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The definition of parent is not set in stone: legal expert

by Keeli Cambourne, Deputy Editor, SMSF Adviser** and **Matthew Burgess, Director, View Legal

With the increasing incidence of blended and non-traditional families, deciding who is legally designated as a parent is not as cut-and-dried as it once was, warned a leading solicitor.

Matthew Burgess, director of View Legal, told SMSF Adviser the 2019 High Court decision of Masson v Parsons [2019] HCA 21 highlights the complex issue of parental rights when there is a non-traditional path to parenthood.

In this case, the court found that a man who donated his sperm for a child born of an artificial conception procedure is a 'parent' of the child, within the meaning of the Family Law Act 1975 (the Family Law Act).

The facts of the case were that Mr Masson provided his semen to a close friend, Ms Parsons, to enable her to conceive a child by artificial insemination in 2006. At the time of conception, Masson believed that he would be involved in the child's life. His name was recorded on the child's birth certificate as her father.

Although the child lived with Parsons and her partner, Masson continued to have an ongoing role in the child's financial support, health, education and general welfare. He and the child were described as having "an extremely close and secure attachment relationship".

In 2015, Parsons and her partner sought to relocate to New Zealand with the child. Masson instituted proceedings in the Family Court of Australia seeking orders to restrain the relocation of the child among other things.

In the first instance, the primary judge in the Family Court found in favour of Masson. On appeal to the Full Court of the Family Court, Parsons was successful in overturning the primary judge's decision, having relied upon section 14 of the Status of Children Act 1996 (NSW) (the NSW Act), which provides that there is an irrebuttable presumption that a biological father of a child conceived by a fertilisation procedure is not a 'parent'.

"When a dispute arose in relation to living and caring arrangements for the child between the biological mother and father the court confirmed there are at least three ways in which a person may be or may become a natural parent of a child depending on the circumstances of the particular case, namely genetically, gestationally and psychologically," Burgess said.

"It also found that the question of whether a person qualifies as a 'parent' is a question of fact and degree to be determined according to the ordinary, contemporary understanding of the word and the relevant circumstances of the case."

Burgess said the court also confirmed that to characterise the biological father of a child as a "sperm donor" and therefore not a "parent" suggests that the man in question has relevantly done no more than provide his semen to facilitate an artificial conception procedure based on an express or implied understanding that he is thereafter to have nothing to do with any child born as a result of the procedure.

"This said the court said it was unnecessary in this case to decide whether a man who relevantly does no more than provide his semen to facilitate an artificial conception procedure that results in the birth of a child falls within the ordinary accepted meaning of the word 'parent'," he added.

"This was because in the circumstances of this case, the man provided his semen to facilitate the artificial conception of his daughter on the express or implied understanding that he would be the child's parent; that he would be registered on her birth certificate as her parent, as he was; and that he would, as her parent, support and care for her, which since her birth he had done."

Although it may seem like a long bow to draw, Burgess said the issue of who is a parent can have an impact on things such as estate planning, inheritance, and death benefits.

“When it's an adoption, it is very clear, but the law can get very murky when it is not straight adoption, and things like donating sperm or eggs can become very complicated,” he said.

“Wills and trusts can provide some guidance, but a will is not binding. In this case what should have happened is there should have been a clear agreement documented at the time of donation, outlining rights and duties.”

He said although the parties involved had done things such as commit to an ongoing financial relationship that indicates a parent/child relationship as well as complete the birth certificate, the key facts indicate other issues were not considered at the outset.

“When emotions are involved it can become very complicated, very quickly. In an SMSF situation, if there is not what we would consider a ‘normal’ legal relationship it could open all sorts of pathways later on. For example, a ‘child’ may have no entitlement in the will but then they do have that entitlement under the superannuation laws,” he said.

“There is now a convergence of a lot of these types of issues and with an ever-increasing wealth inside SMSF, and with people living longer but with less capacity, there could be lots of complexities, especially with things like blended families, surrogacy and sperm or egg donations.”

Burgess said to try and mitigate these problems from the outset, there should be rigid documentation in place, and more importantly, the arrangements and documents should be reviewed annually.

“There should be a level of hygiene applied to any documentation put in place. Although things may have been documented at the birth like a birth certificate, if just one of the parties disagrees after the event, or their view has changed and is not dealt with in real time, it can become very contentious.”