LESBIAN FAMILIES

Parental responsibility of co-mothers

JENNI MILLBANK discusses how a recent case used equitable principles to resolve a dispute following the breakdown of a lesbian family.

W v G (1996) 20 Fam LR 49 is a landmark decision of the NSW Supreme Court which held a lesbian co-mother liable to pay child support for the children raised within a lesbian relationship. It is a remarkable decision in that it finds a legal relationship of parenthood, in the sense of parental responsibility to support, regardless of biology or statute. However, it is not an unequivocally positive decision for lesbian families. This note mentions some of the negative elements of the case. These reservations about the case are in part due to the somewhat shaky factual foundations of the decision, but largely concern the imposition of financial liability on lesbian (or gay) co-parents who nevertheless have very few legal rights as parents or partners.

Facts

W v G concerned two women who separated after an eight-year lesbian relationship into which two children were born. The plaintiff, Wendy (not, as they say, her real name) was the biological mother of both children, born after she had self-inseminated sperm donated by a known donor. Wendy approached the court asking *inter alia* for 'equitable compensation' from Grace (Wendy's ex-partner) by means of a lump sum towards the cost of maintaining the two children to the age of 18. The claim was successful, and Wendy was granted $150,000 from Grace's estate to be held on trust and used for the children.

The case was argued and decided on equitable principles. The *Artificial Conception Act 1984* (NSW) provides that donors of sperm, even known donors, are *not* defined as fathers. Thus the court held that the donor was not liable under federal child support legislation. Nor was Grace liable under statute because the legislation only contemplates the liability of biological and adoptive parents.[1] Grace's unsuccessful defence rested largely on the idea that the sperm donor should have been regarded as the other legal parent. As I have noted elsewhere, this is a somewhat ironic argument coming from a lesbian, especially considering that the sperm donor had agreed to have no connection to the children and was not even called at trial.[2]

Promissory estoppel

In the absence of statutory recognition, Wendy's counsel sought a novel use of the promissory estoppel principle from *Waltons v Maher*.[3] Wendy argued that by virtue of Grace's statements in support of Wendy having children, Grace's (contested) participation in the insemination process and her silence as to any contrary view, Grace had 'created or encouraged . . . a belief or assumption, or could otherwise be said to have promised' that she would 'accept the role of parent to each of the children, and would in so doing accept responsibility for the material and general welfare of both children' (at 56). In reliance on that implied promise, Wendy had two children, which was to her detriment in the sense that she would now be left to support them to adulthood alone. Hodgson J accepted this argument and applied *Waltons v Maher* to estop Grace from resiling from the implied promise.

The use of equitable principles in this case appears just and reasoned. The court was faced with a situation where one partner was being left with the financial burden of two children and very few assets following an eight-year relationship, while the other partner had substantial assets and no legal liability to provide support. Law, specifically statute law, had failed to provide a remedy and equity stepped in, as equity does, in an attempt to do justice between the parties.

However, the extent to which the facts supported the use of promissory estoppel is a major issue. First, there was no explicit promise to parent. Thus, the court looked to the words and conduct of the parties to find an implied promise. When did this implied promise arise? Was it when Grace agreed to the insemination? Was it when she participated in the insemination? (The extent of this participation was hotly contested and left undecided with respect to the second child). Was it when she had an ongoing live-in relationship with Wendy, knowing that Wendy was going to, and subsequently did, have children? Was it when she took on a parenting role with the children? (And *did* she in fact do this?) Was it a combination of all of these things? From a close reading of the case, the answer is unclear, and it is this lack of clarity which may have laid the groundwork for appeal.

Detrimental reliance

Detrimental reliance on the promise by the plaintiff and knowledge of that reliance by the defendant are key elements in promissory estoppel. Of particular importance in this case is the fact that promissory estoppel requires that the reliance *follow* the promise. For Wendy to establish detrimental reliance, in that she had two children, the promise must have preceded the reliance. The promise, therefore, had to have arisen prior to each insemination, not after. However, the court used evidence such as greeting cards, words spoken to third parties, and wills — all of which came into being *after* the births — to imply a promise from Grace that she would parent. To fall within the bounds of promissory estoppel this evidence must have been used to prove retrospective intent, because promises following the births do not fulfil the necessary element of detrimental reliance.

Scope of the promise

A further serious issue sidestepped in the case is the scope of the promise. The court quantified the promise using a three-step process. First, an expert report on the cost of raising children to adulthood relative to parental income (the Lee

Scale) was applied. Second, Grace's income was calculated by assuming an 8% return on her inheritance (she was unemployed at the time of trial). Third, the costs between Wendy and Grace were apportioned by applying the formula under the *Child Support (Assessment) Act.* Thus, the court held that Grace was to bear approximately two-thirds of the cost of child raising. However, when the promise was made (which had to be prior to insemination under promissory estoppel's constraints), and indeed for most of the relationship in which the children were raised, Grace was either engaged in low-paying employment or was on unemployment benefits. Thus, when Wendy relied on Grace's financial support in having the children, Wendy was surely relying on the support of a *low income earner* — not on the support of a woman who many years later would inherit $500,000 (and have her contribution apportioned by a statute which did not apply to her). It is clearly a fiction to say that Grace represented, or that Wendy relied on, a promise to support the children at the top end of the Lee Scale until adulthood.

Final orders and costs have not yet been determined, so it is not known whether an appeal will proceed. If it does, the two issues discussed above, the timing of the point of promise and the scope of the promise, may well be weak spots, which could allow the Court of Appeal to overturn the case on purely technical grounds and ignore the policy import of the decision.

Recognition of lesbian families?

Despite the fact that the decision in W v G does go some way towards recognising lesbian families, it does so in what is effectively a legal and social vacuum. The decision applied a case about building supermarkets to raising children without acknowledging the wider legal context in which the parties were and are operating. Grace was required by equity to stand by her promise to be a parent, to the tune of $150,000, without being recognised as a parent in any other area of law. If Grace had died or been injured, the children would have had no right to compensation or to her estate if there was no will (although they could have applied under the *Family Provision Act 1982* (NSW), as it is broader than all other States, except the revised ACT version). If Wendy had died or been injured, Grace would have had no right of guardianship.[4] Although Grace could have approached the Family Court of Australia seeking custody or access to the children,[5] the extent to which the court would recognise her claim is questionable. Non-biological parents are generally referred to as a 'stranger' and biological parenthood has been regarded as a 'significant factor' by the court in assessing which proposal advanced the welfare of the child.[6] Moreover, in child custody cases involving lesbian mothers and their male ex-partners, the court has continued to issue judgments which are at best disrespectful and at worst pathologising of (biological) lesbian mothers, as recently as last year.[7] Thus, the technical right in equity of a lesbian co-mother to approach the court may indeed do very little in fact to provide equality between lesbian and heterosexual families.

Conclusion

When the broader context of the failure of the law to recognise lesbian partnerships and parenthood is acknowledged, it is hard to see the *W v G* case as an unequivocal improvement in the legal position of lesbian families. Effectively, we have the right to sue each other and thereby save the state money on child support, but not much else. Of course, this is not the fault of the court in *W v G*. Like most litigation, issues are privatised and individualised and the Court could only do justice with the specific issues put to it. The case does, however, serve to highlight how iniquitous this area will be until legislation begins to fill in some of the gaps.

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References

1. See *Child Support (Assessment) Act 1989* (Cth) ss.3, 5, 29.
2. See 'An Implied Promise to Parent: Lesbian Families, Litigation and W v G', (1996) 10 *Australian Journal of Family Law* 112.
3. *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387. Promissory estoppel as a 'sword', a way of actively enforcing what would otherwise not be a legal obligation, stems from this case.
4. See Lesbian and Gay Legal Rights Service, *The Bride Wore Pink*, 2nd edn, Gay and Lesbian Rights Lobby, Sydney, 1994.
5. The *Family Law Act 1975* (Cth) s.65C(c) provides that 'any other person concerned with the care, welfare or development of the child' can apply for a parenting order (which encompasses residence or contact, formerly known as custody and access). The Act also states that a parenting order may be made in favour of a person who is not a parent: s.64C. This is a vast improvement on many other jurisdictions where lesbian co-parents do not even have standing to approach the court, see, for example, the American cases: *Curiale v Reagan*, 222 Cal App 3d 1597 (3d Dist 1990); *Nancy S v Michele G* 228 Cal App 3d 831 (1st Dist 1991): *Alison D v Virginia M*, 572 NE 2d 27 (Ct App 1991).
6. See, for example, *Drew v Drew*; *Lovett (interveners)* (1993) 16 Fam LR 536, limited by *Hodak and Hodak and Newman* (1993) 17 Fam LR 1.
7. See, for example, the demeaning eight step test applied to a lesbian mother in *L and L* (1983) FLC 91-353, including questions such as, 'Whether a homosexual parent would show the same love and responsibility as a heterosexual parent'. A recent case involving a gay father adopted this approach: *Doyle* (1992) 15 Fam LR 274. The Family Court has taken such steps as banning mothers from living with a female lover: the most recent of which was *G and G* (1988) FLC 91-939 (interim order, lasting one year). In *A and J* (1995) 19 Fam LR 260, the trial judge expressed the view that 'it was inappropriate for children to observe overt displays of affection between persons in a committed and continuing homosexual relationship'. The court granted the custody to the husband despite the evenly balanced claims of the parents, on the grounds that it was of overriding importance that the child have a 'balancing' male influence to counter the effects of the mother's lesbian relationship. This was upheld on appeal by the Full Family Court.

MATERNITY RIGHTS

The baby or the job?

CAROLINE ALCORSO discusses the experience of Working Women's Centres.

Working Women's Centres are community-based, government-funded information resource centres for working and unemployed women.

Although there is considerable interstate variation, all centres provide information, advice and support on employment issues, including:

- unfair dismissal
- discrimination
- pay and employment conditions
- maternity rights and entitlements
- health and safety
  workplace bargaining and
- vocational support.

The NSW Working Women's Centre, in Parramatta, NSW, is one of the four *new* centres across Australia. In late 1994, coalitions of women's organisations, trade unions and (in