BAKER v LANDON

FEDERAL MAGISTRATES COURT OF AUSTRALIA

RIETHMULLER FM

31 August, 1, 2 September 2009, 25 March 2010 — Melbourne

[2010] FMCAfam 280

Children — Parentage — Man and woman in relationship — Child conceived by woman through assisted conception via semen donor — Man not biologically related to child — Man applying for declaration of parentage — Whether applicant was a "parent" of child — Whether man was a "de facto partner" of woman at time of conception — Meaning of expression "de facto partner" as used in Family Law Act 1975 (Cth) — Whether donor of genetic material was a parent for purposes of the Family Law Act — (CTH) Family Law Act 1975 ss 4AA, 60CA, 60EA, 60H.

Words and phrases — "de facto partner".

This was an application for a declaration as to the paternity of a child E who was a child conceived as a result of assisted reproductive technology. The respondent Ms Landon (L) was a biological parent of the child, however, the applicant Mr Baker (B) was not. B and L had commenced a relationship in mid-2004. At the end of 2007 the parties had agreed to marry, but the marriage had not taken place. The procedure that resulted in conception occurred on 19 May 2008, and was carried out with the consent of both parties.

The only issue in dispute was whether or not B was a "parent" of the child within the meaning of that term in Pt VII of the Act. In turn, this required the court to determine whether B was a "de facto partner" of L on the date that the procedure was carried out. If he was a de facto partner then E would be the child of both L and B for the purposes of the Family Law Act 1975 (Cth) (the Act) because of the operation of s 60H of the Act.

Held, finding that at the time of E's conception the parties were de facto partners within the meaning of that term in Pt VII of the Act and that E was therefore a child of the applicant within the meaning of the Act:

(i) The requirements of s 60H are satisfied if the parties were de facto partners on the day the procedure was carried out. They need not have been de facto partners for any particular period before or after that day: at [7].

> *Keaton v Aldridge* (2009) 223 FLR 158; [2009] FMCAFam 92; *Ganter v Whalland* (2001) 54 NSWLR 122; 28 Fam LR 260; [2001] NSWSC 1101, referred to.

(ii) The meaning of "de facto partner" is governed by ss 4AA and 60EA of the Act. Because of s 60EA(a) (referring to registration under a prescribed state or territory law) the meaning of de facto partner in Subdiv B of Div 1 of Pt VII of the Act is to that extent at least broader than under the definition in s 4AA as applied to the balance of the provisions of the Act. This reflects that parties need only be de facto partners on the day of the procedure and the real relevance of their state of mind of intentions as to their relationship at this relevant time: at [10].

(iii) The requirements of s 4AA require a decision as to whether the parties "have a relationship living together on a bona fide domestic basis". In coming to this decision the court must have regard to "all of the circumstances of the relationship", which may include the factors set out in s 4AA(2). Importantly, no finding as to a particular aspect of the relationship appears to be determinative (s 4AA(3)) nor does the section attempt to

prescribe the weight to be attached to any particular factor (s 4AA(4)). As a result the definition cannot be said to be closely proscribed. Therefore it is important not only to identify particular circumstances that are relevant, but also to step back and consider the matter as a whole: at [11], [126].

(iv) On one view the relationship defined by s 4AA must be broader than a "marriage like" relationship which would ordinarily require some consideration of the notion of exclusivity (in keeping with the prohibition on polygamy in marriage) even if it was not determinative of the nature of the relationship: at [14].

> *Re Lambe v Director-General of Social Services* (1981) 38 ALR 405; 57 FLR 262; [1981] FCA 171; *Green v Green* (1989) 17 NSWLR 343; 13 Fam LR 336, referred to.

(v) Definitions of de facto relationships appear in a myriad of legislative provisions. It is likely that there will be differences in the relationships covered by the term "de facto" as it appears in various enactments, as a result not only of differences in wording, but the different purposes of the statutory schemes: at [19], [22].

(vi) The statute must be construed so that it is consistent with the language and purpose of all the provisions of the statute: at [23].

> *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; 153 ALR 490; 72 ALJR 841; [1998] 8 Leg Rep 41; [1998] HCA 28, followed.

(vii) In this case it is argued that the orders sought by the applicant are in the "best interests" of the child, in accordance with s 60CA. Arguably, a declaration as to whether the applicant is a parent is a parenting order within s 64B. However, there is nothing with respect to the "best interests" of the child that logically assists in determining whether the parties were or were not de facto partners at the relevant time: at [26].

(viii) Care must be exercised before relying upon either the authorities, or developed norms, with respect to the definition of the term "de facto" under other legislative provisions: at [27].

> *D v McA* (1986) 11 Fam LR 214; (1986) DFC 95-030, doubted.

(ix) A difficult issue arises with respect to the role of the donor of the genetic material, with respect to this litigation about the parentage of the child. The child is biologically the child of the respondent and the donor. If the parties fall within the definition of de facto partners under the Act, s 60H results in the child being a child of the parties, and the donor of genetic material would no longer be one of the child's parents: at [30].

> *Re Michael (Surrogacy Arrangements)* (2009) 41 Fam LR 694; [2009] FamCA 691, followed.

(x) The donor, in this case, does not appear to have procreated or created the child in the relevant sense as he had no contact with, nor ever knew of, the mother. In this case the donor would not be aware of the actual use made of the genetic material, or if it was used at all. It is difficult to describe him as a person who had "begotten" the child. A person in this position can not have been contemplated as a person who would have shared parental responsibility for the child under the Family Law Act. On the dictionary definition it appears that the donor in this case is not a "parent" of the child in the sense the term is used in the Act, but simply a donor of genetic material: at [43], [44].

> *Re Mark (an application relating to parental responsibilities)* (2003) 31 Fam LR 162; (2003) FLC 93-173; 179 FLR 248; [2003] FamCA 822, followed.
>
> *B v J* (1996) 21 Fam LR 186; (1996) FLC 92-716; 135 FLR 472; *Re Patrick* (2002) 28 Fam LR 579; (2002) FLC 93-096; 168 FLR 6; [2002] FamCA 193; *Re J and M — Residence Application* (2004) 32 Fam LR 668; [2004] FMCAfam 656; *In the Marriage of C V and S L Tobin* (1999) 24 Fam LR 635; (1999) FLC 92-848; 150 FLR 185; [1999] FamCA 446; *Simpson v Brockmann* (2010) 43 Fam LR 32; [2010] FamCAFC 37, considered.

(xi) For these reasons, for the purpose of Pt VII of the Act, the donor of the genetic material is not a parent of the child in the circumstances of this case. As a result, the donor is neither a necessary party nor a person who should be served with the application or response: at [46].

(xii) On the evidence, considering each of the factors individually, and then taking the circumstances of the case as a whole, it has been shown that the applicant was a de facto partner of the respondent, within the meaning of s 60H of the Act, on the date of conception of the child. As a result, by operation of law, the child is a child of the applicant for the purposes of the provisions of the Act: at [127].

Whitchurch instructed by *Heinz & Partners* for the applicant.

Kiernan instructed by *Vicki Sweet Family Law* for the respondent.

[1] Riethmuller FM. This is an application for a declaration as to the paternity of a child, E, a child conceived as a result of assisted reproductive technology. The respondent is a biological parent of the child, however the applicant is not. The procedure that resulted in conception occurred on 19 May 2008, and was carried out with the consent of both parties. The issue to be decided in this judgement is whether or not the applicant is a "parent" within the meaning of the term in Pt VII of the Family Law Act 1975 (Cth).

[2] Section 60H provides for circumstances where a child will be taken to be a child of a person under the Family Law Act by two possible routes:

> 60H *[Children born as a result of artificial conception procedures]*
>
> (1) If:
>
> (a) a child is born to a woman as a result of the carrying out of an artificial conception procedure while the woman was married to, or a de facto partner of, another person (the other intended parent); and
>
> (b) either:
>
> (i) the woman and the other intended parent consented to the carrying out of the procedure, and any other person who provided genetic material used in the procedure consented to the use of the material in an artificial conception procedure; or
>
> (ii) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman and of the other intended parent;
>
> then, whether or not the child is biologically a child of the woman and of the other intended parent, for the purposes of this Act:
>
> (c) the child is the child of the woman and of the other intended parent; and
>
> (d) if a person other than the woman and the other intended parent provided genetic material — the child is not the child of that person.
>
> …
>
> (3) If:
>
> (a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and
>
> (b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of a man;
>
> then, whether or not the child is biologically a child of the man, the child is his child for the purposes of this Act.

[3] The alternative route for the applicant is pursuant to the prescribed law as contained in ss 10A and 10D of the Status of Children Act which also deals with the issue of paternity, relevantly providing, at the time:

> 10A *[Interpretation]*

(1) A reference in this Part to a married woman includes a reference to a woman who is living with a man as his wife on a bona fide domestic basis although not married to him.

(2) A reference, however expressed, in this Part to the husband or wife of a person—

(a) is, in the case where the person is living with another person of the opposite sex as his or her spouse on a bona fide domestic basis although not married to the other person, a reference to that other person; and

(b) does not, in that case, include a reference to the spouse (if any) to whom the person is actually married.

…

10D *[Implantation procedures: presumption as to status of child where donor semen used]* …

…

(2) Where a married woman, in accordance with the consent of her husband, has undergone a procedure as a result of which she has become pregnant—

(a) the husband shall be presumed, for all purposes, to have produced the semen used for the fertilization of the ovum used in the procedure and to be the father of any child born as a result of the pregnancy; and

(b) the man who produced the semen used for the fertilization of the ovum used in the procedure shall, for all purposes, be presumed not to have produced that semen and not to be the father of any child born as the result of the pregnancy; and

…

(d) the man who produced the semen—

…

shall, for all purposes, be presumed not to have produced that semen and not to be the father of any child born as the result of the pregnancy.

(3) A presumption of law that arises by virtue of subsection (2)—

(a) is irrebuttable; and

(b) prevails over any conflicting presumption that arises by virtue of section 8 or 10.

[4] As a result, the applicant would be presumed to be the father of the child under the Victorian Act, if the respondent was "living with [the applicant] as his wife on a bona fide domestic basis although not married to him" at the time of insemination.

[5] The state courts have not made any order with respect to parentage of E, thus s 60HB is not engaged.

[6] The only issue in dispute in this case is whether or not the applicant was a "de facto partner" of the respondent as at 19 May 2008, the date that the procedure was carried out: see *Keaton v Aldridge* (2009) 223 FLR 158; [2009] FMCAFam 92 (*Keaton*), and *Ganter v Whalland* (2001) 54 NSWLR 122; 28 Fam LR 260; [2001] NSWSC 1101.

[7] It is important to note that the requirements of s 60H are satisfied if they were de facto partners on the day the procedure was carried out. They need not have been de facto partners for any particular period before or after that day.

[8] It is not in dispute that the parties were not "legally married", nor "related by family". Neither is it suggested that either party was married to, or in a de facto relationship with, another person at any relevant time.

Meaning of "de facto" partner

[9] The meaning of "de facto partner" is governed by ss 4AA and 60EA of the Family Law Act which relevantly provide:

4AA *[De facto relationships]*

Meaning of *de facto relationship*

(1) A person is in a de facto relationship with another person if:

(a) the persons are not legally married to each other; and

(b) the persons are not related by family (see subsection (6)); and

(c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.

Paragraph (c) has effect subject to subsection (5).

Working out if persons have a relationship as a couple

(2) Those circumstances may include any or all of the following:

(a) the duration of the relationship;

(b) the nature and extent of their common residence;

(c) whether a sexual relationship exists;

(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;

(e) the ownership, use and acquisition of their property;

(f) the degree of mutual commitment to a shared life;

(g) whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship;

(h) the care and support of children;

(i) the reputation and public aspects of the relationship.

(3) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether the persons have a de facto relationship.

(4) A court determining whether a de facto relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

(5) For the purposes of this Act:

(a) a de facto relationship can exist between 2 persons of different sexes and between 2 persons of the same sex; and

(b) a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship.

…

60EA *[Definition of de facto partner]* For the purposes of this Subdivision, a person is the de facto partner of another person if:

(a) a relationship between the person and the other person (whether of the same sex or a different sex) is registered under a law of a State or Territory prescribed for the purposes of section 22B of the Acts Interpretation Act 1901 as a kind of relationship prescribed for the purposes of that section; or

(b) the person is in a de facto relationship with the other person.

[10] In summary form, the definition in s 60EA defines a de facto partner as either a partner in a relationship registered under a prescribed law, or a person in a de facto relationship. Section 4AA provides an extended definition of the meaning of "de facto relationship". While registration of a relationship is determinative of the issue within the bounds of Subdiv B of Div 1 of Pt VII of the Family Law Act, it is but one factor to be considered under the definition in s 4AA as applied to the balance of the provisions of the Family Law Act. To this extent, at least, the meaning of de facto partner in this subdivision is broader than elsewhere in the Act. This reflects that parties need only be de facto partners on the day of the procedure and the real relevance of their state of mind of intentions as to their relationship at this relevant time.

[11] The requirements of s 4AA, in summarised form, require a decision as to whether the parties "have a relationship living together on a bona fide domestic basis". In coming to this decision the court must have regard to "all of the

circumstances of the relationship", which may include the factors set out in s 4AA(2). Importantly, no finding as to a particular aspect of the relationship appears to be determinative (s 4AA(3)) nor does the section attempt to prescribe the weight to be attached to any particular factor (s 4AA(4)). As a result the definition cannot be said to be closely proscribed.

[12] In the explanatory memorandum to the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 it is said:

> [38] This item inserts new section 4AA, which provides a new definition of "de facto relationship" for the purposes of the Act. The new definition applies the pre-existing definition in subsection 4(1) of the Act of a couple living together on a genuine domestic basis although not legally married to each other. In addition, the new definition:
>
> — encompasses both opposite-sex and same-sex de facto relationships, unlike the previous definition which was confined to opposite-sex de facto relationships, and
>
> — is derived from the definition of the term in the State reference Acts.

The state reference Acts are those referring power to the Commonwealth, for example, s 3 of the Commonwealth Powers (De Facto Relationships) Act 2003 (NSW): see note 1 of the explanatory memorandum. The NSW reference Act defines a de facto relationship as meaning "a marriage-like relationship (other than a legal marriage) between two persons": see s 3. The Queensland, Victorian and Tasmanian reference Acts mirror the definition in the NSW reference Act, however the South Australian reference Act states:

> "de facto relationship" has the same meaning as in section 4AA of the Family Law Act 1975 of the Commonwealth.

[13] Significantly, the definition does not require an exclusive relationship and can be established even where one or both parties are married to others, or in de facto relationships with others, at the same time. Kovacs argues that this "represents a significant extension of the existing law where a finding of a de facto relationship generally requires 'monogamy' to the exclusion of other de facto relationships": see *Kovacs, Federal Law of De Facto Property Rights: The Dream and the Reality* (2009) 23 *AJFL* 104 at 107 (although it may be that s 4 of the Property (Relationships) Act 1984 (NSW) was not so limited: see Law Reform Commission (NSW), De Facto Relationships (1983, Report 36) at 17.16, and compare s 36G of the Probate and Administration Act 1898 (NSW) which specifically imposes such a limitation upon the definition for the purposes of that Act).

[14] On one view the relationship defined by s 4AA must be broader than a "marriage like" relationship which would ordinarily require some consideration of the notion of exclusivity (in keeping with the prohibition on polygamy in marriage) even if it was not determinative of the nature of the relationship: for example see *Re Lambe and Director-General of Social Services* [1981] AATA 24 at [48] (approved generally in *Re Lambe v Director-General of Social Services* (1981) 38 ALR 405; 57 FLR 262; [1981] FCA 171); Law Reform Commission (NSW), De Facto Relationships (1983, Report 36) at 17.7. As a result the phrase "living together on a bona fide domestic basis" must be read broadly enough to at least allow for the possibility of cases where a person has multiple relationships in different households that simultaneously fall within s 4AA. Thus, relationships of the type seen in *Green v Green* (1989) 17 NSWLR 343; 13 Fam LR 336, may well be within the definition. The importance of this point

is that there is only one definition, the breadth of which applies to all cases not just those involving multiple contemporaneous relationships. However, the broadening of the definition as a result of s 4AA(5) could be easily overestimated, particularly in cases where there are not multiple relationships. Whether the provision, in this broader sense is within the limit of the powers referred to the Commonwealth under the state Acts for the purpose of property division and spousal maintenance does not need to be decided here.

[15] The wording of the definition is often said to flow from a decision of Powell J in *Roy v Sturgeon* (1986) 11 NSWLR 454; 11 Fam LR 271 (although the relevant passage also appears in his Honour's earlier judgement in *D v McA* (1986) 11 Fam LR 214; (1986) DFC 95-030). However, it appears that the relevant list was derived from social security guidelines, as appears in Law Reform Commission (NSW), De Facto Relationships (1983, Report 36) where it was said that:

> 17.11 A review of the [Administrative Appeals] Tribunals decisions in social security cases reveals a large number of matters considered by the Tribunal in deciding whether or not a particular relationship amounted to a de facto relationship: the nature and extent of common residence; the duration of the relationship; whether or not a sexual relationship existed; the degree of financial interdependence and arrangements for support the ownership, use and acquisition of property, procreation of children; care and support of children, performance of household duties; use of a common surname; nature of social activities; degree of mutual commitment and moral support; plans for a common future; reputation and "public" aspects of the relationship; and explanations and interpretations offered by the parties. [… The guidelines are discussed at length in A. Jordan, As His Wife — Social Security Law and Policy on de Facto Marriage (1981)]

[16] Although the section is said to be modelled on the provisions of the New South Wales Property (Relationships) Act, there are differences. Section 4 of the NSW Act refers to adults who "live together as a couple", whereas the Family Law Act provision refers to "a relationship as a couple living together on a genuine domestic basis". In the list of factors to be taken into account in NSW the provision includes s 4(2)(h), "the performance of household duties". Provisions to the effect of s 4AA(5) of the Family Law Act are absent from s 4 of the Property (Relationships) Act. Most significantly, the context of the two provisions is very different. In *Evans v Marmont* (1997) 42 NSWLR 70 at 78; 21 Fam LR 760 at 767; [1997] NSWSC 331 Gleeson CJ and McLelland CJ in Eq (with whom Meagher JA agreed) noted some of the significant differences of context, saying:

> There are some similarities between the provisions of the Family Law Act and those of the De Facto Relationships Act. There are also differences. Those differences are substantial, conspicuous, and deliberate …
>
> There are at least two major reasons for the differences. The first relates to the limited purpose of the New South Wales Act, which will be explained below. The second relates to the essential legal nature of marriage, which is referred to in the Family Law Act (s 43) as an institution, and which is given by that Act its common law meaning as being "the union of a man and woman to the exclusion of all others voluntarily entered into for life". Marriage involves matters of legal status and public commitment. Included in the formal commitment undertaken by people who marry, and reflected in s 72 of the Family Law Act, is a mutual undertaking by each party to maintain the other to the extent of their respective abilities and needs. No such commitment need be involved in

a de facto relationship; hence the substantial differences between the way in which the two Acts address the subject of maintenance.

[17] A technical analysis of the specific Latin term is not helpful, nor does a word by word analysis help. As Bryson J explained, in *Davies v Sparkes* (1989) 13 Fam LR 575 at 577; (1990) DFC 95-080 at 76,114 (with respect to the NSW version of the definition):

> Why are the words "de facto" used; what is the fact to which this refers and why in Latin; …? The meaning of the words is not found by answering these questions: the language used is the common coin, not attempted precision; and that is what the subject matter required. The definition does not use language which is charged with special legal meaning or with any particular difficulty of understanding. Exposition and exegesis could add little to understanding and could do little to assist the task of applying the concept to any particular set of facts.

[18] Thus, for example, the phrase "living together" cannot be taken in isolation and read as requiring that de facto couples always live together: see *Przewoznik v Scott* [2005] NSWSC 74 at [15] and *Greenwood v Merkel* (2004) 31 Fam LR 571; [2004] NSWSC 43 (although not with respect to s 4AA), and particularly *Dion v Riesner* [2010] NSWSC 50.

[19] Definitions of de facto relationships appear in a myriad of legislative provisions. The variety in wording is apparent and the wide variety of statutory contexts is significant. The definition in the Acts Interpretation Act 1901 at s 22C (which is adopted in many other Acts including the Bankruptcy Act 1966, the Parliamentary Entitlements Act 1990, the Prohibition Of Human Cloning For Reproduction Act 2002 and the Research Involving Human Embryos Act 2002) is substantially the same as that in the Family Law Act, although with s 4AA(2)(g) omitted. In other Commonwealth legislation differently worded definitions appear, for example: the Migration Act 1958 at s 5CB refers to "a mutual commitment to a shared life to the exclusion of all others"; the National Health Act 1953 at s 4 refers to "living with the person on a genuine domestic basis"; the Fair Work Act 2009 at s 12 refers to "a relationship as a couple on a genuine domestic basis"; the Income Tax Assessment Act 1936 at ss 317 and 102AAB refers to "live with each other on a genuine domestic basis in a relationship as a couple". The Social Security Act 1991 at s 4 provides an extensive definition with respect to couples (over 2000 words), which provides a list of relevant factors in s 4(3) that is very structured:

> (a) the financial aspects of the relationship, including:
> (i) any joint ownership of real estate or other major assets and any joint liabilities; and
> (ii) any significant pooling of financial resources especially in relation to major financial commitments; and
> (iii) any legal obligations owed by one person in respect of the other person; and
> (iv) the basis of any sharing of day-to-day household expenses;
> (b) the nature of the household, including:
> (i) any joint responsibility for providing care or support of children; and
> (ii) the living arrangements of the people; and
> (iii) the basis on which responsibility for housework is distributed;
> (c) the social aspects of the relationship, including:
> (i) whether the people hold themselves out as married to, or in a de facto relationship with, each other; and

(ii) the assessment of friends and regular associates of the people about the nature of their relationship; and
(iii) the basis on which the people make plans for, or engage in, joint social activities;
(d) any sexual relationship between the people;
(e) the nature of the people's commitment to each other, including:
(i) the length of the relationship; and
(ii) the nature of any companionship and emotional support that the people provide to each other; and
(iii) whether the people consider that the relationship is likely to continue indefinitely; and
(iv) whether the people see their relationship as a marriage-like relationship or a de facto relationship.

[20] While this list of factors under the Social Security Act has similar factors to the Family Law Act, it also has different factors. The importance of a consideration of the social security rule, its interpretation, and the attendant critical literature, is that it demonstrates: first, that there is a degree of uncertainty in the legislation, which has resulted in a number of amendments of the Social Security Act; and second, it is apparent that the context of the legislation is of significant impact in interpreting the provisions. In this respect, it is important to note that the Social Security Act provides for financial support for those in society in need, in contrast to legislation such as the Family Law Act, and in particular the Status of Children Act in Victoria, which regulate the parentage and property rights of parties who enter into relationships.

[21] The words of s 4AA, making it clear that not every factor is necessarily required to be considered, indicate that the legislature moved away from the very structured approach suggested by French J (as his Honour then was) in *Pelka v Secretary, Dept of Family & Community Services* (2006) 151 FCR 546; 43 AAR 220; [2006] FCA 735 with respect to the Social Security Act. Similarly, the legislature's use of a definition section different to that utilised in the Social Security Act indicates that the two definitions are intended to be different, although both assess similar situations.

[22] As a result, it is likely that there will be differences in the relationships covered by the term "de facto" as it appears in various enactments, as a result not only of differences in wording, but the different purposes of the statutory schemes. It may well be that a person is in a relationship sufficient to satisfy s 4AA of the Family Law Act, yet not satisfy the relevant provision of the Social Security Act 1991. As a result, the receipt of a single rate of pension will not be determinative of the question under the Family Law Act, although the circumstances leading to such a pension being granted will be a factor to take into account.

[23] It is important to recall the principle of statutory interpretation set out in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; 153 ALR 490; 72 ALJR 841; [1998] 8 Leg Rep 41; [1998] HCA 28, where McHugh, Gummow, Kirby and Hayne JJ said (at [69]):

> [69] The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with

which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed.

[24] An example of the express statutory recognition of this principle within one Act can be seen in the Migration Act 1958 at s 5CB where the definition of de facto relationship includes the rider that:

> (3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.

[25] The result is that the definition must be interpreted in the context of the operation of the Family Law Act. Significantly, the objects of Pt VII are set out in s 60B as:

> *Objects of Part and principles underlying it*
>
> (1) The objects of this Part are to ensure that the best interests of children are met by:
>
> (a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and
>
> (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
>
> (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
>
> (d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.
>
> (2) The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):
>
> (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
>
> (b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and
>
> (c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and
>
> (d) parents should agree about the future parenting of their children; and
>
> (e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).
>
> (3) For the purposes of subparagraph (2)(e), an Aboriginal child's or Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:
>
> (a) to maintain a connection with that culture; and
>
> (b) to have the support, opportunity and encouragement necessary:
>
> (i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and
>
> (ii) to develop a positive appreciation of that culture.

[26] In this case it is argued that the orders sought by the applicant are in the "best interests" of the child, in accordance with s 60CA. Arguably, a declaration as to whether the applicant is a parent is a parenting order within s 64B. However, I find nothing with respect to the "best interests" of the child that logically assists in determining whether the parties were or were not de facto partners at the relevant time.

[27] The matters referred to in s 4AA should be considered, along with any other facts or circumstances in the particular case or relationship "as may seem appropriate in the circumstances of the case": see s 4AA(4). Care must be exercised before relying upon either the authorities, or developed norms, with respect to the definition of the term "de facto" under other legislative provisions. In this respect, the comments of Powell J in *D v McA* (1986) 11 Fam LR 214 at 227; (1986) DFC 95-030 at 75,355 overstate the benefits of cases under statutory schemes with similar tests as to the nature of relationships.

[28] Similarly, the definition in the Victorian Act must be considered in the context of that legislation, if the case falls outside the definition relevant for the Family Law Act. As I have ultimately found that the case falls within the definition in the Family Law Act I have not gone on to consider the operation of the Victorian provision.

Role of donor of genetic material

[29] A difficult issue arises with respect to the role of the donor of the genetic material, with respect to this litigation about the parentage of the child. The child is biologically the child of the respondent and the donor.

[30] If the parties fall within the definition of de facto partners under the Family Law Act, s 60H results in the child being a child of the parties, and the donor of genetic material would no longer be one of the child's parents: *Re Michael (Surrogacy Arrangements)* (2009) 41 Fam LR 694; [2009] FamCA 691 (*Re Michael*). However, if the parties are not de facto partners, then s 60H is not engaged and the donor is not excluded from being a parent, by s 60H of the Family Law Act (to this extent *Re Michael* overstates the effect of s 60H). For the purpose of determining whether the donor is a parent, and should be joined in the proceedings, it is appropriate to consider this as a case where the findings could have resulted in s 60H not being engaged. Unlike many cases this was a real, not feigned, issue.

[31] Under the child support scheme, the term parent is defined to mean only parents within s 60H, if a child is born as a result of an artificial conception procedure: *B v J* (1996) 21 Fam LR 186; (1996) FLC 92-716; 135 FLR 472 (*B*). In *B*, Fogarty J, considered the possibility that the word "parent" included a donor under the Family Law Act, and the obvious problems this would cause for donors, however his Honour's comments were clearly obiter.

[32] In *Re Patrick* (2002) 28 Fam LR 579; (2002) FLC 93-096; 168 FLR 6; [2002] FamCA 193 (*Re Patrick*) Guest J concluded that s 10F of the Status of Children Act had the effect of excluding the donor from the definition of parent as it relevantly provides:

> 10F(1) Where semen is used in a procedure of artificial insemination of a woman who is not a married woman … the man who produced the semen has no rights and incurs no liabilities in respect of a child born as a result …

[33] Importantly, s 10F of the Status of Children Act 1974 (Vic) does not require that the recipients of the genetic material be married or in a de facto relationship before it takes effect. As a result, under the state Act, and for the purpose of state law, if the parties are not in a de facto relationship at the relevant time no rights or liabilities would subsist between the donor and child.

[34] In *Re Mark (an application relating to parental responsibilities)* (2003) 31 Fam LR 162; (2003) FLC 93-173; 179 FLR 248; [2003] FamCA 822 (*Re Mark*), Brown J was critical of the reasoning of Guest J in *Re Patrick* where his

Honour interpreted s 60H as impliedly resulting in nobody outside the section being a parent when the case concerned artificial insemination. Brown J concluded that s 60H merely enlarged the definition of "parent" for the purposes of the Family Law Act. To this extent it seems clear that her Honour must be right, lest there could be cases where a child had no parents: see, for example, the discussion in *Re J and M — Residence Application* (2004) 32 Fam LR 668; [2004] FMCAfam 656.

[35] When turning to the effect of the state legislative provisions, her Honour said (at [69]–[78]):

> [69] The various statutes enacted by the States and Territories which have put into effect the decision of the Standing Committee of Commonwealth and State Attorneys-General may have a common intent, but the intention is now effected in different ways. Some do so by the creation of presumptions of parentage; see for example, Status of Children Act 1996 (NSW), s 14. Others (including Victoria) do not. In the passage quoted at para 64 above Sandor refers to all States and Territories having laws which "presume that a sperm donor is not a parent" unless he is the legal or de-facto husband of the recipient but the Victorian legislation is not couched in those terms.
>
> …
>
> [71] … Section 10F does not say that in certain circumstances a person is presumed to have no rights and liabilities in respect of a child. Rather, it provides that a person in a particular position has no rights and incurs no liabilities in respect of a child. It is a statement of the law as it applies in particular circumstances. Nor does it say … that a sperm donor is not a parent unless he is the legal or de-facto husband of the recipient. The Victorian statute merely removes the rights and obligations which the law attaches to fatherhood.
>
> [72] A presumption involves the assumption of truth of a thing until the contrary is proved or an inference established by law as applicable to certain circumstances. The language of the Victorian legislation is not the language of presumptions.
>
> [73] A finding that a word in Part VII of the Family Law Act (in this case "parent") is to be construed "in light of" s 10F of the Status of Children Act 1974 (Vic) involves construing a federal statute "in light of" State law.
>
> …
>
> [78] Nowhere in the part of the judgment cited [*W v G* (1996) 20 Fam LR 49] (or elsewhere) does Hodgson J say or imply that there is any principle of statutory construction which means a federal law should be construed in the light of State or Territory presumptions. If such a principle exists one wonders at its effect in areas where State and Territory laws differ.

[36] The central question is whether the term "parent" as used in the Family Law Act should be given a definition based upon ordinary meaning, technical scientific meaning (genetic similarity), or its meaning at law describing the legal relationships that the law recognises between persons.

[37] That it has a different meaning at law from ordinary usage is apparent from legal history. For example, a biological father of an illegitimate child was not recognised by the common law for civil purposes (*R v Inhabitants of Brighton* (1861) 1 B & S 447 at 451; 121 ER 782; [1861] EngR 760 per Cockburn CJ) and had no right to custody of the child: *R v Soper* (1793) 5 Term Rep 278; 101 ER 156; [1793] EngR 1473 and *Ex parte Knee* (1871) LR 13 Eq 36. Paternity, and in modern times parentage, are well-recognised concepts describing the legal relations between adults and children. The ongoing debates about "social parenting", which commenced in earnest with the introduction of adoption laws also demonstrate that the concept of "parent", as used in the law (and increasingly in social discourse) often refers to the legal and social

relationships between the relevant persons rather than their biological connection. The Full Court in *In the Marriage of C V and S L Tobin* (1999)24 Fam LR 635; (1999) FLC 92-848; 150 FLR 185; [1999] FamCA 446 (*Tobin*) and *Simpson v Brockmann* (2010) 43 Fam LR 32; [2010] FamCAFC 37 (*Simpson*) makes clear that the term "parent" in Pt VII of the Family Law Act does not include a "social parent" who is not involved in the child's conception.

[38] The drafting styles in the federal and state Acts are quite different. The Family Law Act uses phrases such as "is the child of", "is not the child of", "is his child for the purposes of the Act", and "ceases to be the child of" throughout the division in conjunction with the phrase "for the purpose of this Act". The terms of the Act appear to be creating legal fictions, or presumptions about the relationships between a person and child that would be recognised. The state Act is drafted to create a fiction in s 10D, and also to abolish the relationships that the law recognises between the adult and child in the Hohfeldian terms of duties and liabilities in s 10F. It appears clear that the provisions of the state Act potentially do two things: s 10D creates a fiction as to parentage, and s 10F removes any legal duties or liabilities that may arise as a result of the biological relationship between the donor and child.

[39] The Commonwealth has power to legislate with respect to "the determination of a child's parentage for the purposes of the law of the Commonwealth" with respect to a child in Victoria as a result of the referral of state powers to the Commonwealth in s 3(1)(c) of the Commonwealth Powers (Family Law — Children) Act 1986 (Vic), but has not exercised that power in a way that affects the operation of s 10F on the parties in this case, if they are not in a de facto relationship. If they are in a de facto relationship then s 60H of the Family Law Act excludes the donor from being a parent under the Family Law Act. Thus, although s 10F of the Victorian Act appears to apply, the abolition of duties and liabilities in s 10F does not create any fiction as to parentage. The fiction of non-paternity only arises when s 10D is engaged.

[40] In *Tobin*, the Full Court considered the term "parent" with respect to child maintenance saying that "the natural meaning of the word in the context in Pt VII, Div 7 of a child is the biological mother or father of the child and not a person who stands in loco parentis". However, that case concerned the obligations for child maintenance of a person in loco parentis, but outside the definition of a stepparent. As the decision is clearly confined to the definition for Div 7 it does not appear to be binding (and was not been treated as such in *Re Mark*). Although *Tobin's* case was not referred to in *Simpson*, a similar result flowed.

[41] The dictionary definitions were referred to in both *Tobin's* case and *Re Mark*. As Brown J said in *Re Mark* (at [53]–[60]):

> [53] … The Full Court [in *Tobin v Tobin* (1999) 24 Fam LR 635; (1999) FLC 92-848; [1999] FamCA 446] considered a number of dictionary definitions of "parent" and (at [40]) found the natural meaning of the word in respect of the Family Law Act to be the first definition given in the Oxford English Dictionary, being "a person who has begotten or borne a child".
>
> …
>
> [58] The Oxford English Dictionary (2nd Ed) does not define "begotten", referring the reader to "beget", which is defined as follows:
>
> 1. trans. To get, to acquire (usually by effort).
> 2. To procreate, to generate: usually said of the father, but sometimes of both parents.

3. Theol. Applied to the relationship of the Father to the Son in the Trinity; also to the spiritual relationship of God to man in regeneration.
4. fig and transf. To call into being, give rise to; to produce, occasion.

[59] Mr X provided his genetic material with the express intention of fathering (begetting) a child he would parent. He is not a sperm donor (known or anonymous) as that term is commonly understood. The fact the ovum was fertilised by a medical procedure, as opposed to fertilisation in utero through sexual intercourse, is irrelevant to either his parental role or the genetic make-up of [name omitted].

[60] I am satisfied that the ordinary meaning of the word "parent" encompasses a person in Mr X's position. If it were otherwise there would be no need for legislation such as that contained in the Status of Children Act 1974 (Vic).

[42] The importance of identifying persons who created the child in the sense of parents as procreators or generators can be seen starkly in a hypothetical example. If a man were to donate semen for research alone and the semen were mistakenly used for insemination, then in no meaningful sense could he be considered a parent who had begotten the child, other than through biological similarity. The donor in this case had relinquished any property in the genetic material and relinquished any control over its use.

[43] The donor, in this case, does not appear to have procreated or created the child in the relevant sense as he had no contact with, nor ever knew of the mother. In this case the donor would not be aware of the actual use made of the genetic material, or if it was used at all. It is difficult to describe him as a person who had "begotten" the child. A person in this position can not have been contemplated as a person who would have shared parental responsibility for the child under the Family Law Act. This is in sharp contrast to the facts in *Re Mark* where the involvement of the man who provided the sperm desired, and directly facilitated, the particular conception.

[44] On the dictionary definition it appears that the donor in this case is not a "parent" of the child in the sense the term is used in the Family Law Act, but simply a donor of genetic material. Of course, it is likely that a donor would be a person with standing to bring proceedings for children's orders under the Family Law Act as a person with an appropriate interest in the child, as can others such as extended family and persons who have significant roles in children's lives, but no biological connection: see s 65C of the Family Law Act.

[45] Such an interpretation based upon the ordinary meaning of the term (as extrapolated from the decision of Brown J in *Re Mark*) sits comfortably with other provisions of the legislative schemes. It protects the donor's anonymity, and the recipient's anonymity from the donor. The significant duties and obligations imposed upon parents by the Family Law Act are not imposed upon an unknown person who has donated biological material in the expectation (fulfilled in state law) that there would be no duties or obligations to the child. It allows for novel situations to be dealt with on their underlying facts, rather than by technical rules that may produce anomalous results. I find that this is an appropriate interpretation of "parent" under the Family Law Act. The extent to which persons without a biological connection can be considered parents (broadening the definition) is not an issue here; the issues in this case is confined to whether mere biology alone is sufficient when using donated genetic material to assist in conception.

[46] For these reasons, for the purpose of Pt VII of the Family Law Act, I am not persuaded that the donor of the genetic material is a parent of the child in the circumstances of this case. As a result, I find that the donor is neither a necessary party nor a person who should be served with the application or response.

[47] If I am wrong with respect to the meaning of "parent" under Pt VII of the Family Law Act, then the donor appears to have significant rights and responsibilities with respect to the child, despite the fact that only through subpoenas piercing the legislated anonymity could he and the child become known to each other. However, the donor has conducted himself in such a way as to eschew any rights and avoid any responsibilities, utilizing a process specifically designed for that purpose by the state legislature. In these circumstances the effect of orders in these proceedings do not derogate, on a practical level, from the position he has taken by his conduct to date, but have the potential to perfect the legal fiction he must have expected when donating. As a result I am not persuaded that he should be served or joined and would have granted leave to proceed without joining or serving him with the proceedings, should that have been necessary.

The evidence

[48] The applicant was born [in] 1973 and is currently 36 years of age. The respondent was born [in] 1982 and is currently 28.

[49] The parties agree that they commenced a relationship in mid-2004. They also agree that While they commenced their relationship in [S] they ultimately moved to the Ballarat area. At the end of 2007 the applicant asked the respondent to marry him and she agreed. They did not ultimately marry.

[50] As a result of the infertility of the applicant, the parties attended on their general practitioner with a view to undertaking an IVF procedure for the purposes of having a child. Tests were undertaken which confirmed that the applicant was infertile. The parties agreed upon a course of IVF treatment that involved the artificial insemination of the respondent from a donation by an anonymous sperm donor. That process was only available at that time pursuant to the Infertility Treatment Act 1995 (this Act has now been replaced by the Assisted Reproductive Treatment Act 2008, which commenced on 1 January 2010). At the relevant time, a person who may undergo such treatment was defined in s 8 as follows:

> 8 *Persons who may undergo treatment procedures*
>
> (1) A woman who undergoes a treatment procedure must—
>
> (a) be married and living with her husband on a genuine domestic basis; or
>
> (b) be living with a man in a de facto relationship.
>
> (2) Before a woman undergoes a treatment procedure she and her husband must consent to the carrying out of the kind of procedure to be carried out.
>
> (3) Before a woman undergoes a treatment procedure—
>
> (a) a doctor must be satisfied, on reasonable grounds, from an examination or from treatment he or she has carried out that the woman is unlikely to become pregnant from an oocyte produced by her and sperm produced by her husband other than by a treatment procedure; or
>
> (b) a doctor, who has specialist qualifications in human genetics, must be satisfied, from an examination he or she has carried out, that if the woman became pregnant from an oocyte produced by her and sperm produced by her husband, a genetic abnormality or a disease might be transmitted to a person born as a result of the pregnancy.

[51] Sections 10 and 11 required certain information to be given to the parties and for counselling to take place. Those sections are as follows:

> 10 *Information*
>
> (1) Before a woman consents to undergo a treatment procedure the doctor in charge of the woman's case must give to the woman and her husband—
>
> (a) a list of counsellors who have been approved under Part to give counselling to women undergoing treatment procedures and their husbands; and
>
> (b) enough information about the procedure and the alternatives to the procedure to enable the woman and her husband to make an informed decision about whether or not to undergo the procedure.
>
> (2) Before a woman undergoes a treatment procedure, she and her husband must give the prescribed information required to be recorded in the Register under section 62 or 63 for women undergoing treatment procedures and their husbands.
>
> 11 *Counselling*
>
> (1) Before a woman consents to undergo a treatment procedure, she and her husband must have received counselling (including counselling in relation to the prescribed matters) from a counsellor who has been approved under Part 8 to give counselling to women undergoing treatment procedures and their husbands.
>
> (2) Before a woman undergoes a treatment procedure, the doctor in charge of that woman's case must take all reasonable steps to ensure that a counsellor who has been approved under Part 8 to give counselling to women undergoing treatment procedures and their husbands is available to give further counselling to the woman and her husband after the procedure is carried out.

[52] In this case the parties attended upon a psychologist, Ms L, on 17 May 2008 for a counselling session. Following this the parties signed a consent and undertook an IVF procedure on 19 May 2008. The respondent conceived a child, E, who was born [in] 2009.

[53] The respondent has a child of a previous relationship, M, born [in] 2003, who is currently six. M's father is known and has contact with him, although the extent of that relationship is in dispute. M continues to live with the respondent.

Evidence of the applicant

[54] The applicant explained that the parties were on his version engaged to be married in October 2007, and that the engagement took place during a public-performance show, although he had asked the respondent prior to the public request that she marry him in front of the persons attending the show. The event was repeated some time later in Western Australia for the benefit of the respondent's father and stepmother (that is, a request to marry during the course of a public-performance show).

[55] The applicant had not been able to have a child with his first wife and is deeply committed to building a relationship with E.

[56] He said that all of the bills and household expenses were paid for on the respondent's credit card but then he gave the respondent cash, and that he provided financially for her. He says that she did not lend him money. At the time when they were first together, he said he earned $800–1200 per week and that they shopped together, weekly, at the supermarket. He said that various household furniture and appliances were also bought on the respondent's credit card but then he gave her cash for them. He said that various household furniture and appliances were also bought on the respondent's credit card but then he gave her cash for them. He said that he had his belongings stored in the shed on the property she rented at one stage.

[57] After they moved out of a residence in Ballarat, and the respondent declined to move into a residence at [C] (a town nearby), they then moved in together to the respondent's mother's house for a short period. He says that at this point he decided he would stay with his friends, [Ms G and Mr N], because of the difficulty of having so many people in the unit. On his evidence the parties appear to have separated. Thereafter their relationship deteriorated further to the point where he says that he was only able to see a copy of the ultrasound of the baby if he paid for it, or paid for half of it, and that various domestic violence proceedings were brought in the state courts.

[58] The applicant said that he had a good relationship with the respondent's son, M, to the extent that he bought him a quad bike, as the family all has an interest in motorbikes. He also says that he bought him toys and played video games with him and watched monster truck videos with him. The applicant says that M rarely saw his father and that he had taken a role in the nature of a parent with M.

[59] As a sign of his commitment to M and the respondent, he says that he had their names tattooed on his forearms, and displayed the large tattoos running the length of the inside of his forearms in court.

[60] During cross-examination he denied that he was ever addicted to drugs, although it seems clear that he had a significant drug and alcohol problem, at least at one time. This is apparent from a letter that he penned to the respondent after the relationship had broken down, where he apologised for the impacts of his drug and alcohol use and the consequences that it had had on the family. He denied that he was an addict but is aware that she had concerns about his use. He was of the view that he was not strong enough to stay off drugs, but did not see this as being sufficient to put him in the category of an addict. It seems that the applicant was indeed an addict, although not to the extent that it had completely destroyed his life, which may explain his different definition of the word "addict".

[61] He says that the parties only separated for 6 months between April '07 and September–October '07 throughout the whole of the period of the relationship, which he describes as commencing in 2005 and ending in January 2008. He said that even during this period of separation, during the times when he was not trading in Queensland he did meet with the respondent and they had a sexual relationship from time to time. It was put to him that they were effectively sharing a house and had a casual relationship that did not amount to being a de facto relationship. It was put that this involved him meeting his half of the household budget and having a separate room in the house. He said that he did contribute to his share of the household budget but that it was on the basis that he was in a couple relationship with the respondent. He says that they were a couple for 18 months at [S].

[62] He explained that the move to Ballarat was so that the mother could be closer to her mother and because they were planning on having another child. Initially at Ballarat they rented a residence at Property C where he says the relationship was marriage-like. At Property C the lease and utilities were all in the respondent's name as she was on a supporting parent's pension and did not wish to lose the benefit of that pension. He said he wanted to merge their bank accounts but she had declined, presumably for the same reason. It was put to him that he had no key to the Property C house, which he strongly denied. It was also put to him that he lived in the bungalow "out the back", but he said that it was

used as a games room and for guests. After 3 months at Property C he left and went to Queensland to family and returned when they changed residence to Property P (reduced cost housing).

[63] He said in evidence that he had never been unemployed although his draft tax return for the '05/06 year indicates at least a small period of unemployment. The accuracy of the tax return however is in doubt as it was a copy that was retained by the respondent which had not been signed. It appears that the applicant had earned considerable moneys cash in hand that did not appear in that draft tax return.

[64] He admitted that he was asked to leave the residence at Property C and said he was not sure why but was happy when the parties got back together. It seemed from cross-examination that there was a total of nearly 10 months when the parties were not actually living in the same house, although he maintained that they were a couple for much of that time. He said that the IVF program commenced after they agreed to marry and that from the time of the parties commencing to live in Property P they lived as a couple. He denied that the relationship was starting to unravel by January/February 2008 and denied that he had started living at the household of [Ms G and Mr N] around that time. He maintained that the parties were still together at the time of conception. He said that the respondent was not wanting a financial commitment from him before [C], although he says he was prepared to go on the lease and tell the Department of Social Security that they were a couple, but she did not want to do that. He said he never understood the reasons why she would not move into the [C] house with him and end her reliance on social security. He also spent Christmas Day with the respondent and the respondent's mother. In addition he maintained that they undertook family activities together, such as breakfasts, going to the markets, shopping, taking M to kindergarten (when work permitted) and the like.

[65] The applicant was later recalled to give evidence about the tax return that was produced by the respondent. He did not have a copy of his tax documents with him and indicated that the draft may have been correct as a large amount of his earning may have come from cash jobs that did not appear on the return. He declined to answer further questions about that.

[66] On the whole I did not find the applicant a particularly impressive witness. It appeared to me that his recollections as to detail were not particularly clear. His understanding of the relationship and the events that took place appear to be skewed by his desire for this to have been a committed and marriage-like relationship. However, on the whole I accept his evidence.

Ms W

[67] The respondent's stepmother, Ms W, was called to give evidence by telephone. She gave evidence largely in accord with an affidavit filed by her partner, the respondent's father, who was unable to give evidence as he was in country Western Australia and not contactable. As a result, I place no weight on his affidavit material to the extent that it is evidence from him, nor do I draw any adverse inference from the fact that he was not called as there was clearly an appropriate explanation for his unavailability.

[68] I found the evidence from Ms W impressive, although I note that it was telephone evidence so I did not have the opportunity to observe her in person. She explained that she heard many of the conversations outlined in Mr E's affidavit as he would often place the phone on speakerphone so that both of them

could participate in the conversation. She said that the respondent often rang to enquire of her own father details about the entitlements of the applicant in his job [in the transport industry] (her own father having [worked in the industry] for many years) and her understanding that they were cohabitating and a couple. She agreed that her evidence was limited by the fact that they spent little time with the applicant and respondent due to the great distance that they lived apart. She also agreed that while they spoke about the IVF process that they did not speak a lot about the precise nature of the relationship between the applicant and the respondent. She said that when she did see the applicant he was very good with M and that he and M played games, they rode bikes, and the like.

[69] It appears that the respondent's father and stepmother understood the parties to be a couple raising a child and undertaking the IVF program. However, they were not privy to the precise details of the day-to-day workings of the relationship of the parties, which Ms W readily admitted.

[70] Ms W's evidence appears to me to have the ring of truth about it when one considers the nature of the calls. Her concessions lead me to have greater faith in the evidence given by her. I accept her evidence.

Ms A

[71] The applicant also called Ms A to give evidence. The applicant lives at the rear of her property and the parties are known to her. A card congratulating Ms A on her engagement was sent to her and her spouse, marked "with love, [the respondent] and [the applicant] and [M], xoxo". This was done in 2007. It certainly has the appearance of the type of card that one family would send to a couple in the way that it has been completed and signed. This card was completed by the respondent.

[72] She explained that she did have conversations with the mother with respect to the IVF treatment and discussed with the mother that she was lucky to get into the IVF treatment program early. She explained, however, that she did not pry into other people's business and could not say for certain where the applicant was living between February and April 2008, but she was aware that the applicant moved into her house in June or July 2008. She was not able to give a specific date, pointing out that it is not the type of thing that one expects to have to remember. She explained that she thought that the respondent and the applicant were working out their relationship. On some occasions the respondent came to see the applicant in the bungalow at the rear of her house, as the respondent attended from time to time and stayed overnight on occasions. She believed that the relationship became sour a few weeks after the respondent was confirmed to be pregnant.

[73] I found Ms A an impressive witness and I accept her evidence.

Mr W

[74] Mr W was called on behalf of the applicant and confirmed the contents of the affidavit of Ms A. He described the applicant, respondent and her son attending work dinners together as a family when the applicant worked for [omitted], and during the time that he observed them together he saw the applicant interact with M as though he was his own son and referred to the respondent as "babe" when speaking to her. In early 2008 he and Ms A attended the engagement party of the applicant and respondent, giving them a coffee machine as an engagement present. He also explained that the mother would

leave M with the applicant at his work from time to time. Mr W was aware that the applicant had time off during the IVF process and was very excited when the respondent fell pregnant.

[75] In cross-examination he explained that he knew that the applicant had stayed at [Ms G and Mr N]'s from time to time due to problems with the relationship, which he understood the parties were trying to sort out. Largely, what he knew of this he had heard from others, and therefore I place no weight on this part of his evidence.

[76] As with Ms A, I found Mr W an impressive witness and accept his testimony.

Evidence of the respondent

[77] While the respondent was on social security throughout the period (with some small payments for occasional part time work), she also said that she received $20,000 from a matrimonial property settlement which she had available to her, although no documents were produced to confirm this. She explained that between her pension, family tax benefit and child support she receives $560 one week and $400 the next.

[78] The respondent produced some financial documents. Unfortunately she did not produce any sets of bank statements or credit card statements to show the general course of her finances but only isolated documents or documents showing transfers. It is difficult to ascertain from these documents that she was, as she says, financially self-supporting, relying upon her social security entitlements.

[79] She explained that she had loaned the applicant money on numerous occasions, saying some 20 to 30 occasions, and was repaid on less than five occasions. She said that this went on throughout the time that she knew him. She said that she stopped loaning him money after they left Property P. She estimates that she had loaned him $10,000 over the period of their relationship but says she has no records of the amount. She says she was not expecting to be repaid due to the applicant's current attitude towards her. On her evidence there was considerable financial support that she was providing to the applicant. The support she described appears to me to have been in the nature of the support that one would provide in a relationship, although the case for the applicant is that the financial support had been provided by him to her.

[80] In cross-examination she confirmed that she had signed the IVF consent document and said that the applicant was her partner at the time of signing and entering into the process with the IVF clinic. She said she understood that by signing the documents they were agreeing that he and her would be the lawful parents of the child born as a result of the process. She said she did not know if a single woman could undertake IVF, but that she believed she told the psychologist that the relationship between the parties was on and off over the period of 3 years.

[81] She said in her evidence that she would not have told the IVF psychologist that they were together for 3 years. She said at first that she could not recall whether anything was said about how the applicant treated M, but also said that it was possible that the psychologist was told that the applicant treated M like his own child. She said that the parties may have said to the IVF psychologist that they would like three or four children together. There is no question that she understood the consent form and that she went through it with the psychologist

before signing it. The respondent maintained that at the time they saw the psychologist they were still "partners", but that the preference was for the applicant to live at another place. She maintained that she had never told the counsellor that they were living together and agreed that they did separate soon after she fell pregnant.

[82] She said in cross-examination that she liked him to live at her place when he was not drunk, and reiterated she wanted the man that she thought he was, to be the father of their child. When the parties were living in the same house at [S], she said sometimes they shared a bed but not at all times. She said they shared the fridge but that she did everything in the house, cooking and cleaning. She denied that the applicant spent any money except at the bottle shop.

[83] She agreed that, in Ballarat, they took a residence together. The applicant hired a truck and drove all of their things down in the truck. If her family visited they would spend time together. In 2007 they split up and he went to Queensland for a period, although she went to Queensland for 3 to 4 days to be with him in that time. When he came back from Queensland they had left the Property C property and she was living at Property P. They looked at a house at [C] but decided not to move in after she had a discussion with him. While the applicant's evidence was that he did not understand why she would not move into [C] with him, she said she did not believe that he would support her financially.

[84] She said that they lived together in Property P. During cross-examination she said that in her view the word "partner" meant "boyfriend". She agreed, however, that the nature of the relationship involved a sexual relationship, sharing some things, such as spending time watching television together and the like. She also agreed that she saw being a fiancé as being at a different level of commitment to boyfriend or girlfriend. However, no date was ever set for marriage.

[85] She explained that after around late February, in her view, the applicant only came around to the house to have sex with her, and the problems in their relationship began because he was spending too much time with [Ms G and Mr N] and that she suspected that he was using drugs. She said that she wanted him to show more attention toward her during the IVF program.

[86] She said that she had undertaken a number of his internet financial transfers and that for this purpose he had given her his login and password. She also located among her documents a copy of his 2006 tax return. She had also assisted him in conducting his shows at the truck show and said that on one occasion that she had paid the hotel bill and he gave her money back later.

[87] She explained that Centrelink was told of the house share arrangement and that she says she went through a checklist with Centrelink to determine whether she should be on the partnered rate of social security.

[88] She explained the applicant's relationship with M as being one where M would enter the applicant's world but the applicant would not do other things with M.

[89] She stressed that the applicant was not in a position to financially support her and her children and said that it was the applicant who did not want to move into the [C] property as it would cost too much, and that he had told her that she would have to work after the baby was born if they were living together without the social security.

[90] She said that she was committed at the time of the IVF treatment and thought that he was at that time but now believes he is not committed to a family.

[91] She also said that, in an interview with Dr D, she said that the parties were in a relationship and asked the doctor if it made any difference if they were not living together (Dr D being the treating specialist.)

[92] The respondent's evidence was characterised by a sense of bitterness. She reiterated that she believed the applicant was "pretending to be a different person" than when he was with her. I find that the respondent is minimising her relationship with the applicant. I am not able to accept her evidence where it differs from the applicant and others as to the existence of the relationship.

Ms L

[93] The respondent called her mother, Ms L. Ms L agreed that the parties had travelled to visit her together on at least two occasions, although she said that at the time, the parties were in [S] and came to visit, the applicant would not stay overnight. She said he did stay overnight at her house in May '08 when the parties had moved out of Property P. She explained that she had not seen him at Property P much, although he was away with work a lot. She recalls the parties breaking up in '07 and the applicant travelling to Queensland for a period. She recalled the parties getting engaged at the end of October 2007, and described the living arrangements as the applicant staying there "more than he should have". Exactly what she meant by that is unclear to me.

[94] She said that in March '08 she saw the applicant living a carefree and simple life, but she did not perceive the respondent to be undertaking IVF to be a single mother. She said that the respondent told her that they had not taken the [C] property because of financial reasons and that the respondent would not be able to continue to get social security if they took that house together and they did not have enough money. Events after the birth of the child had led the respondent's mother to have a very dim view of the applicant to the extent that she does not want him to "be a father to the children". She saw the applicant as a "buddy" to M rather than a father figure.

[95] She agreed that they all had Christmas together at [S], saying however that they had separate living areas. She also saw the applicant helping with M, bathing him, reading stories and the like. She said that the applicant was always saying he was in the process of finding his own place when he was in Ballarat.

[96] With respect to money, she recalls that after one of the truck shows the applicant asked her to hold some money for him as he was going out, and there was a large amount of cash involved.

Ms G

[97] The respondent called Ms G to give evidence in her case. She and her partner, Mr N, run a business, [name omitted]. She explained that she offered to be a witness rather than having been requested to give evidence by the respondent. She accepted that the applicant and her husband were friends, although she said she did not like him from the earliest times. She believed that the applicant thought her husband was a "party person". She explained that the applicant, when he stayed at her husband's house, stayed in their daughter's bedroom and that their daughter would stay in the bedroom with their sons. She believed that the applicant was staying at her place from time to time during the period from late February to June. She said she thought it was odd that the couple were going to have a baby together given their relationship. It appears clear that

at one point her husband and the applicant had an altercation (although she stressed that it was not a violent one) and after that falling out the relationship did not recover.

[98] It was apparent from the outset that Ms G could barely contain her dislike for the applicant. I do not find her evidence of assistance.

Mr N

[99] Mr N gave evidence in similar fashion to his partner, Ms G. His dislike for the applicant was palpable from the outset. He produced an invoice book to show the date that the applicant had purchased a four wheel motorbike. He denied that he had assaulted the applicant or committed arson on the applicant's car (the latter being an issue that is the subject of allegations after the pregnancy).

[100] He said that he never really spoke to the respondent and knew nothing of the IVF until much later. He said that the applicant would come around to the shop and help out with working on the bikes and have a drink, and that he started to stay at his house when the applicant told him that he needed somewhere to stay short term. He said that his partner never liked the applicant.

[101] He said that the applicant "cried on my shoulder" about his father's death, that he had nowhere to go and problems with his brothers and sisters, but said that he knew nothing about the applicant's relationship with the respondent. He said he had not noticed that the applicant had the respondent's name and the respondent's child's name tattooed on his forearms, though it would be difficult to miss if someone was not wearing long-sleeved shirts given the size of the tattoos. When it was put to him that it was apparent that the quad bike was purchased for the respondent's first child he was evasive in his answers.

[102] I found Mr N a less than impressive witness. I do not accept that his evidence concerning his relationship with the applicant could have covered so many of the applicant's personal issues without including discussions with respect to the respondent even if I were to accept the respondent's version of the relationship. I find that I am not assisted by his evidence.

Ms L

[103] The IVF psychologist, Ms L, was called. She is a registered psychologist who undertakes counselling for the IVF clinic. Her counselling role is required under the statutory scheme as part of the process of preparing a couple for IVF treatment. She said she usually gets a history of why the parties were there and reads through the forms with them. She said that she had a follow-up session with the mother, which she believed to be in June, although it may have been earlier, but at least at a time after she was pregnant. At that session the mother explained that the relationship was breaking down and was upset that it was donor sperm and an unknown father when she thought that the applicant would be the father. The psychologist said she offered ongoing counselling but this was not taken up.

[104] She said in her evidence-in-chief that she thought the parties had a strong relationship as a result of the matters she recorded in her notes. Her notes record as follows:

> Couple have been together 3 years. [Mr Baker] thought he was infertile because of previous relationship — he and his partner wanted children together, but were unsuccessful. More recently, had tests including testicular biopsy. [Ms Landon] has a son (five) from a previous relationship. The father of this boy has very little contact with him. [Mr Baker] treats him as his own child. Couple would like to have three — four

children together. Using donor sperm. Issues re being a recipient of donor sperm discussed. Consent form discussed, completed.

[105] While the consent form refers to information that the parties received from the Infertility Treatment Authority, it is her understanding that the nurse coordinator gives the parties a booklet in this regard. No copy of the booklet was produced by any of the witnesses at the hearing.

[106] The psychologist explained she could not recall which of the parties had said the things that were contained in her notes, as it was a joint session. She said that she had no recollection of the respondent saying that the relationship was on and off, but added the rider that she "really can't say". She said she had no memory of talking about the nature of the de facto relationship. She could not remember being told they were not living together. She said she expected them to be a couple, and added the rider that there can be circumstances where couples do not always live together so she would not have gone on with the discussion of this point.

[107] I found her evidence professional. She admitted that she could not recall all of the details and did not seek to embellish her notes and recollection. I accept her evidence in this case, and prefer her evidence to that of the mother to the extent that her notes differ from the evidence of the mother.

Dr D

[108] Dr D was called to give evidence by telephone and clearly understood that the Act only allowed for IVF treatment upon those in a marriage-like relationship, and also that the Infertility Treatment Authority provided a good quality service for assessing cases where there was any doubt. He said that he had utilised that service and that he would not have undertaken the IVF treatment if he had understood the parties were not a couple.

[109] While it seems unlikely that he has an independent recollection of the couple, it appears to me that his knowledge of the rules relating to IVF treatment would have resulted in him taking steps to make further enquiries or withhold treatment had he been aware that they were no longer living together.

Factors listed in s 4AA(2)

(a) The duration of the relationship

[110] The relationship of the parties spanned many years, although it was not always a happy one, and had various levels of commitment from time to time. The parties were fiancés by late 2008. I do not accept that they separated prior to the relevant IVF treatment.

(b) The nature and extent of their common residence

[111] I accept that the parties shared residences. While at the start of the relationship it may have been as housemates, by the time they left [S] they were already living as a couple, even having a family Christmas. I accept that they were living together at the relevant time, even though they had periods apart.

(c) Whether a sexual relationship exists

[112] The parties had a sexual relationship. Even at times when their relationship was difficult, and for a period they lived separately, I accept that they continued to have a sexual relationship. While the relationship had its ups and downs it continued for a lengthy period. Even if the respondent's evidence of separate bedrooms were to have been accepted they nonetheless had an ongoing sexual relationship.

(d) The degree of financial dependence or interdependence, and any arrangements for financial support, between them

[113] On the mother's case she financially supported the applicant to a significant extent from her assets and pension and made considerable unsecured loans to him. On the applicant's case he provided his income to the respondent to assist with the household budget and that she used it to fund the household, although making purchases on her own credit card.

[114] On either party's version of their finances they had moved well beyond the financial relationship of friends or housemates, to a point of interdependence, the respondent even managing the applicant's bank account over the internet.

[115] However, it also seems clear that one of the factors that led to the final separation of the parties was the potential financial impact of a loss of social security benefits for the respondent once the relationship was disclosed to Centrelink.

(e) The ownership, use and acquisition of their property

[116] No significant assets were purchased by the parties. I accept that the applicant contributed to chattel purchases. I also accept that the respondent managed the applicant's bank account over the internet.

(f) The degree of mutual commitment to a shared life

[117] The agreement to marry, the extent of the applicant's involvement in the life of the respondent's son, and the conduct and statements of the parties in the IVF program show a significant commitment to a shared life. The parties even mentioned to the IVF psychologist a desire to have a number of children through the IVF program.

[118] There is no doubt that at the time of participating in the IVF program they had a significant commitment to each other and a life together raising children. The very participation in IVF together demonstrates this. In this respect the facts differ from those in *Keaton*, where Pascoe CFM found (at [91]–[101]):

> [91] Despite this involvement in each other's lives and the applicant's commitment to helping the Respondent during this period, the couple's intentions as to the role the applicant would play in the child's life remained ambiguous:
>
> (a) The respondent accepted that she could have joined the program as a single mother and that the applicant was her partner but said it was not about having a child together at that time. The respondent said in evidence that she didn't know how to describe their relationship and didn't know what she wanted to do in relation to their future together.
>
> (b) It is agreed by both parties that the respondent was to decide the role the applicant was to play in the child's life. In her affidavit the applicant states that in the period 2002 to 2003 the parties had conversations relating to the possibility of the respondent having a child. The applicant asserts that she said to the respondent:
>
> (c) "I don't want to push you into a [sic] being a mother, and I'm not suggesting that I want to have anymore children. Having children has to be your decision for yourself and for your life … I will be as much or as little in your child's life as you want".
>
> (d) The respondent stated that in making the decision to have a child one of the factors was her ability to decide how much or little involvement the applicant would have in the child's life.
>
> [92] This evidence demonstrates a high degree of doubt as to the couple's mutual commitment to raising a child together and, to a lesser extent, to each other. The

> applicant clearly places the responsibility for any decision to have a child on the respondent alone and also envisages the possibility having a very limited role in the child's life — or in fact no role at all.
>
> …
>
> [101] On all the material before me, including evidence unrelated to parenting, I find there was a degree of mutual commitment to a shared life, but that in April 2005 this commitment was more one of support by the applicant to the respondent's independent decision to have a child and to raise the child as she saw fit. This finding is further confirmed by the respondent's evidence in cross-examination in relation to joining the fertility clinic, which I accept:
>
> > "We were partners to a degree, but it was not about having a child together at that stage at all."

[119] The applicant was emotionally committed to the respondent and the child, even having their names tattooed on his forearms in large lettering.

(g) Whether the relationship is or was registered under a prescribed law of a state or territory as a prescribed kind of relationship

[120] The relationship was never registered under a provision of state or territory legislation.

(h) The care and support of children

[121] The applicant had a relationship with, and commitment to, the respondent's first child. I accept the evidence that the applicant treated the respondent's first child like a son.

[122] The parties desired to have the child together as the child's parents. Both attended the procedure expecting to be the parents of the child.

(i) The reputation and public aspects of the relationship

[123] There is no doubt that there were public displays of commitment by the parties: the marriage proposals repeated in public at shows are clear evidence of this. Similarly I find that family members understood them to be in a de facto relationship and intending to marry. Their conduct led the counsellor and IVF doctor to believe they were in a de facto relationship.

[124] I note that the mother continued to claim a single person's benefit from the Department of Social Security. For this she must have represented that she was not in a de facto relationship. The applicant appears to have had no dealings with the Department of Social Security.

Other relevant circumstances

[125] I also take into account that the parties had relationship difficulties related to the applicant's substance abuse and that the respondent was receiving a pension on the basis that she was not in a de facto relationship under the Social Security Act.

Conclusion

[126] Section 4AA(1)(c) requires a consideration of "all of the circumstances of their relationship". Section 4AA(3) ensures that no particular finding is determinative. As a result it is important to not only identify particular circumstances that are relevant, but also to step back and consider the matter as a whole.

[127] Considering each of the factors individually, and then taking the circumstances of the case as a whole, I am satisfied that the applicant was a de facto partner of the respondent, within the meaning of s 60H of the Family Law

Act, on the date of conception of the child. As a result I find that, by operation of law, the child is a child of the applicant for the purposes of the provisions of the Family Law Act.

Orders

(1) That the matter be listed for directions at the Ballarat Circuit of the Federal Magistrates Court of Australia on 17 May 2010 at 2.15 pm.

ROGER HARPER
BARRISTER