

15/93

## FAMILY COURT OF AUSTRALIA

**PLUMB v COOPER**

Kay J

26 April 1993

**FAMILY LAW – PARENTAGE OF CHILD – WHETHER COURT HAS JURISDICTION TO MAKE DECLARATION OF PATERNITY.**

**Where the parentage of a child is in issue in proceedings under the *Family Law Act*, a magistrate is empowered to make a finding that a party to the proceedings is the father of the child. A magistrate has no jurisdiction to make a declaration of paternity.**

**KAY J:** [1] The matter of Plumb and Cooper is before the Court by way of an appeal from a Magistrates' Court. Margaret Cooper filed an application in the Magistrates' Court at Frankston on 11 February 1993 in which she sought the following orders:

1. That the respondent Gary Plumb be declared the father of the child Bradley Gary Cooper, born 6 July 1985.
2. That the respondent pay to the applicant maintenance for the said child of the relationship in such sum as the court deems reasonable.
3. Such further other orders as the court deems fit.

On 5 March 1993 on the return date of that application there was no appearance for the respondent *Gary Plumb*, and the following order was made by the Magistrates' Court:

Respondent (sic) is declared father of the child Bradley Gary Cooper, born 6 July 1985. adjourned 2.4.93 for question of maintenance.

By document filed in this Court on 5 April 1993 as a form 53 was filed on behalf of Gary Plumb appealing from the order of the Magistrates' Court made 5 March 1993, and seeking an order that the form 7 application of Margaret Freda Cooper filed 11 February 1993 be dismissed, that Margaret Freda Cooper pay the costs of the appellant. On 21 April an answer was filed in this Court seeking:

1. The application of Margaret Freda Cooper filed Frankston Magistrates' Court. 11 February 1993. be dismissed.

[2] 2. That the order made by the Frankston Magistrates' Couyrt (sic) on 5 March 1993 be discharged.

3. The applicant pay the respondent's costs of and incidental to this application.

This morning when the matter came on before me Miss Fox appeared as agent for the appellant seeking to have the matter referred by consent to a short defended list. It appears to me that the order of the Magistrates' Court is fatally flawed, and as such there was no point in sending the matter off to the short defended list on that issue. In the company of Miss Fox I telephoned Sherife Ymer, at the Frankston North Legal Service who apparently act on behalf of Miss Cooper, and who were consenting in writing to the transfer of the proceedings to the short defended list. She has agreed with the course of action that I proposed, namely, that I allow the appeal because of the fatal nature of the flaw in the order and that the matter otherwise be remitted to be dealt with in the maintenance proceedings. The problem with the proceedings before the Magistrates' Court is that the applicant, the respondent, and the Magistrate misunderstood the powers that are involved in issues of relating to questions of paternity.

The case is a claim by a mother of a child for maintenance against a person she says is the father of the child. The child was born in 1985 and as such, is subject to the [3] jurisdiction

of the *Family Law Act*, particularly Division 6, Part 7, which provides that the parents of a child shall support their children. Division 7 and Division 8 of Part 7 of the *Family Law Act* deal with issues of parentage. Division 7 sets out a number of circumstances in which a presumption of parentage may arise, and Division 8 empowers the Court to effectively order medical testing procedures to take place in order to determine parentage.

Given that parentage may be almost certainly determined by DNA testing there is an easy answer to the question of who is or who is not the father of any particular child. The only jurisdiction I know of to make a declaration of paternity exists under the *Status of Children Act*, which is a state Act in Victoria, and it is administered by the Supreme Court. The Family Court of Australia in exercise of jurisdiction under the *Jurisdiction of Courts (Cross-Vesting) Act* would be able to exercise that jurisdiction if it were invited to do so and by proper application. A Magistrates' Court cannot. All that was necessary for the Magistrate to have done in these proceedings was to make a finding that Mr Plumb was the father of the child. By making a declaration that he was the father of the child he has exceeded his jurisdiction, and to that extent I propose to allow the appeal. [4] That leaves alive the issue of child maintenance, and the only question now crossing my mind is whether that matter should be dealt with in the Magistrates' Court or dealt with in the Family Court. The Court may, under Section 46(3A) of the *Family Law Act* of its own motion, order proceedings be removed to the Family Court where they are pending in a court of summary jurisdiction. It does not appear to me, however, given the nature of the dispute, namely, should Mr Plumb pay maintenance and if so, what maintenance, that I should exercise that power at this time. I do not know the status of the matter in the Magistrates' Court because the Magistrate adjourned the further hearing of the maintenance application to 2 April. I do not know what happened to it after 2 April. I propose to make the following orders.

- (1) That the appeal filed 5 April 1993 be allowed:
  - (2) The declaration made by the Magistrates' Court at Frankston on 5 March 1993 be set aside.
  - (3) The answer filed by the appellant on 21 April 1993 is transferred to the Magistrates' Court at Frankston to be considered on the hearing of the maintenance application filed 11 February 1993 and pending in that court.
-