In Re. An Application under the Status of Children Act [2002] NTCA 3

TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP7 of 2001
DELIVERED:	20 May 2002
HEARING DATES:	11 March 2002
JUDGMENT OF:	Martin CJ, Mildren & Bailey JJ

CATCHWORDS:

Appeal – *Status of Children Act* – Declaration of Paternity – Jurisdiction – whether adopted person can seek declaration of paternity of natural father – whether discretion to make declaration should be exercised

Text

Williams Civil Procedure Vol. 1, paras 23.01.20; 23.01.25 and 23.03.1

Statutes

1. *Adoption of Children Act*, s 90
2. *Adoption of children Ordinance* 1949-1950, ss 5(1), 16, 17, 20, 30, 31 and 39;
3. *Adoption of Children Ordinance* (1964); ss21, 31 and 46.
4. *Status of Children Act*: ss 2, 4, 5, 8, 9, 11 and 19
5. *Supreme Court Act*; s 18
6. *Supreme Court Rules*: r 23.01

Cases cited

1. *Aldridge v Attorney-General (Rogers intervening)* [1968] P 281 at 292 – followed.
2. *Bass & Anor v Permanent Trustee Co Ltd & Ors* (1999) 198 CLR 334 at 355 – followed
3. *Butler v Attorney-General for the State of Victoria* (1961) 106 CLR 208 at 276 – applied.
4. *Dey v Victorian Railways Commission* (1948-49) 78 CLR 62 – followed.

5. *Guaranty Trust Company of New York v Hannay & Co* [1915] 2 KB, 536 – followed.
6. *Knowles v Attorney-General* [1915] P 54 – followed
7. *Warter v Warter* (1890) 15 P 35 – distinguished.
8. *Woodruffe v The Northern Territory of Australia* (2000) 10 NTLR 52 at [28] – referred to.

REPRESENTATION:

Counsel:

Appellant:	J B Waters QC and P Keyzer
Respondent:	G Downes QC and R Bruxner

Solicitors:

Appellant:	Geoff James
Respondent:	Brian S Cooney

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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

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No. AP7 of 2002

CORAM: Martin CJ, Mildren & Bailey JJ

REASONS FOR JUDGMENT

(Delivered 20 May 2002)

MARTIN CJ:

[1] I have had the benefit of a draft of the judgment of Mildren J. I agree with his Honour's reasons that the appeal be dismissed.

[2] However, I wish to add some comments of my own. In my opinion there is no interrelationship between the Status of Children Act 1979 (NT) and the Adoption of Children Act 1994 (NT) which can support the appellant's case. The Status of Children Act was originally directed to children born out of wedlock. The foundation for all that followed in the Act was to be found in s 4, which provided that for all purposes of the law in the Northern Territory the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are, or have been, married to each other and all other relationships were to be determined accordingly. The rule of construction whereby in any instrument, in the absence of expression of any intention to the contrary, words of relationship

signify only legitimate relationships, was abolished. Further, the original Act, as amended from time to time, contains a number of presumptions such as that arising from marriage (s 4A), going to paternity arising from cohabitation (s 5), parentage arising from registration of birth (s 9), paternity arising from certain acknowledgments (s 9A) and of parentage arising from findings of court. It is in that context that s 11 was enacted and, in my opinion, its operation should be confined to matters arising out of the operation of that Act. Given that it is especially provided that the presumption of law arising by virtue of s 5D(1) of the Act is irrebuttable and there is no like provision in respect of the other presumptions, then they are open to be rebutted and s 11 appears to have been designed to effect that purpose.

[3] The Adoption of Children Act regulates the adoption of children. Over the years the consequences of an adoption order have been significantly expanded, but one feature has remained constant, that is, that subject to express limited exceptions, the adopted child is regarded as if born to the adopting parents in lawful wedlock. The legal relationship between the biological parents and child is terminated.

[4] Another feature of adoption, until recent times, has been the legislative protection of the privacy of the child and other parties to it by imposing secrecy on disclosure provisions in regard to the process. However, the law has recognised the difficult task of acknowledging the importance of birth relationships, while continuing to provide security for adoptive parents in

their care of adopted children. Those views have been taken into account in the Territory in Pt 6 of the 1994 Act. Those provisions for access to information by the adopted person, a relinquishing parent or an adopted parent, are special provisions relating to that subject.

[5] In my view the two Acts can not operate together. The provisions of s 11 of the Status of Children Act was not intended to be a vehicle to support the application made in this case. The Status of Children Act does not expressly distinguish in any way between birth children and adopted children. No such distinction is expressed in it.

MILDREN J:

[6] This appeal and the Notice of Contention raise for consideration three questions:

1. Can a person who has been adopted seek a declaration of paternity in respect of that person's natural father pursuant to s 11(1) of the *Status of Children Act?*

2. If the answer to question 1 is yes, should the Court have, on the alleged facts of this case, refused to hear the application vide s 11(2) of the *Status of Children Act?*

3. If the answer to question 1 is no, does the Court have any independent power under its general jurisdiction to make a declaration of paternity

limited to the period prior to the date of the adoption order, and if it does, ought the Court refuse to exercise that jurisdiction?

[7] The relevant facts may be simply stated. The appellant alleges that she is the natural daughter of A and B. At the time of her birth, A and B were not married. Subsequently B, her mother, married C. Some years later, an adoption order was made by Kriewaldt J in respect of the appellant in favour of B and C. It is further alleged that A was represented by a solicitor at the time of the hearing of the adoption application.

[8] The adoption order was made pursuant to s 5(1) of the *Adoption of Children Ordinance 1949-1950* (the 1949 Ordinance). In 1964 that Ordinance was repealed and replaced by the *Adoption of Children Ordinance* (the 1964 Ordinance), the transitional provisions of which continued in force the original adoption order. In 1979 the *Status of Children Act* (the Status Act) came into force. That Act, which has subsequently been amended on a number of occasions, remains in force. In 1994 the 1964 Ordinance (as well as a number of amending Ordinances and Acts thereto) was repealed by s 88 of the *Adoption of Children Act* which came into force on 3 May 1994 (the 1994 Act). Section 90(a) of the 1994 Act continued in force an adoption order made or continued in force under the repealed 1964 Ordinance (as amended) as if the order had been made under the new Act. It will be necessary to return to the provisions of the 1949 Ordinance and the 1964 Ordinance (as amended) and the 1994 Act, but for present purposes, it is sufficient to note that the original order still continues in force.

[9] Sections 11(1) and (2) of the Status Act provide:

> (1) A person who –
>
> (a) alleges that a named person is the father of her child;
>
> (b) alleges that the relationship of father and child exists between that person and any other named person; or
>
> (c) being a person having a proper interest in the result, wishes to have it determined whether the relationship of father and child exists between 2 named persons,
>
> may apply to the Supreme Court for a declaration of paternity and, if it is proved to the satisfaction of the Court that the relationship exists, the Court may make a declaration of paternity whether or not the father or the child or both of them are living or dead.
>
> (2) Notwithstanding anything in subsection (1), the Court may refuse to hear an application for a declaration of paternity if it is of the opinion that it is not just or proper to do so.

[10] In February 2001, the appellant filed an application seeking, inter alia, an order under s 11(1)(c) of the Status Act that A was the appellant's father. That application was subsequently amended to seek the order either under s 11(1)(b) or (c) of the Status Act, or alternatively, for an order pursuant to the general jurisdiction of the Court declaring that A was her father from the time of her birth until the date of the adoption order. Other amendments were also made to the application, the effect of which was to delete entirely any claim for any consequential relief.

[11] In April 2001 the respondents applied to have the application summarily dismissed, or alternatively, for an order under s 11(2) of the Status Act. The

respondents' application was heard by Angel J who delivered judgment on 1 June 2001 dismissing the appellant's application. The nub of his Honour's decision was that the effect of the adoption order was to create the relationship of father and child between C and the appellant and that this necessarily precluded the appellant from claiming that A was her father vide s 11(1) of the Status Act. As to the alternative order sought, his Honour held that he had no jurisdiction to make any order under the Court's general jurisdiction.

[12] As Angel J recognised, it is a serious matter to strike out a claim summarily and this should only be done in a clear case and if the appellant's case is hopeless. In this case, the application for summary judgment was made presumably under the Court's inherent jurisdiction although according to the summons it was made pursuant to Rule 23.01(1) of the *Supreme Court Rules* which provides:

> (1) Where a proceeding generally or a claim in a proceeding –
>
> (a) does not disclose a cause of action;
>
> (b) is scandalous, frivolous or vexatious; or
>
> (c) is an abuse of the process of the Court,
>
> the Court may stay the proceeding generally or in relation to a claim or give judgement in the proceeding generally or in relation to a claim.

[13] It is not necessary in this case to consider (or resolve) the differing approaches in the authorities as to the circumstances under which a claim may be dismissed, whether under the Court's inherent jurisdiction or under this Rule. The authorities are discussed in Williams' *Civil Procedure Victoria*, Vol 1, paras 23.01.20 and 23.01.25 (see also para 23.03.1 dealing with rule 23.03). However, on appeal to this Court, as the issues are questions of law, this Court should to the extent possible, decide whether the judgment given by Angel J was right or wrong, rather than whether the appellant had an arguable case in law. That was the approach adopted in *Dey v Victorian Railways Commissioners* (1948-1949) 78 CLR 62. To adopt any other approach now, having heard full argument, would be a waste of time and money and of this Court's resources and not result in any prejudice to the appellant as this Court will assume that the facts alleged by the appellant, taken at their highest, are or will be proved.

[14] The argument of Mr Waters QC for the appellant begins with the proposition that the original adoption order did not have the effect of transferring the entirety of the relationship of father and child from the natural father to the adopting father for all purposes. Section 16 of the 1949 Ordinance provided:

> (1) Upon the making of an adoption order, all rights, duties, obligations and liabilities of the parent or guardian of the adopted child shall, in relation to future custody, maintenance and education of that child, including the right to appoint a guardian or consent to marriage, be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against

> the adopter as though the child was born to the adopter in lawful wedlock.
>
> (2) Where an infant has been adopted by two spouses, the infant shall, in the event of any question arising between the spouses as to the custody, maintenance, education of, or right of access to, the infant, be deemed by the Court exercising jurisdiction in the matter, to have been born to the two spouses in lawful wedlock.

[15] Sections 16(3) and (4) made certain provisions affecting an adopted child's rights to succession vis-a-vis both his adoptive parents and his natural parents, but these provisions did not effect changes to the child's rights of succession through either the relatives of the adoptees or the relatives of the natural parents. Section 16(5) made provision affecting the adopted child's ability to marry anyone within the prohibited degrees of consanguinity or affinity (whether the relationship was by blood or by adoption): see also s 17 which prohibited marriage between an adopter and adopted child. Section 16(5) also affected certain provisions of the *Criminal Code* dealing with rape and incest in a similar way.

[16] On an analysis of these provisions, Mr Waters QC submitted that the original order did not have the effect of a deemed notional biological substitution of the adoptive parents for the natural parents for all purposes. I accept that this is correct. Clearly the order did not entirely destroy the original status of a child as the child of its natural parents, but made only limited changes to that status, as well as created a new relationship or status between the child and its adopters, again of a limited nature.

[17] However, with the exception of s 5(4) which dealt with certain dispositions or devolution of property by persons who had died prior to its commencement, the 1964 Ordinance did not merely keep the order in force as if the 1949 Ordinance had not been repealed. Section 5 of the 1964 Ordinance provided (relevantly):

> (1) Notwithstanding the repeal effected by section 4 –
>
> (a) an adoption order...made...under the repealed Ordinances and in force at the commencement of this Act continues in force;
>
> (b) ...
>
> (2) ...
>
> (3) Subject to subsection (4), the provisions of section 30 and section 31 (other than subsection (4)) apply in relation to an adoption order made under the repealed Ordinances ... as if this Ordinance had been in force when the order was made and the order was made under this Ordinance.

[18] Section 30 provided:

> (1) For the purposes of the laws of the Territory, but subject to this Ordinance and to the provisions of any law of the Territory that expressly distinguishes in any way between adopted children and children other than adopted children, upon the making of an adoption order -
>
> (a) the adopted child becomes a child of the adopter or adopters, and the adopter or adopters become the parent or parents of the child, as if the child had been born to the adopter or adopters in lawful wedlock;

(b) the adopted child ceases to be a child of any person who was a parent (whether natural or adoptive) of the child before the making of the adoption order, and any such person ceases to be a parent of the child;

(c) the relationship to one another of all persons (including the adopted child and an adoptive parent or former parent of the adopted child) shall be determined on the basis of the foregoing provisions of this sub-section so far as they are relevant;

(d) any existing appointment of a person, by will or deed, as guardian of the adopted child ceases to have effect; and

(e) any previous adoption of the child (whether effected under the law of the Territory or otherwise) ceases to have effect.

(2) Notwithstanding the last preceding sub-section, for the purposes of any law of the Territory relating to a sexual offence, being a law for the purposes of which the relationship between persons is relevant, an adoption order, or the discharge of an adoption order, does not cause the cessation of any relationship that would have existed if the adoption order, or the discharging order, as the case may be, had not been made, and any such relationship shall be deemed to exist in addition to any relationship that exists by virtue of the application of that sub-section in relation to that adoption order or by virtue of the discharge of that adoption order.

[19] Section 31 effected further changes to the laws of succession. It is not necessary to set out the provisions. Broadly speaking, the effect of s 31 was to treat an adoption order as affecting all dispositions of property, whether by will or otherwise, unless the donor had already died, or unless the disposition had already taken effect in possession, but did not affect agreements or instruments not being dispositions of property made before the commencement of the 1964 Ordinance.

[20] As can be seen, the shift in the language employed by ss 30(1)(a), (b) and (c) affected the original order by creating a new parent child relationship and extinguishing the old relationships for all purposes, except for a few limited exceptions. However, Mr Waters QC pointed to the words in s 39(1)(c) "... so far as they are relevant". In his submission, so far as the biological status of the appellant was concerned, s 39(1)(a) and (b) were not relevant and the 1964 Ordinance did not establish a different father/child relationship for *all* purposes to the extent that the adopted person's biological history was to undergo a retrospective deemed statutory extinction and revision. This may be accepted, but the question is, even if that is correct, did it entitle the appellant to seek an order under s 11(1) of the Status Act?

[21] In 1979 the Status Act first came into force. Section 11 set out above, is in the same form now as it was when first enacted. No argument was put to the effect that any assistance is to be gained by looking at the provisions of that Act when it first came into force. However, it cannot be argued that the legislature ignored any effect that the Act might have in relation to adopted children. Amongst the many Acts and former Ordinances amended by the Status Act 1978 was the 1964 Ordinance (in its amended form by then called the *Adoption of Children Act*): see s 19 and the Schedule. In particular, s 21(3) of the 1964 Ordinance was enacted to enable the Court to stay an application for adoption where a putative father had sought a declaration of paternity under s 11 of the Status Act. Section 21(3)(b) provided that if he

obtained such a declaration the consent of the biological father was required before an order could be made.

[22] In so far as the 1994 Act is concerned, s 90(a) provides:

> Notwithstanding the repeal effected by section 99 [which repealed the 1964 Ordinance as amended] except as expressly or by necessary implication provided by this Act –
>
> (a) an adoption ... order made or continued in force under the repealed Act and in force immediately before the commencement continues in force under this Act as if the order was made under this Act, and this Act applies accordingly

Sub-section 90(e) provides:

> A right, privilege, duty liability or relationship that was acquired or vested in a person or came into being under a law in force in the Territory before the commencement continues to be a right, privilege, duty, liability or relationship of that person as if acquired or vested in that person or came into being under this Act.

[23] The effect of an adoption order under the 1994 Act is dealt with in s 45 which provides:

> (1) For the purposes of the laws of the Territory, but subject to this Act and to the provisions of any other law in force in the Territory that expressly distinguishes in any way between birth children and adopted children, on the making of an order for the adoption of a child –
>
> (a) the child becomes a child of the adoptive parent or adoptive parents, and the adoptive parent becomes, or adoptive parents become, the parent or parents of the child as if that parent or those parents were the birth parent or parents of that child;

(b) the child ceases to be a child of any person who was a parent of the child before the making of the adoption order, and such person ceases to be a parent of the child;

(c) the relationship to one another of all persons affected by the order for the adoption of the child (including the child and a former parent of the child) shall be determined on the basis of the provisions of paragraphs (a) and (b) so far as they are relevant;

(d) an existing appointment of a person, by will or deed or otherwise in accordance with a law in force in the Territory, as guardian of the adopted child ceases to have effect; and

(e) a previous adoption of the child (whether effected under a law in force in the Territory or otherwise) ceases to have effect.

(2) Notwithstanding subsection (1), for the purposes of any law of the Territory relating to a sexual offence, being a law for the purposes of which the relationship between persons is relevant, an adoption order, or the discharge of an adoption order, does not cause the cessation of any relationship that would have existed if the adoption order, or the discharging order, as the case may be, had not been made, and any such relationship is deemed to exist in addition to any relationship that exists by virtue of the application of that subsection in relation to the adoption order or by virtue of the discharge of the adoption order.

[24] As can be seen, s 45 is in very similar terms to s 30 of the 1964 Ordinance. Having regard to the words "For the purposes of the laws of the Territory..." Mr Downes QC for the respondents, submitted that the legal status, or the relationship at law of the appellant was that of the child of her adoptive parents "as if those parents were the birth parents" of the appellant, with the consequential changes in rights flowing therefrom as provided for in the

1994 Act. He submitted that this was to be distinguished from the factual biological situation. Clearly this is right and I do not understand Mr Waters QC to be contending otherwise. However, Mr Waters QC maintained that the 1994 Act recognises that biological relationships for some purposes affect rights and obligations. Apart from s 90(2) which leaves it open to natural parents to be convicted of incest notwithstanding an adoption order, Mr Waters pointed to s 46 which is in similar terms to s 31 of the 1964 Ordinance. As such, the order would not affect dispositions of property or devolutions of property that have become effective before the Act commenced, etc. Mr Waters QC submitted that a disposition of property could occur in circumstances where the disposition was made by a natural parent or grandparent who died before the commencement of the Act and that had taken effect in possession before the commencement of the Act, but that there may be argument which arose after the commencement between the beneficiaries as to whether or not an illegitimate child was in fact the child of the deceased and entitled to share in the disposition. In those circumstances he submitted that the question could be resolved utilising s 11 of the Status Act. If this be so, so the argument went, it is plain that s 11 of that Act contemplated applications being made in respect of adopted children against their biological parents. Whatever may be the situation regarding the right of an illegitimate child to inherit or to take a disposition from its natural parent under the 1994 Act, I do not think that this bears any light on the circumstances of this case or on the interpretation to be given to

s 11. There is no suggestion that the appellant is entitled to any such disposition and I consider that any such question, should it arise, could be determined in proceedings brought in the Court's general jurisdiction where a claim is made to share in the deceased's estate.

[25] The Status Act, vide s 2A, applies to "a person, whether or not the person – (a) was born in the Territory; (b) was born before the commencement of this Act; or (c) is an infant, and whether or not the person's parents have ever been domiciled in the Territory". The Act does not say, as it might easily have done, that it does not apply in respect of children that have been adopted. If that be so, Mr Waters QC argued that the Act was beneficial legislation and should therefore be construed so as to give the most complete remedy which is consistent with the actual language employed and to which its words are fairly open: see *Woodruffe v The Northern Territory of Australia* (2000) 10 NTLR 52 at [28]. It was submitted that the provisions of the Act created distinct parallel sets of rights which stem, in almost every case, from natural birth or from artificial insemination and that its provisions should not be read down so as to deprive adopted children of the benefits of its provisions unless there is the clearest legislative direction so to do. The same argument could be applied to the provisions of the 1994 Act.

[26] As Mr Downes QC pointed out, s 45(1) of the 1994 Act provides that, subject to the provisions of any other law in force of the Territory that expressly distinguishes between birth children and adopted children, the

effect of the order is that the appellant's natural father ceased to be a parent of the appellant. Mr Downes QC emphasised that s 11(1) of the Status Act, by its terms, refers to existing relationships of parent and child, although it is to be noted that a declaration may be made notwithstanding that the father or the child or both are dead. So, it was argued, the only existing parental relationship (at least at the time of the death of A) was the relationship between the appellant and her adoptive parents. Mr Waters' submission accepted this but said there was nothing to preclude the Court from making a declaration in respect of the earlier relationship.

[27] On a closer examination of both Acts, I think Mr Downes' submission is correct. There are various provisions in the Status Act which create legislative presumptions of parentage: see ss 4A, 5, 5C, 5D, 5E, 9, 9A and 9B. Some of those presumptions are irrebuttable: see ss 5D(2) and 9B(1). There are also provisions relating to succession in s 8 which provides:-

> 8. Recognition of paternity.
>
> (1) The relationship of father and child and any other relationship traced in any degree through that relationship shall –
>
> (a) for any purpose related to succession to property;
>
> (b) for any purpose related to the construction of any will or other testamentary disposition or of any instrument creating a trust or
>
> (c) for the purpose of an application under the *Family Provision Act*,

be recognized only if –

(d) the father and the mother of the child were married to each other at the time of its conception or at some subsequent time;

(e) paternity has been admitted (expressly or by implication) by the father and if that purpose is for the benefit of the father, paternity has been admitted while the child was living; or

(f) paternity has been established by or against the father.

(2) In any case where, by reason of the provisions of subsection (1), the relationship of father and child is not recognized at the time the child is born, the occurrence of any act, event or conduct which enables that relationship and any other relationship traced in any degree through it to be recognized shall not affect any estate, right or interest in any real or personal property to which any person has become absolutely entitled, whether beneficially or otherwise, before the act, event or conduct occurred.

[28] The Status Act is, as is stated in the pre-amble "an Act relating to the Status of Children", and by "Status" the legislature must be taken to mean, the legal status rather than the biological status of children. The provisions of the Act to which I have referred confirm this impression. Whilst it is true that the Status Act deals in the main with rights of parentage stemming from birth, the result of Mr Waters' argument, if correct, could lead to conflicting results. The irrebutable presumptions created by ss 5D(2) or 9B(1) would conflict with the provisions of ss 45(1)(a) and (b) of the 1994 Act. Section 8 of the Status Act would not sit well with s 46(1) of the 1994 Act. As Mr Downes points out, there is yet another area of potential conflict with respect to s 9 of the Status Act and s 54 of the 1994 Act. Mr Waters seeks

to avoid those conflicts by reference to s 45(1)(c) of the 1994 Act and in particular to the words "so far as they are relevant", but I do not see how those words have the meaning contended for by Mr Waters. The rule of construction to be employed in this situation is that there is a very strong presumption that the legislature did not intend to contradict itself and the question is whether provisions such as these can stand together or live together: see *Butler v Attorney-General for the State of Victoria* (1961) 106 CLR 208 at 276 per Fullagar J:

> It will often be found that the two may reasonably and properly be reconciled by reading the one as subject to the other. In other words it will commonly be found that the appropriate maxim is not *leges posteriores priores contrarias abrogant* but *generalia specialibus non derogant*.

[29] All of these areas of conflict are easily resolved if the 1994 Act is treated as the special Act dealing with adoptions which displaces the general Act, the Status Act, which deals with children who have not been adopted, to the extent that there is a conflict. That being so, I think it is clear that s 11(1) of the Status Act has no application to a person in respect of whom an adoption order has been made and which is still in force. This result is confirmed by ss 27 and 28 of the 1994 Act which envisage applications under the Status Act before an adoption order is made. Accordingly, I agree with Angel J that the appellant cannot seek an order under the terms of that subsection.

[30] I turn now to consider whether the Court has inherent jurisdiction to grant declaratory relief. Section 18(1) of the *Supreme Court Act* enables the Court to make "binding declarations of right, whether or not any consequential relief is or could be sought". Section 18(2) provides that "a proceeding is not open to objection on the ground that a declaratory order only is sought".

[31] A number of arguments were advanced as to why the Court has no general jurisdiction to make a declaration of paternity, particularly where no consequential relief is sought or available. One argument is that the Status Act, having provided for declarations of paternity, the legislature must be taken as having intended that section to be the sole basis for the making of such a declaration. That argument finds support in some of the English decisions relied upon by Angel J and by Mr Downes QC. In *Warter v Warter* (1890) 15 P 35 a declaration of legitimacy was sought in a probate action. Butt J refused to entertain the declaration because "the *Legitimacy Declaration Act* prescribes that it shall be brought before me by petition and not by writ...". That case is distinguishable because it was decided on a procedural ground which has no relevance here. The next case is *Knowles v Attorney-General* [1915] P 54. Willmer J refused to make a declaration in that case for a number of reasons, one of which was because of the decision in *Warter v Warter* which he considered "precluded him from making a declaration of legitimacy otherwise than in pursuance of the statute". Other reasons advanced were that such a declaration was "something particularly sacred because it is a judgment binding in rem". By "binding in rem", I take

his Lordship to mean binding not merely as against the parties to the suit, but binding against other persons who might be affected by the consequences. Mr Waters QC seeks to avoid this consequence by limiting the declaration sought to the period prior to the date of the adoption order. The logic of this is, apparently, that if the effect of the adoption order is as contended for by the respondents, a declaration limited in that way would not have the result of affecting other persons, but merely the respondents. But, as Mr Downes QC points out, although the respondents would wish to dispute the allegation of paternity, there are no legal consequences to them even if the declaration is made, because there is no controversy, existing or in realistic prospect, to which it is addressed. In *Bass & Anor v Permanent Trustee Company Limited & Ors* (1999) 198 CLR 334, Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ said, at 355:

> The purpose of a judicial determination has been described in varying ways. But central to those descriptions is the notion that such a determination includes a conclusive or final decision based on a concrete and established or agreed situation which aims to quell a controversy. In *R v Trade Practices Tribunal: Ex parte Tasmanian Breweries Pty Ltd* (99), Kitto J said:
>
> > [J]udicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons ... [T]he process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which ... entitles and obliges the persons between whom it intervenes, to observance of the

> rights and obligations that the application of law to facts has shown to exist.

Similarly, Professor Borchard in his pioneering work, *Declaratory Judgments* (100) stated:

> A judgment of a court is an affirmation, by the authorized societal agent of the state ... of the legal consequences attending to proved or admitted state of facts. It is a conclusive adjudication that a legal relation does or does not exist. The power to render judgments, the so-called "judicial power," is the power to adjudicate upon contested or adverse legal rights or claims, to interpret the law, and to declare what the law is or has been. It is the final determination of the rights of the parties in an action which distinguishes the judgment from all other public procedural devises to give effect to legal rights." (Footnotes omitted.)

Because the object of the judicial process is the final determination of the rights of the parties to an action, courts have traditionally refused to provide answers to hypothetical questions or to give advisory opinions. The jurisdiction with respect to declaratory relief has developed with an awareness of that traditional attitude. In *In re F (Mental Patient: Sterilisation)*, Lord Goff of Chieveley said that:

> a declaration will not be granted where the question under consideration is not a real question, nor where the person seeking the declaration has no real interest in it, nor where the declaration is sought without proper argument, eg in default of defence or on admissions or by consent.

By "not a real question", his Lordship was identifying what he called the "hypothetical or academic". The jurisdiction includes the power to declare that conduct which has not yet taken place will not be in breach of a contract or a law and such a declaration will not be hypothetical in the relevant sense. Barwick CJ point this out in *The Commonwealth v Sterling Nicholas Duty Free Pty Ltd*. However, that is not the present case.

[32] Mr Waters QC submitted that the appellant wished to have the matter determined for four reasons;

(1) to establish her biological identity to alleviate emotional distress of a person who seeks knowledge of her biological origins;

(2) to enable her to guide her children who are of marriageable age to avoid the spectre of entering a marriage that may fail within a biologically undesirable degree of consanguinity;

(3) the knowledge may be of medical importance to her or her children in relation to genetically transmitted diseases or illnesses that may affect her or her children;

(4) to enable her, should she wish to do so, to take citizenship of another country, under the laws of which she may receive other benefits, including pension rights.

Assuming that the appellant can establish the facts to support these matters, none of them raise any controversy between the parties affecting legal rights or legal status and in any event, the appellant already knows the identity of her biological father. As to the fourth reason given, there is nothing to suggest that this question, if it needs to be resolved, could not be resolved in the courts of the country concerned. Perhaps a declaration by this Court may be of some evidential value in any such proceedings, but that is not a sufficient reason for this Court to grant declaratory relief: see *Guaranty Trust Company of New York v Hannay & Co* [1915] 2 KB 536; *Aldridge v Attorney-General (Rogers intervening)* [1968] P 281 at 292.

[33] In conclusion, the decision of Angel J was correct. The appeal must be dismissed.

BAILEY J:

[34] I have had the benefit of considering the judgments of Martin CJ and Mildren J in draft. I agree that the appeal should be dismissed for the reasons referred to by Mildren J. I also agree with the observations of Martin CJ as to the lack of any interrelationship between the *Status of Children Act 1979* (NT) and the *Adoption of Children Act* 1994 (NT) which could support the appellant's case.
