forte family law

July 2010

RELOCATION—MOUNT ISA OR SYDNEY?

One of the most difficult decisions about separated families is whether or not a parent can relocate. Since a change in legislation in 2006, Australian Courts have required more parents to share residence of their children than in the past. They have made it harder for parents with shared or primary care of a child to relocate with the child.

A recent case which focused on these issues was *MRR v GR* (also known as *Rosa and Rosa*) [2010] HCA 4.

The Full Court of the Family Court upheld the decision of the Federal Magistrates Court:

- to give the parents equal time with the 5 year old child
- to require the child to remain living in Mount Isa, a remote but large mining town located 1,800 kms from Brisbane and 2,300 kms from Sydney

The mother was given leave to appeal to the High Court of Australia, a rare event in family law matters.

The parties lived in Sydney from 1993 until January 2007, when they moved to Mount Isa to assist the father's career, initially for two years but his contract was likely to be extended.

The parties separated in August 2007 during a visit to Sydney. The mother stayed with the child in Sydney. The father obtained a court order for the child to be returned to Mount Isa. The mother returned too and moved into a caravan park. The child lived week about with the parents.

The mother wanted to live in Sydney with the child. However, the father wished to continue his employment in Mount Isa. Even if the child were to live with the mother in Sydney, he said he would not move back to Sydney.

One of the objectives of the family law legislation is to ensure that the best interests of children are met by ensuring that children have the benefit of having both of their parents involved in their lives, to the extent that this is consistent with the best interests of the child.

There is a rebuttable presumption that it is in the best interests of a child for the parents to have equal shared parental responsibility. As a result, this is the most common arrangement.

If both parents have equal shared parental responsibility, the Court must consider:

1. Is equal time with both parents in the child's best interests?
2. If so, is equal time reasonably practicable for the child?
3. If it is reasonably practicable, it must consider making an order for equal time?

The High Court considered that it was not correct to say that if the father would not move from Mount Isa both parents had to live in Mount Isa. The High Court also said that the Federal Magistrate should have considered not only whether it was in the child's best interests to spend equal time with each parent but also whether equal time was reasonably practicable. Only if both questions were answers in the affirmative could an equal time order be considered.

The High Court found that the Federal Magistrate had not considered whether equal time was reasonably practicable in all the circumstances. He should have considered that:

- The mother and the child lived in a caravan park
- Alternative accommodation was unlikely and good quality private accommodation was expensive
- The mother had limited employment opportunities in Mount Isa but flexible work opportunities in Sydney
- There was no evidence to support the conclusion that the mother's anguish and depression about living in Mount Isa could be dealt with adequately in counselling

The High Court allowed the appeal and sent the matter back for rehearing in the Federal Magistrates Court.

Following this High Court decision, there is an expectation that there will be a less restrictive interpretation of the 2006 Amendments. This may mean that equal time which has often been ordered regardless of the circumstances (for example, high conflict or not practicable), will occur less frequently. Recent research on the negative effect of shared care on children, particularly in high conflict families, is also relevant.

WELCOME TO OUR NEW LAWYERS

We are pleased to welcome two new lawyers, Jane Doornbusch and Kate Whitehouse to the Forte team.

Jane has worked exclusively in family law since her admission in 2007. She also volunteers at the North Melbourne Legal Service. Kate was recently admitted to practice. She worked as a law clerk at Forte Family Lawyers whilst waiting to be admitted. Kate was previously a Legal Associate for two Family Court Judges.

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SURROGACY - WHO IS A PARENT?

Families come in all sorts of different combinations. Some families include children and others don't. Those that have children may have them from previous relationships, some have children from surrogacy, others through donors and some with involved fathers, gay or straight.

There have been several recent changes to State and Federal Laws which effect GLBTI families. GLBTI families are families with parents, partners or prospective parents who identify as say, lesbian, bi sexual, transgender or intersexual and their children.

There are changes that affect:

- Lesbians access to fertility treatment
- Who is a parent of a child
- Who is financially responsible for the children
- What financial responsibilities partners have to each other
- How couples can divide property between them when their relationships break down

Children

Who has access to infertility treatment?

From 1 January 2010, single women and lesbian couples have access to IVF services in Victoria without having to prove that they are medically infertile. This also means that friends or partners who assist with insemination cannot be prosecuted.

Who are legally the child's parents?

Until recently, the law did not recognise the reality of parenting arrangements for children from gay and lesbian relationships.

In 2008, changes to the *Family Law Act* expanded the categories of people who are considered to be parents, to include non-biological mothers in certain circumstances. While this has clarified the position for many lesbian couples, it may have worsened the position of gay men who want to be more than sperm donors.

Lesbian couples

If a woman undergoes an artificial conception procedure while she is in a domestic relationship with another woman, provided she and her partner consented to the procedure and the person who provided the genetic material also consented, then the birth mother will be considered to be a parent of the child and her partner will be the "other intended parent" of the child. This means that both birth mother and non-birth mother will share all responsibilities for parenting decisions for the child. Both mothers can be registered on the child's birth certificate in Victoria. Each of the mothers are financially responsible for the children and if they separate, they can each potentially claim child support from the other. The child is not automatically considered to be a child of the sperm donor even if the intention was that he be the father. He will not have any child support liability. He will not have any parenting rights or responsibilities unless ordered by a court.

Donor/father

A man who donates sperm to the lesbian couple is not considered to be a parent. He must apply to the court for orders in relation to the child if there is a disagreement between him and the lesbian couple about his involvement if any, with the child.

Conclusion

In summary, the changes to the law surrounding the legal parents of children from gay and lesbian relationships have been very positive and a step in the right direction for many parents and children whose status was previously uncertain. This is especially so for lesbian couples. However, the position of gay men wishing to be more involved in the lives of children who are biologically theirs needs the current laws to be tested by the courts and possibly legislative change.

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