

INQUIRY INTO INCLUSION OF DONOR DETAILS ON THE REGISTER OF BIRTHS

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2 March 2012

The Chair
Committee on Law and Safety
Legislative Assembly
Parliament House
Macquarie Street
SYDNEY NSW 2000

By email: lawsafety@parliament.nsw.gov.au

Dear Mr Barilaro,

Inquiry into the inclusion of donor details on the register of births

1. Women's Legal Services NSW (WLS NSW) thanks the Legislative Assembly Law and Safety Committee for the opportunity to comment on the issue of whether there should be provision to include donor details on the register of births.
2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims compensation, care and protection, human rights and access to justice.
3. We note that WLS NSW acted for the plaintiff in the recent District Court case that prompted this inquiry, *AA v The Registrar of Births Deaths and Marriages and BB* [2011] DCNSW 100. In order to assist the Inquiry, our client has given us permission to provide an anonymised copy of the plaintiff's written submissions filed in the case, which explain the relevant legal framework in greater detail than published judgment of Judge Walmsley.

Yours sincerely,

Women's Legal Services NSW

Janet Loughman
Principal Solicitor



DISTRICT COURT OF NSW

SYDNEY REGISTRY

No 52492

of 2011

Co-Mother

Plaintiff

The Registrar of Births, Deaths and Marriages

First Defendant

Donor

Second Defendant

OUTLINE OF PLAINTIFF'S SUBMISSIONS

Note that due to the non publication order made by the District Court on 26 May 2011, all names of the Plaintiff, the 2nd Defendant, the witness and the child have been removed to preserve anonymity.

BACKGROUND TO THE PROCEEDINGS

1. The Plaintiff, Co-Mother, is the second female parent to the child Daughter (**the child**) born in 2001.
2. The Plaintiff was in a de facto relationship with the Mother from approximately 1994 to 2006: see Affidavit of Co-Mother affirmed 1 February 2011 (**Co-Mother affidavit**) paragraphs 8-9; Affidavit of Birth Mother affirmed 27 January 2011 (wrongly dated 27 January 2010) (**Birth Mother affidavit**) paragraphs 6-9.
3. The Plaintiff and the mother pursued a plan as a de facto couple to conceive a child or children through assisted conception using a fertilisation procedure with a known sperm donor: Co-Mother affidavit paragraphs 13-17; Birth Mother affidavit paragraphs 10-15.

4. The mother ultimately conceived the child with the assistance of the second defendant Donor. This conception occurred through an informal home insemination process and not through sexual intercourse: Co-Mother affidavit paragraphs 22-24; Birth Mother affidavit paragraphs 19-21; Affidavit of Donor affirmed 20 May 2011 (**Donor affidavit**), unnumbered paragraph 1.
5. When the child was born in 2001, only the mother's name was listed on the birth certificate: see Co-Mother affidavit, paragraphs 28, 34 ; Birth Mother affidavit, paragraph 24.
6. At some time after 2002, on the joint application of the birth mother and Donor, the name of the Donor was added to the child's birth certificate in the space marked 'father': see Birth Mother affidavit paragraph 27; Co-Mother affidavit paragraph 36 and Annexure E; Donor's affidavit unnumbered paragraph 6.
7. The Plaintiff and the mother separated in 2006 but since that time they have continued to co-parent the child: see Co-Mother affidavit paragraphs 37-38; Birth Mother affidavit, paragraph 25.
8. In 2008, the *Status of Children Act 1996* (NSW) (**SOC Act**) was amended so that a mother's female de facto partner is treated as a parent of a child born to her partner in the circumstances set out in s 14(1A) of that Act. As a result the Plaintiff now seeks to have her name placed on the child's birth certificate pursuant to s 19 and Schedule 3 Part 4 Clause 17 of the *Births, Deaths and Marriages Registration Act 1995* (NSW) (**BDM Act**).
9. The Registrar of Births, Deaths and Marriages (**the Registrar**) may amend the Register in certain circumstances explained in more detail below. However, where in order to do so it is necessary to remove a person's name from the Register, the consent of that person is required: see BDM Act Schedule 3 Cl 17(4). In the absence of that consent, only a Court can order such a removal: see BDM Act Schedule 3 Cl 17(4)(b)(i).

10. On 25 February 2010, the Plaintiff wrote to the 2nd Defendant seeking his consent to remove his name from the birth register: Co-Mother affidavit, paragraph 43 and Annexure G.
11. By letter dated 2 March 2010, the 2nd Defendant wrote to the Plaintiff refusing this request: Co-Mother affidavit, paragraph 44 and Annexure H.
12. On 18 March 2010, the Plaintiff and the mother jointly sent the completed form “Adding Mother’s details to the Birth Record” to the Registrar: Co-Mother affidavit, paragraph 45 and Annexure I. This was followed by a letter sent by the Plaintiff’s solicitor to Donor on 19 March informing him of this application and seeking his consent to removing his name from the birth register: Co-Mother affidavit, paragraph 46 and Annexure J.
13. On 24 March 2010, the Plaintiff’s solicitor received a letter from the Registrar indicating that the Registrar declined to amend the birth register as requested because the 2nd Defendant had not consented to have his name removed from the Register: Co-Mother affidavit, paragraph 48 and Annexure L.
14. On 29 March 2011, the Plaintiff commenced proceedings by way of summons in the District Court seeking:
 - 14.1. an order under Schedule 3 Clause 17(4) of the BDM Act that the name of the Donor be removed from the birth register; and
 - 14.2. an order under s 19 and Schedule 3 Clause 17(2) that the name of the Co-Mother be added to the birth register of the child.
15. The original Defendant in the proceedings was the Registrar (the 1st Defendant). When the matter came before Judicial Registrar Smith for directions on 29 March 2011, the Court ordered that the 2nd Defendant be joined pursuant to UCPR 6.24. The Plaintiff asked the Court to note that the Plaintiff did not consent to that order.

16. The Court also granted leave on that occasion to the Registrar to withdraw his appearance filed on 23 March 2011 pursuant to UCPR 12.5 so that he could file a submitting appearance pursuant to UCPR 6.11.
17. An amended summons was filed by the Plaintiff on 31 March 2011, naming the Donor as the 2nd Defendant.
18. On 1 April 2011, the Registrar filed an appearance submitting to the jurisdiction of the Court save as to costs. The Registrar filed submissions on costs on 23 June 2011, arguing that costs should not be awarded against him given the submitting nature of the appearance.
19. The matter was before the Court again on 14 April 2011 when the 2nd Defendant, who was represented on that occasion, opposed the matter being set down for hearing at that time, and the matter was listed for further directions on 26 May 2011.
20. On that date, following certain publications in the media, the Court made a non-publication order in relation to the names of the Plaintiff, the 2nd Defendant, the Birth Mother, and the child and ordered that the proceedings be heard in closed court and be given the pseudonym of *AA v Registrar of Births, Deaths and Marriages and BB*.
21. The Court also made orders on 26 May 2011 in relation to a timetable for the filing of evidence and submissions and set the matter down for hearing on 2 August 2011.

SUMMARY OF THE PLAINTIFF'S SUBMISSIONS

22. The Plaintiff contends that the Court should exercise its power under s 19 and Clause 17(4) of Schedule 3 of the BDM Act to remove the name of the 2nd Defendant from the birth register of the child Daughter. This is because the 2nd Defendant is not (and has never been) a legal parent of the child: see SOC Act s 14(2).

23. By contrast, the Plaintiff is a parent of the child as a result of s 14(1A) of the SOC Act which, while introduced only in 2008, has effect in relation to children born before the legislation came into effect.
24. Once the name of the 2nd Defendant has been removed from the birth register, the name of the Plaintiff should be added to the birth register to give effect to her status under SOC Act s 14(1A).

THE RELEVANT LEGISLATION

25. This application falls to be determined via the combined operation of the BDM Act and the SOC Act.
26. The key provisions of the BDM Act are s 19, and Schedule 3 Part 4 Clause 17 which provide in relevant part as follows:

19 Orders for registration of birth or inclusion of registrable information

(1) The District Court may, on application by an interested person or on its own initiative, order:

(a) the registration of a birth, or

(b) the inclusion of registrable information about a birth or a child's parents (including details of the marriage of a child's parents) in the Register.

...

Schedule 3 Savings, transitional and other provisions

Part 4 Provision consequent on enactment of Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008

17 Application to alter register as consequence of amendment of *Status of Children Act 1996*

(1) In this clause:

relevant provisions means section 14 (1A) (a) of, and clause 7 of Schedule 2 to, the Status of Children Act 1996, as inserted by the Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008.

(2) An application may be made to the Registrar for the addition of registrable information, about the identity of a woman who is presumed to be a parent of the child under the relevant provisions, in the birth registration of a child **born before the commencement of those provisions**.

(3) The Registrar is to determine the application by making the addition or refusing to make the addition.

(4) The Registrar must not add registrable information in the child's birth registration about the identity of the woman as a parent of the child unless:

(a) the application is made jointly by that woman and the birth mother, and

(b) if the child's birth registration already includes registrable information that purports to identify a person as the father of the child:

(i) that person has given his consent to the removal of the particulars from the birth registration that identify him as the father of the child (**or a court or the regulations authorise their removal because the person is not the father by operation of law or otherwise**), and

(ii) the Registrar removes those particulars from the birth registration, (*emphasis added*)

...

(6) This clause has effect despite sections 18 and 20 of this Act and clause 7 (2) of Schedule 2 to the *Status of Children Act 1996*. (*emphasis added*)

27. The provisions of the BDM Act extracted above need to be considered in combination with the relevant provisions of the SOC Act. Part 3, Division 1 of the SOC Act sets out a number of presumptions of parentage. These include s 11(1) by which a "person is presumed to be a child's parent if the person's name is entered as the child's parent in the Births, Deaths and Marriages Register ...".
28. Section 13 of the SOC Act provides that a man is presumed to be a father if "the man executes a formal paternity acknowledgment or any other instrument acknowledging that he is the child's father...". By s 19(1), such an acknowledgment includes one executed "in or to the effect of a form prescribed by the regulations". The Status of Children Regulation (**SOC Regulation**) sets out a form of paternity acknowledgement (Form 4). There is no dispute that the 2002 application by the mother and the 2nd Respondent (Co-mother affidavit, Annexure I) is such an instrument.
29. Section 14 deals specifically with presumptions of parentage arising out of the use of fertilisation procedures. These include the following:

(1A) When a woman who is the de facto partner of another woman has undergone a fertilisation procedure as a result of which she becomes pregnant:

(a) the other woman is presumed to be a parent of any child born as a result of the pregnancy, but only if the other woman consented to the procedure, ...

...

Note. "De facto partner" is defined in section 21C of the Interpretation Act 1987.

(2) If a woman (whether married or unmarried) becomes pregnant by means of a fertilisation procedure using any sperm obtained from a man who is not her husband, that man is presumed not to be the father of any child born as a result of the pregnancy.

30. Section 14(5A) provides that in any proceedings in which the operation of subsection (1A) is relevant, the consent of a woman to the carrying out of a fertilisation procedure that results in the pregnancy of her de facto partner is presumed.
31. Significantly, by s 14(4), any presumption that arises under s 14(1) - s 14(3) is irrebuttable. By contrast, by s 15(2), the SCA provides that every presumption arising under Part 3 Division 1 (except for a presumption arising under section 12 (1) or 14 (1)–(3)) is a rebuttable presumption. Therefore a presumption arising under s 11 or s 13 is rebuttable while a presumption that arises under s 14(1A) or s 14(2) is irrebuttable.
32. As noted above, the SOC Act provisions that deal with children born in the context of a same sex relationship using a fertilisation procedure (see s 14(1A)) were included in the SOC Act in 2008 by the *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* and came into effect on 22 September 2008. However, by Schedule 2 Part 3 Clause 7 of the SOC Act,
 - (1) The presumptions arising under section 14 (1A) in relation to a child born as the result of a fertilisation procedure, as inserted by the *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008*, extend to a procedure undertaken, and a consent given, before the commencement of that subsection. This subclause applies even though at the time the consent was given the presumptions did not apply.
33. In other words, the amendment has retrospective effect.

34. Section 3(1) of the SOC Act also defines a “fertilisation procedure” as:

- (a) the artificial insemination of a woman, or
- (b) the procedure of transferring to a woman’s body an ovum (whether or not produced by her) fertilised outside her body, or
- (c) the procedure of transferring to a woman’s body an ovum (whether or not produced by her) or both the ovum and sperm to enable fertilisation of the ovum to occur in her body, or
- (d) any other procedure for the assisted conception of children that is prescribed by the regulations.

35. Neither the SOC Act nor the SOC Regulation elaborates any further on a “fertilisation procedure” and there is no definition in either the Act or the Regulation of “artificial insemination”.¹

THE PLAINTIFF IS A PARENT OF THE CHILD

36. In these proceedings, the Plaintiff is seeking an order that her name be placed on the birth register of the child. In order to obtain such an order, a number of conditions must be satisfied. The first of these is to establish that the Plaintiff is a parent of the child under s 14(1A) of the SOC Act.

37. There are a number of elements to the establishment of the presumption of parentage that arises under s 14(1A) of the SOC Act. First, the person who gave birth to the child must have become pregnant having “undergone a fertilisation procedure”. The evidence clearly establishes that the child was born via a “fertilisation procedure” using the gametes of the 2nd Defendant via a means that was not sexual intercourse: see Co-Mother affidavit, at paragraphs 22-24; Birth Mother affidavit, paragraphs 19-21; Donor affidavit unnumbered paragraph 1. Contrary to the assertion of the 2nd defendant, at Donor affidavit unnumbered paragraph 10, the statute draws no distinction between sperm

¹

In *W v G* (1996) 20 Fam LR 49 the Supreme Court (Hodgson J) held (at 62) that what was, in effect, an informal home insemination process using sperm from a known donor was “artificial insemination” under s 6 of the then *Artificial Conception Act 1984* (NSW). The *Artificial Conception Act* was repealed by s 37 of the SOC Act.

donation by a known donor and that of an unknown donor in defining a “fertilisation procedure”.

38. Secondly, the Plaintiff must have been the de facto partner of the woman who became pregnant as a result of that fertilisation procedure at the time the procedure was undertaken. De facto partner is defined in s 21C of the *Interpretation Act 1987* as follows:

(1) Meaning of “de facto partner”

For the purposes of any Act or instrument, a person is the **de facto partner** of another person (whether of the same sex or a different sex) if:

- (a) the person is in a registered relationship or interstate registered relationship with the other person within the meaning of the *Relationships Register Act 2010*, or
- (b) the person is in a de facto relationship with the other person.

(2) Meaning of “de facto relationship”

For the purposes of any Act or instrument, a person is in a **de facto relationship** with another person if:

- (a) they have a relationship as a couple living together, and
- (b) they are not married to one another or related by family.

A de facto relationship can exist even if one of the persons is legally married to someone else or in a registered relationship or interstate registered relationship with someone else.

39. There is no dispute about the fact that at the time the decision was made to conceive the child using the fertilisation procedure, and at the time the child was actually conceived, the Plaintiff and the mother were in a de facto relationship: see Co-Mother affidavit paragraphs 23-24; Birth Mother affidavit paragraphs 20-21; Donor affidavit unnumbered paragraph 1.
40. There is also no dispute that the Plaintiff consented to the procedure: see Co-Mother affidavit paragraphs 23-24; Birth Mother affidavit paragraph 20 (though note that under s 14(5A) such consent is in any event presumed).

41. On this basis, the Plaintiff is presumed to be a parent of the child born as a result of that procedure (s 14(1A)(a)) and that presumption is irrebuttable (s 14(4)).
42. Therefore, as a parent, the Plaintiff is entitled to seek to have her name added to the birth register. However, as explained above, the Registrar's position is that he cannot add the Plaintiff's name to the Register while the 2nd Defendant's name appears there and while the 2nd Defendant has refused consent to the removal of his name (see Co-Mother affidavit, annexure L). Therefore, before the Plaintiff's name can be added to the Register, it is necessary for this Court to make an order under s 19 and Clause 17 of Schedule 3 of the BDM Act that the 2nd Defendant's name be removed from the Register.

DONOR IS NOT A PARENT OF THE CHILD

43. There is no factual dispute about the circumstances of the child's conception and birth: see Co-Mother affidavit paragraphs 22-24, Birth Mother affidavit paragraphs 20-21, Donor affidavit unnumbered paragraphs 1-3.
44. Section 14(2) of the SOC Act provides clearly that where a woman becomes pregnant by means of a fertilisation procedure using sperm obtained from a man who is not her husband, **that man is presumed not to be the father of any child born as a result of the pregnancy**. And, as noted above, the presumption in s 14(2) is irrebuttable: SOC Act s 14(4).²
45. However, by s 11(1), a person is presumed to be a child's parent if that person's name is entered as the child's parent in the Register. There is also no dispute about the fact that the 2nd defendant's name has been entered as the second parent in the Register, though there is some disagreement as to the circumstances or reasons for which this occurred: see Birth Mother affidavit

² The respective strength of the presumptions and the distinction between those that are irrebuttable (see s 14(2)) and those that are rebuttable (ss 11 and 13) was relied on by the Supreme Court in its decisions in *PJ v Department of Community Services* [1999] NSWSC 340 at [10], [12] (per Windeyer J), and *A and B* (2000) 26 Fam LR 317; [2000] NSWSC 640 at [38]-[40] (per Bryson J).

paragraph 27; Co-Mother affidavit paragraphs 32-36; Donor affidavit unnumbered paragraph 6.

46. The fact that the 2nd Defendant's name is on the birth register gives rise to a presumption that he is a parent of the child (SOC Act, s 11). Likewise the acknowledgment signed by the 2nd Defendant raises a presumption that he is a legal father (SOC Act s 13). Those presumptions are rebuttable presumptions (SOC Act s 15(2)). By contrast, the presumption that the 2nd Defendant is NOT a parent as a man whose sperm was used via a fertilisation procedure to enable the mother to become pregnant is irrebuttable: see s 14(2).³
47. Section 17(2) of the SOC Act provides:
- (2) If an irrebuttable presumption arising under this Division conflicts with a rebuttable presumption arising under this Division that is not rebutted in any proceedings, the irrebuttable presumption prevails over the rebuttable presumption.
48. The circumstances of the child's conception and birth set out in the evidence before the Court are sufficient to rebut the presumption, on the balance of probabilities (see s 15(1)) that arises from the 2nd Defendant's name being on the birth certificate and from the acknowledgement that he signed. In addition, by s 17(2), even if that presumption were not rebutted, the irrebuttable nature of the presumption under s 14(2) must negate the rebuttable presumptions that arise under ss 11 and 13.
49. Therefore the 2nd Defendant is not a parent to the child. As he has not consented to remove his name from the birth register, the Plaintiff submits that the Court should exercise its power to make that order.
50. In order to make the order under s 19 of the BDM Act (to include information on the Register), and because the 2nd Defendant's name appears on the Register, the Court must first make an order under BDM Act Schedule 3 Part 4 Clause 17(4)(b)(i) authorising the removal of the name of the 2nd Defendant from the Register on the ground that he is not the second legal parent of the child. Once

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See *A and B* (2000) 26 Fam LR 317; [2000] NSWSC 640 at [40] (per Bryson J); *PJ v Department of Community Services* [1999] NSWSC 340 at [12] (per Windeyer J).

that order is made and the Registrar has removed the 2nd Defendant's name from the Register, the Registrar can then add the Plaintiff's name to the Register.

CONCLUSION

51. For the reasons set out above, the 2nd Defendant's name should be removed from the Register of Births, and the Plaintiff's name should be added to it.



Reg Graycar



Jenni Millbank



Counsel for the Plaintiff

30 June 2011