

In the Matter of an Application for a Declaration of Paternity
[2001] NTSC 41

IN THE MATTER OF AN APPLICATION
FOR A DECLARATION OF PATERNITY

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: CIVIL

FILE NO: 44 OF 2001

DELIVERED: 1 JUNE 2001

HEARING DATES: 23 APRIL 2001

JUDGMENT OF: ANGEL J

REPRESENTATION:

Counsel:

Plaintiff: J B Waters QC
Defendants: G Downes QC & A H Silvester

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IN SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

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No. 44 of 2001

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 1 June 2001)

- [1] These proceedings were commenced by Originating Motion dated 22 February 2001 whereby the plaintiff sought the following relief:
1. An order pursuant to s11(1)(c) Status of Children Act NT for a declaration that a certain deceased person was the father of the plaintiff.
 2. An order pursuant to s 9(2) Family Provision Act NT as against the second, third and fourth defendants as joint executrices of the will of the deceased for an extension of time within which to make an application pursuant to s 8 of the Family Provision Act NT.
 3. Orders as against the second, third and fourth defendants as joint executrices as aforesaid for such provision for the maintenance and advancement in life of the plaintiff as the

Court thinks fit pursuant to s 8 Family Provision Act NT out of the estate of the deceased.

- [2] The relief sought against the estate of the deceased, who died in March 1984, has now been abandoned and there remains the application for a declaration of paternity pursuant to the Status of Children Act NT. By way of amendment at the hearing the plaintiff now alternatively seeks a declaration pursuant to the general power of the Court that the deceased was her father until 15 October 1954.
- [3] The defendants are respectively the son, two daughters and widow of the deceased. The first, second and third defendants by summons now seek summary dismissal of the plaintiff's claim for a declaration of paternity. Argument on the summons was heard in a closed court – see s 17(1) Status of Children Act NT. Noting s 17(2), which provides that a person shall not publish the name of or any particulars relating to the identity of any person by, or in relation to, whom proceedings are taken under the Status of Children Act NT without the authority of the Court, I have refrained from mentioning the names of the parties or those of their solicitors which might lead to identification of the parties.
- [4] The plaintiff was born in January 1943 at Paddington, New South Wales. On 15 October 1954 by order of the Supreme Court of the Northern Territory (Kriewaldt J in Chambers), the plaintiff was lawfully adopted

pursuant to the provisions of the then Adoption of Children Ordinance 1949–50 NT. S 16(1) of that Ordinance provided:–

“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 the future custody, maintenance and education of that child, including the right to appoint a guardian or to 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 children was born to the adopter in lawful wedlock.”

The Adoption of Children Ordinance 1949–50 was repealed by s 4 of the Adoption of Children Act 1964 NT. Notwithstanding that repeal, by operation of s 5(1)(a) Adoption of Children Act (1964) NT, Kriewaldt J’s adoption order in respect of the plaintiff continued in force. S 16 Adoption of Children Ordinance 1949–50 was replaced by s 30 Adoption of Children Act 1964 NT which provided as follows:–

“30. GENERAL EFFECT OF ADOPTION ORDERS

(1) For the purposes of the laws of the Territory, but subject to this Act 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 adopter 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 subsection 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 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 shall be deemed to exist in addition to any relationship that exists by virtue of the application of that subsection in relation to that adoption order or by virtue of the discharge of that adoption order.”

[5] The Adoption of Children Act 1964 NT was in turn repealed by s 88 of the Adoption of Children Act 1994 NT. S 30 Adoption of Children Act 1964 NT was replaced by s 45 of the new Act which provides:

“45. General effect of adoption orders

- (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 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.”

[6] The adoption order relative to the plaintiff continues in force to this day by virtue of s 90 Adoption of Children Act 1994 NT.

[7] Counsel for the defendants submitted that the Adoption Order was, as a matter of law, necessarily fatal to the plaintiff’s claim pursuant to the Status of Children Act NT. It was submitted that as a matter of law and by operation of the legislative provisions to which I have referred the plaintiff became the daughter of her adoptive parents upon the making of

Kriewaldt J's order and that her status being as though a child born of the adoptive parents in lawful wedlock she can not now claim status as the daughter of the deceased.

[8] Counsel for the plaintiff submitted that the Status of Children Act NT enabled a plaintiff to establish his or her biological father irrespective of any matter of adoption. He submitted that whether or not the plaintiff's natural father was the deceased was not a hypothetical or academic question. He further submitted that the plaintiff's abandonment of the claims under the Family Provision Act NT was irrelevant and that a declaration of paternity was available whether or not there were any consequential orders sought. It was submitted that the plaintiff had a right to know the identity of her biological father. It was submitted that this was not a matter of mere curiosity and that it related to the plaintiff's identity. It was submitted that the Status of Children Act NT related to biological relationships and that to hold that the plaintiff's adoption excluded the plaintiff from seeking a paternity declaration would circumscribe statutory provisions which have "a clear beneficial effect". So to hold, it was argued, would deprive adopted children of rights under the Status of Children Act NT available to the rest of society.

[9] The Status of Children Act NT relates, if I may be permitted to say so, to the status of children. I am unpersuaded by counsel for the plaintiff's argument that it is primarily concerned with biological facts. I agree with counsel for the defendants that the order for the plaintiff's adoption, having the legal

effect, as it did, of creating and maintaining a father/child relationship for all relevant purposes, both past and present, necessarily precludes the plaintiff from claiming a declaration pursuant to the Status of Children Act NT that the deceased was her father. In short, the plaintiff is the lawful daughter of her adoptive parents and that conclusion can not be circumvented or contradicted via the Status of Children Act NT.

- [10] Faced with this conclusion the plaintiff alternatively seeks a declaration in the general jurisdiction of the Court that the deceased was the plaintiff's father up to the date of the adoption order. Counsel for the plaintiff stressed the increasing readiness of the Courts to grant declarations irrespective of whether other relief is sought. He repeated his submissions as to the importance to the plaintiff of knowing the identity of her biological father.
- [11] Counsel for the defendants on the other hand submitted that the Court's general jurisdiction to make declarations (see s 18 Supreme Court Act) was confined to declarations "of right". It was submitted there was no jurisdiction to grant declarations of fact (biological or otherwise) or of status.
- [12] Whilst the Supreme Court Act NT, in common with legislation in other jurisdictions based on the Judicature Acts UK speaks of "declarations of right" and whilst declarations usually concern legal (or civil) rights, the jurisdiction to make declarations concerning status, sometimes without reference to consequential legal rights, is well established and of long

standing: see, generally, Zamir & Woolf, *The Declaratory Judgment* (2nd edn) 1993 at 87 ff, Young, *Declaratory Orders* (2nd edn) 1984 para 1101.

[13] However, I agree with counsel for the defendants' submission that the Court has no general power to make declarations of fact, at least in the absence of some real legal consequence. The plaintiff has not demonstrated any legal consequence that would follow upon a declaration that at one time, in the eyes of the law, she was – although she is no longer – the daughter of the deceased. Broad, though the power to make declarations is, and fully recognizing that Courts' refusals to grant declaratory relief are mostly adverse exercises of a discretion within jurisdiction rather than a denial of jurisdiction, in the present case I hold (in the absence of demonstrated legal consequence) that I have no jurisdiction (Statute apart) to grant a declaration that the plaintiff was the daughter of the deceased until the date of the adoption order. This conclusion accords with the law as stated in Halsbury's *Laws of Australia* Vol 13 paras 205–1500 and 205–1525, viz. "No court has inherent jurisdiction to make a declaration of paternity".

[14] I am also of the view a declaration of paternity otherwise than in pursuance of the express provisions of the Status of Children Act NT could or, in any event, would not be made, substantially for the reasons given by Willmer J in *Knowles v Attorney-General* [1951] P 54. In that case a plaintiff sought a declaration of legitimacy pursuant to the inherent jurisdiction of the Court alternative to relief under s 2 Legitimacy Act 1926 UK. His Lordship held that the Legitimacy Act 1926 UK covered the field and that a declaration

could only be made, if at all, under the express provisions of that Act, see, at 63, 64. That decision was approved and followed in *Aldrich v Attorney-General* [1968] P 281. It seems to me similar reasoning applies to the present case. The Status of Children Act NT has various indicia that it is intended to cover the field of declarations of paternity and maternity and exclude declarations concerning paternity or maternity otherwise than in pursuance of its express provisions; see, for example, the medical procedures in Part V, the presumptions in ss 4A, 5, 5D, 9, 9A, 9B, the express powers of revocation in ss 11(3) and 12(3). In my view a plaintiff seeking a declaration of paternity can not outflank the Status of Children Act NT by resort to the general jurisdiction of the Court to make declarations.

[15] Of course, summarily to dismiss the plaintiff's claims is a serious matter and something that can and should only be done in a clear case and only if the plaintiff's case is hopeless. In my view, given the Adoption Order, the plaintiff's case has no prospects of success and ought to be dismissed.

[16] I would add that on the present state of the evidence (various affidavits were filed) I am far from convinced that as a matter of discretion the Court would make a declaration in any event. I say this because it presently appears a declaration would produce no real or foreseeable consequence (legal or otherwise) for either the plaintiff or the defendants.

[17] The fourth defendant, the widow of the deceased, was unrepresented before me. Counsel for the plaintiff intimated in the course of the hearing that in the event the first, second and third defendants' application for summary dismissal was successful I should treat the proceedings as also dismissed as against the fourth defendant.

[18] The Originating Motion is dismissed as against all defendants. I shall hear the parties as to costs.