Talbot & Norman* has been approved by the Chief Justice pursuant to s 121(9)(g) of the Act.

FAMILY COURT OF AUSTRALIA AT BRISBANE

FILE NUMBER: BRC 1568 of 2012

Mr Talbot

Applicant

And

Ms Norman

Respondent

EX TEMPORE

REASONS FOR JUDGMENT

1. Late yesterday afternoon, an Initiating Application was filed by Mr Talbot. That Application sought relief on an urgent basis in the following terms:
    1. Injunction – to stop [Ms Norman] aborting my child, as neither the baby or [Ms Norman] are unwell.

2. [Ms Norman] must not leave QLD whilst pregnant with my child.

3. All ultrasounds, blood tests or medical information regarding my baby to be sent to my via registered mail.
4. I am to be informed when [Ms Norman] is in labour and that I may attend the hospital when the baby is being born.
5. At the birth of our baby I am seeking full residency and sole responsibility of my child.
2. Those orders are contained in an Application drawn by a self-represented person. The orders as just quoted appear as final orders sought. The interim orders sought are expressed simply as:

1. Injunction order

2. Residency order.

3. I will take the application for interim orders as being, effectively, in the same terms, in respect of "injunction" and "residency", as those to which I have just referred which are sought by way of final order.
4. When the Application was filed urgently, a Registrar of this Court ordered that service be effected. Service was effected last night on the respondent, Ms Norman. Ms Norman is yet a child, born in October 1995. However, Ms Norman has a child from a previous relationship who is aged about nine months.
5. The parties had a short relationship and separated in January of this year. The affidavit accompanying the Application refers to that short relationship and to Ms Norman falling pregnant with Mr Talbot's child. The affidavit asserts that Ms Norman is 13 weeks pregnant with that child. Ms Norman appeared this morning representing herself. In light of her age, I permitted her mother to attend and sit at the bar table with her.
6. Initially, Ms Norman requested that she receive the assistance of the duty lawyer, and of course, I indicated to her that she would be permitted to do so. However, Ms Norman indicated almost immediately from the bar table that, while she was indeed pregnant, she did not intend to terminate that pregnancy.
7. In light of that statement, I requested Ms Norman to give sworn evidence to such effect, and she did so. Mr Talbot did not seek to ask any questions of her. The sworn evidence of the mother is, then, that she is about 13 weeks pregnant, but that she does not intend to terminate that pregnancy.
8. Accordingly, there is no factual foundation for the Application for injunction, and it ought be dismissed on that basis.
9. However, the highest that the mother's evidence can be put is that it is evidence of present intention as at today. Moreover, given the nature of the Application, it is, I think, important to set out for these parties, and perhaps more generally, my view that this Court does not, in any event, have the jurisdiction or power to make the order sought by the father in this case.

10. The parties are not married. Queensland referred power to the Commonwealth permitting this Court to deal with ex-nuptial children pursuant to the *Commonwealth Powers (Family Law – Children) Act 1990* (Qld).
11. Section 69ZE of the *Family Law Act 1975* (Cth) ("the Act") provides for the extension of powers given to this Court in Part VII to ex-nuptial children in circumstances where the legislation of a state refers that power, and where that legislation remains in force.
12. The Queensland legislation to which I have just referred does indeed remain in force, and accordingly, this Court has power to make orders pursuant to Part VII of the Act in respect of ex-nuptial children in Queensland.
13. Section 69B(1) of the Act provides relevantly that:

Proceedings that may be instituted under this Part must not, after the commencement of this section, be instituted otherwise than under this Part.

14. Accordingly, the power to make parenting orders pursuant to Part VII of the Act in respect of ex-nuptial children shall be instituted under Part VII and not otherwise.
15. The relief sought by the father is in the nature of injunctive relief. Before embarking upon a discussion of that issue, I pause to observe again that the respondent mother in these proceedings is a child. Nevertheless, I reiterate, she is a child who is herself a mother already, and appears here today in the company of her mother. I have no doubt that she has sufficient maturity to represent her interests in these proceedings and, in any event, is assisted by her mother in doing so.
16. Section 68B provides the power within Part VII of the Act for this Court to make injunctions. Section 68B(1) provides:

If proceedings are instituted in a court having jurisdiction under this Part for an injunction in relation to a child, the court may make such order or grant such injunction as it considers appropriate for the welfare of the child, including...

17. Thereafter, the section provides for specific instances of that power, including:

(b) an injunction for the personal protection of...[a number of specified persons].

18. Plainly enough, this Court has power to grant an injunction for the personal protection of a child (see section 68B(1)(a)).
19. It will have been observed that the extension of power by reference to the state legislation to which I have referred, and section 69ZE of the Act, pertains to proceedings in respect of ex-nuptial children. That is to say, there must be a "child" the subject of those proceedings.
20. Reference to section 68B will reveal that it, too, is dependent upon there being a "child" in respect of whom the injunction might apply.
21. In this case, the injunction is directed towards the mother, but in respect of a foetus, that is, a child not yet born. The circumstances just described do not frequently occur.
22. Lindemayer J, in *In the Marriage of F* (1989) FLC 92-031 dealt with a similar issue in respect of a married couple. His Honour held that the Court had jurisdiction by reason of the matter being a matrimonial cause within the meaning of section 4(1) of the Act.
23. The jurisdiction of the Court in this case derives from the referral of powers in respect of ex-nuptial children to which I have just referred. It cannot, of course, be argued that there is a "matrimonial cause" here, because the parties are not, and never have been, married.
24. Accordingly, the jurisdiction of this Court, as well as the power of this Court to make orders if the Court does have jurisdiction, is dependent upon there being a child in respect of whom the jurisdiction devolves.

25. In the decision to which I have just referred, a number of principles were established, albeit in the context to which I have just referred. First, the principle established in *Paton v The British Pregnancy Advisory Service* [1979] 1 QB 276 was approved for the purposes of the Act. That is to say, there is "no common law right" of the husband which would enable him to force his wife to carry a child to term.
26. A second argument advanced in that case as founding jurisdiction for the orders sought (which were almost a mirror copy of the orders sought in this case) is that the unborn child has a right to protection against abortion and that the husband may enforce that right on behalf of the child. (In this case, of course, the word "father" needs to be read in lieu of the word "husband").
27. The basis for that so-called right of protection was said in that case to be the International Covenant on Civil and Political Rights and the United Nations Declaration of the Rights of the Child. That argument was rejected by Lindenmayer J. His Honour held (at 77,434):

Whilst I accept, for the purposes of this judgment, that it may be legitimate for the Court to have regard to those international covenants in order to resolve any doubt as to the existence of a supposed common law right, I am of the opinion that there is no doubt that, at common law, no such right exists.

28. I have already observed that the father represents himself. This of course places him in a very difficult position in terms of advancing arguments in respect of matters such as that to which I have just referred. Obviously enough, I invited him to do so. Equally obviously perhaps, Mr Talbot advanced no argument in respect of those matters.
29. It seems to me, with great respect, that Lindenmayer J was plainly right in that conclusion. His Honour referred to the decision of the Supreme Court of Queensland in *K v T* [1983] 1Qd R 396 in finding that "a foetus has no legal personality and cannot have a right of its own until it is born and has a separate existence from its mother" (at 401).
30. That decision, by Williams J, was confirmed on appeal to the Queensland Court of Appeal and ultimately expressly approved of by the Chief Justice of the High Court of Australia, Gibbs CJ, in dismissing an application for special leave to appeal. (See *Attorney General (Queensland); (Ex rel Kerr) v T* (1983) 46 ALR 275). The then Chief Justice of Australia said (at 277):

As at present advised, I would agree with the judgment of Sir George Baker P in *Paton v BPAS Trustees*... that a foetus has no right of its own until it has been born and has a separate existence from its mother ....

31. The issue in *K v T* was ultimately resolved on different grounds relating to the criminal law of Queensland but, as Lindenmayer J said, "his Honour cast no doubt whatsoever upon the correctness of that proposition, and I am of the opinion that there has been no basis shown to me to do so in this case." Again, with great respect, I agree.
32. It is of some significance as it seems to me that in *In The Marriage of F*, it was specifically argued that the word "child" wherever it appears in the Act includes an unborn child. If that proposition was, and is, correct, this Court has jurisdiction by reason of the fact that the referring legislation, and in turn section 69ZE, confers jurisdiction in respect of an ex-nuptial child.
33. So, too, if that proposition is correct and the Court has jurisdiction, the Court has power to order injunctions in respect of a "child" by reference to section 68B of the Act.
34. Lindenmayer J rejected that argument, holding that the word "child" as used in the Act means a child once born. Again, with great respect to his Honour; I agree with that conclusion. In my view that conclusion is consistent with common law authority. (See, more recently, e.g., *Barrett v Coroner's Court of South Australia* [2010] SASCFC 70, applying *Re Iby* [2005] NSWCCA 178; (2005) 63 NSWLR 278). Special leave to appeal was refused by the High Court in *Barrett*

(*Barrett v Coroner's Court of South Australia* [2011] HCATrans 166).

35. In my view, nothing in the Act alters that position, including, in particular, the so-called "welfare jurisdiction" conferred by s 67ZC – a jurisdiction sometimes referred to as akin to that exercised by courts exercising the *parens patriae* jurisdiction.
36. Section 67ZC was inserted into the Act in 1995. That section provides:

ORDERS RELATING TO THE WELFARE OF CHILDREN

67ZC(1) In addition to the jurisdiction that a court has under this Part in relation to children, the court also has jurisdiction to make orders relating to the welfare of children.

Note: Division 4 of Part XIIIAA (International protection of children) may affect the jurisdiction of a court to make an order relating to the welfare of a child.

67ZC(2) In deciding whether to make an order under subsection (1) in relation to a child a court must regard the best interests of the child as the paramount consideration.

Note: Sections 60CB to 60CG deal with how a court determines a child's best interests.

37. In *Minister for Immigration and Multicultural and Indigenous Affairs v B* [2004] HCA 20; (2004) 219 CLR 365, the plurality held at [52]:

By necessary implication the Family Court may also make an order under section 67ZC that is binding on a parent. Under that section it may also make orders such as those made in *Marion's* Case [relating to special medical procedures] or those analogous to orders traditionally made by courts exercising the parens patriae jurisdiction. Nothing in that section or in the rest of Part VII, however, suggests that the Family Court has jurisdiction to make orders binding on third parties whenever it would advance the welfare of a child to do so.

38. Nothing in section 67ZC (or in Part VII generally), imposes – expressly or inferentially – any duty or liability on third parties to act in the best interests of, or to advance the welfare of, a child except where Part VII expressly imposes obligations on third parties (for example, ss 65M, 65N and 65P). That Part is concerned with the relationship between parents and children and parents' duties in respect of their children.
39. Nothing in that decision of the High Court, or the Act's reference to "additional jurisdiction" suggests that the references to "child" or "children" changes the common law position.
40. Thus, it seems to me that, whatever jurisdiction this Court might have as being "analogous to orders traditionally made by courts exercising the parens patriae jurisdiction", no such jurisdiction extends to making orders in respect of a child not yet born in circumstances where the Act does not clearly provide for any such order to be made and where common law authority is to the effect that the meaning of "child" does not include a child not yet born and where the Act does not otherwise define child to include an unborn child.
41. It may well be that a court which, unlike this Court, does not have its jurisdiction limited by statute, may have power to make orders of the type sought. Obviously, I do not purport to make comment other than in respect of the jurisdiction or power of this Court. In that respect, I am of the view that this Court does not have jurisdiction to make orders with respect to an ex-nuptial child in circumstances where the orders are directed toward a foetus. That is, in my view the jurisdiction of this Court in respect of ex-nuptial children extends only to ex-nuptial children once born.
42. Accordingly, this Court has no jurisdiction to make the order sought and the Application should be dismissed.

43. I, accordingly, dismiss the Application on the following bases:
    (a) the Court has no jurisdiction to make the orders; and
    (b) there is, in any event, no evidence justifying the making of any such order.

I certify that the preceding forty-three (43) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Murphy delivered on 24 February 2012.

Associate:

Date: 6 March 2012.
