

SUPREME COURT OF QUEENSLAND

CITATION: *AED v Registrar-General of Births, Death & Marriages; AED v GWK & Anor* [2019] QSC 287

PARTIES: **In BS 11286 of 2019:**
AED
(applicant)
v
REGISTRAR-GENERAL OF BIRTHS, DEATHS & MARRIAGES
(respondent)

In BS 11284 of 2019:
AED
(applicant)
v
GWK
(first respondent)
ZMR
(second respondent)

FILE NO/S: BS 11286 of 2019
BS 11284 of 2019

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: Date of Orders: 13 November 2019
Date of Publication of Reasons: 22 November 2019

DELIVERED AT: Brisbane

HEARING DATE: 13 November 2019

JUDGE: Davis J

ORDERS: **Date of Orders: 13 November 2019**

In BS 11286 of 2019:

- 1. Pursuant to s 10 of the *Status of Children Act 1978 (Qld)*, a declaration that CDJ was a parent of AED.**
- 2. Pursuant to s 42 of the *Births, Deaths and Marriages Registration Act 2003 (Qld)*, the Registrar-General correct the information in the register of births with respect to AED so as to identify CDJ as her father.**

3. The affidavits of AED and ZMR be placed in a sealed envelope on the court file and marked “Confidential. Not to be opened except by order of the court or a judge”.

4. No order as to costs.

In BS 11284 of 2019:

1. Pursuant to s 225 of the *Adoption Act 2009 (Qld)*, the final adoption order made on 30 January 1970 relating to the applicant be discharged.

2. Pursuant to s 225(5)(b) of the *Adoption Act 2009 (Qld)*, and s 42 of the *Births, Deaths and Marriages Registration Act 2003 (Qld)*, the register of births be corrected to identify the applicant therein as “[Applicant’s full name showing her biological father’s surname]”.

3. The affidavits filed in this proceeding be placed in a sealed envelope on the court file and marked “Confidential. Not to be opened except by order of the court or a judge”.

4. No order as to costs.

CATCHWORDS:

FAMILY LAW AND CHILD WELFARE – OTHER MATTERS – REGISTRATION OF BIRTHS, DEATHS AND MARRIAGES – where the applicant is a mature woman who had been adopted in 1970 – where the adoptive father had sexually abused the applicant and she sought discharge of the adoption order – where the applicant had identified her biological father – whether an order should be made directing the Registrar-General of Births, Deaths and Marriages to correct the register of births to identify the applicant’s biological father as her father and to identify her by his surname

Adoption Act 2009 (Qld), s 219, s 225

Births, Deaths and Marriages Registration Act 2003 (Qld), s 42

Status of Children Act 1978 (Qld), s 10

Adoption of LVH [2014] NSWSC 1902, cited

In re B (Adoption: Jurisdiction to Set Aside) [1995] 3 All ER 333, cited

MJD v Chief Executive, Department of Communities, Child Safety, and Disability Services, Adoption Services & others [2015] QSC 139, followed

Re Cressy [1993] QSC 216, cited

Re Fleetwood [2012] QSC 325, cited

Re Pellitteri [1991] 1 Qd R 154, cited

Re Susan (2009) 41 Fam LR 596, cited

Re Wintour [2002] QSC 173, cited

COUNSEL:

M Steele with M Walker for the applicant in BS11286 of 2019
S Munasinghe for the respondent in BS11286 of 2019

M Steele with M Walker for the applicant in BS11284 of 2019
S Munasinghe for the Department of Child Safety, Youth and
Women, intervening in BS11284 of 2019

No appearance for the respondents in BS11284 of 2019

SOLICITORS: Herbert Smith Freehills for the applicant in BS11286 of 2019
Department of Child Safety for the respondent in BS11286 of 2019

Herbert Smith Freehills for the applicant in BS11284 of 2019

No appearance by the respondents in BS11284 of 2019

- [1] The applicant applied for orders under the *Adoption Act 2009*, the *Births, Deaths and Marriages Registration Act 2003* and the *Status of Children Act 1978*.
- [2] On 13 November 2019, I made the following orders in BS 11286 of 2019:
1. Pursuant to s 10 of the *Status of Children Act 1978* (Qld), a declaration that CDJ was a parent of AED.
 2. Pursuant to s 42 of the *Births, Deaths and Marriages Registration Act 2003* (Qld), the Registrar-General correct the information in the register of births with respect to AED so as to identify CDJ as her father.
 3. The affidavits of AED and ZMR be placed in a sealed envelope on the court file and marked "Confidential. Not to be opened except by order of the court or a judge".
 4. No order as to costs.

I made these orders in BS 11284 of 2019:

1. Pursuant to s 225 of the *Adoption Act 2009* (Qld), the final adoption order made on 30 January 1970 relating to the applicant be discharged.
2. Pursuant to s 225(5)(b) of the *Adoption Act 2009* (Qld), and s 42 of the *Births, Deaths and Marriages Registration Act 2003* (Qld), the register of births be corrected to identify the applicant therein as "[Applicant's full name showing her biological father's surname]".
3. The affidavits filed in this proceeding be placed in a sealed envelope on the court file and marked "Confidential. Not to be opened except by order of the court or a judge".
4. No order as to costs.

Background

- [3] The applicant's mother had a relationship with the applicant's father in Victoria for a period of about 12 months. She fell pregnant and returned to North Queensland. The applicant was born on 4 February 1966 in Ayr.
- [4] A birth certificate issued in respect of the applicant. It lists the applicant's mother¹ by her maiden name and the section on the birth certificate relating to her father's details has been left blank.

¹ Who is the second respondent in BS 11284 of 2019.

- [5] Although there was some contemplation of the applicant's mother and father marrying, that did not occur.
- [6] In 1967, the applicant's mother married the man who became the applicant's adoptive father.² The applicant's mother took her husband's surname.
- [7] On 30 January 1970, the applicant was adopted by her adoptive father. A new birth certificate issued for the applicant showing her adoptive father as the applicant's father and showing the applicant's surname as that of her adoptive father.
- [8] In 1972 the family, who by this stage had been joined by three sons born to the applicant's mother by the applicant's adoptive father, then moved to Victoria where they lived for about three and half years.
- [9] The applicant's adoptive father sexually abused the applicant, both while the family lived in Queensland and while the family lived in Victoria.
- [10] In 1975, the applicant's mother and adoptive father separated. The applicant confided in her mother about the sexual abuse and the applicant's adoptive father was charged with offences committed against the applicant. He pleaded guilty to those charges and was jailed.
- [11] The abuse has, understandably, had a significant and lasting effect upon the applicant. She has undergone counselling for many years to attempt to cope with life. She was fairly recently diagnosed with Post-Traumatic Stress Disorder.
- [12] Almost all aspects of the applicant's life have been adversely affected by the sexual abuse she endured at the hands of her adoptive father. Her physical as well as mental health has suffered. As a teenager, she was unable to excel at school and left high school at the age of 15 years. Fortunately, she has been able to undertake study later in life. For a time as a teenager and in her early twenties, she abused illicit drugs and alcohol. Her ability to maintain long-term relationships is limited and she attributes this to an inability to trust any partner.
- [13] The applicant took action to identify her biological father. The evidence before me is:
- (i) the applicant's mother has named the applicant's father;³
 - (ii) the applicant's mother was informed by the applicant's father during their relationship in the 1960's that he:
 - (a) was born in Ireland;
 - (b) was born on 6 October 1942; and
 - (c) arrived in Australia in about 1950.

² Who is the first respondent in BS 11284 of 2019.

³ And told the applicant of her father's name years ago.

- [14] A birth certificate was obtained of a person of the name known to the applicant's mother showing him to have been born in Cork in Ireland on 6 October 1942. Further evidence shows that a person born in Cork, Ireland on 6 October 1942, by the name known to the applicant's mother, immigrated to Australia in July 1950.
- [15] A death certificate has been obtained of a person by the name known to the applicant's mother and who died aged 34 years on 26 October 1976 in Victoria. That person would have been born in 1942, the same year as the person the subject of the birth certificate to which I have referred. The death certificate records that the person lived in Australia for 25 years which places him arriving in Australia in about 1951.
- [16] The applicant's case is that the man born in Cork in Ireland on 6 October 1942, as identified in the birth certificate, is one and the same man who died in Victoria on 26 October 1976, and that person was the applicant's father.
- [17] There are some discrepancies in the material but I am satisfied that it is far more likely than not that the man who died on 26 October 1976, is one and the same as the man born on 6 October 1942 and who immigrated from Ireland, and who was the biological father of the applicant.

Statutory context

- [18] Section 10 of the *Status of Children Act 1978* provides, relevantly here, as follows:

"10 Declaration of parentage

- (1) A person who—
- (a) alleges that any named person is the parent of her child; or
 - (b) alleges that the relationship of parent and child exists between the person and another named person; or
 - (c) having a proper interest in the result, wishes to have determined the question whether the relationship of parent and child exists between 2 named persons;

may apply to the Supreme Court for a declaration of parentage and the Supreme Court may, if it is proved to its satisfaction that the relationship exists, make the declaration whether the parent or the child or both of them are living or dead..."

- [19] It is pursuant to s 10 that the applicant sought a declaration that the man who died in Victoria on 26 October 1976 was her parent. The applicant need not prove that fact to the criminal standard. "Comfortable satisfaction" is sufficient.⁴

⁴ *Re Pellitteri* [1991] 1 Qd R 154 at 158; *Re Fleetwood* [2012] QSC 325 at [9]-[10]; *Re Cressy* [1993] QSC 216 and *Re Wintour* [2002] QSC 173.

[20] In order to support the application for an order that the register of births be corrected to identify the man as the applicant's father, the applicant relied upon s 42 of the *Births, Deaths and Marriages Registration Act 2003* which is in these terms:

“42 Correcting the register

- (1) The registrar must correct a register—
 - (a) on the order of a Queensland court or QCAT; or
 - (b) on the application of the chief executive (corrective services) under the *Corrective Services Act 2006*, section 27(4) or the *Dangerous Prisoners (Sexual Offenders) Act 2003*, section 43AB(4); or
 - (c) on the application of the police commissioner under the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004*, section 74A(5); or
 - (d) subject to section 41(5), to reflect a coroner's findings if the findings differ from the information entered on a register.
- (2) The registrar may correct a register—
 - (a) on the order of a non-Queensland court; or
 - (b) to reflect a finding made on inquiry under section 43; or
 - (c) on the application, in the prescribed form, of a person who can provide correct information to the registrar; or
 - (d) to ensure the particulars in an entry about a registrable event conform with the most reliable information about the registrable event that is available to the registrar.

Example of paragraph (a)—

The registrar might correct a register if a Commonwealth court found that a particular person was the parent of a child.
- (3) The registrar may correct a register—
 - (a) by adding, or cancelling, an entry in the register; or
 - (b) by adding, amending or deleting particulars in an entry in the register.
- (4) The registrar need not correct a register in relation to historical information.
- (5) A certificate from an entry that contains corrected information must show the most recent information.
- (6) However, the certificate may also show information that has been corrected if the registrar considers it necessary.

(7) In this section—

police commissioner means the commissioner of the Queensland Police Service.”

[21] The applicant also sought orders rescinding the adoption order made on 30 January 1970 and correcting the register of births so that the applicant is named therein with the surname of the man who died in Victoria on 26 October 1976, rather than the surname of her adoptive father.

[22] The making of orders to that effect are authorised by s 225 of the *Adoption Act* 2009 and s 42 of the *Births, Deaths and Marriages Registration Act* 2003.

[23] Section 225 of the *Adoption Act* 2009 is in these terms:

“225 Court orders

- (1) The court may discharge the final adoption order only if satisfied of a ground mentioned in section 219.
- (2) If the applicant is not the adopted person, the court must not discharge the order if it considers the discharge is likely to be contrary to the adopted person’s wellbeing and best interests.
- (3) The order may be discharged even if the adopted person is an adult.
- (4) If the adopted person is a child and has any views about the proposed discharge and is able to express the views, having regard to the child’s age or ability to understand, the court must consider the views.
- (5) If the court makes an order discharging the final adoption order, it may also make any other order it considers appropriate in the interests of justice or to ensure the adopted person’s wellbeing and best interests including, for example, an order about—
 - (a) the ownership of property; or
 - (b) the adopted person’s name; or
 - (c) if the adopted person is a child, custody or guardianship of the child.”

[24] Section 219 is as follows:

“219 Grounds for discharge

- (1) A final adoption order may be discharged on any of the following grounds—
 - (a) the order was made or something was done for the purpose of making the order—

- (i) because of a false or misleading document or representation; or
 - (ii) because a person acted fraudulently or used undue influence on another person; or
 - (iii) in another improper way;
 - (b) a consent required for the adoption was not given freely and voluntarily by a person with capacity to give the consent;
 - (c) there are other exceptional circumstances that warrant the discharge.
- (2) For this section, a person used **undue influence** on another person if the first person—
- (a) used or threatened to use force or restraint against the other person; or
 - (b) caused or threatened to cause injury to the other person; or
 - (c) caused or threatened to cause any other detriment to the other person.”

Why the orders were made

- [25] As previously observed, I am satisfied that the man who died in Victoria on 26 October 1976 was the applicant’s father. While only “comfortable satisfaction” of that fact is required to justify making the declaration of parentage, the position is that the applicant has, in my view, made a very strong case that the man was her father. I think there is little if any doubt.
- [26] The applicant clearly has a proper interest⁵ in having her parentage declared. There is no opposition to the application. There is no evidence of any existing estate of the applicant’s father who died now over 40 years ago. There are no discretionary reasons to refuse the declaration, and so it was appropriate to make it.
- [27] The Registrar should correct the register to reflect the declaration.
- [28] In order to succeed on the application for the discharge of the adoption order, the applicant must show “exceptional circumstances” which is the ground identified in s 219(1)(c) of the *Adoption Act*. None of the more specific grounds prescribed by s 219 are made out.
- [29] There are good public policy reasons why adoption orders ought not easily be set aside. An adoption order, when made, is meant to be final and establishes legal rights which have significance beyond just those of the adopted person.⁶

⁵ Section 10(1)(c) of the *Status of Children Act 1978*.

⁶ *In re B (Adoption: Jurisdiction to Set Aside)* [1995] 3 All ER 333 at [51], *Re Susan* (2009) 41 Fam LR 596 at [23] - [24] and [81] - [82].

[30] Mistreatment by the adoptive parent of the child adopted may enliven the discretion to discharge an adoption order.⁷ In *MJD v Chief Executive, Department of Communities, Child Safety, and Disability Services, Adoption Services & others*,⁸ which was such a case, Atkinson J said this:

“[16] If the aim of adoption today is to ensure the best interests of the child, then those aims were clearly not met by this adoption. Even the Act under which it was made required that the welfare and interests of the child concerned in an adoption should be paramount, but they were manifestly not treated as paramount in this case. The applicant has suffered exceptionally from physical and emotional abuse which made him vulnerable to further damage during his adulthood and has now rendered him in a pitiable state. Unfortunately, while it cannot be said that it is exceptional for children to be treated badly, the extent of the abuse in this case does fulfil the criterion of exceptional circumstances.

[17] The order sought is not an order that should be made lightly. The impact of discharging the adoption order will be not only on the applicant but also on his siblings and his natural and adoptive parents. Nevertheless, he has satisfied me that circumstances which provide grounds for discharge of the adoption order have been made out. Considering that the Act quite properly requires me to apply the paramount principle that the Act is to be administered so that the wellbeing and best interests of an adopted child both through childhood and the rest of his life are met, I am satisfied that the order discharging the adoption order finalised on 22 November 1974 should be made.” (Citations omitted)

[31] Here, there are “exceptional circumstances” justifying the discharge of the adoption order. In particular:

- (i) the applicant’s adoptive father accepts that he offended against the applicant;
- (ii) he regrets his actions and seems to have some insight into the damage he caused. Whether he fully appreciates the consequences of his criminal conduct is difficult to know;
- (iii) he did not oppose the application;
- (iv) the applicant’s mother supported the application;
- (v) the applicant’s treating psychologist opines that the making of the discharge order will be beneficial to the applicant’s mental health; and

⁷ *Re Susan* (2009) 41 Fam LR 596, *Adoption of LVH* [2014] NSWSC 1902 and *MJD v Chief Executive, Department of Communities, Child Safety, and Disability Services, Adoption Services & others* [2015] QSC 139.

⁸ [2015] QSC 139.

(vi) the Department of Child Safety, Youth and Women “concedes, that the applicant’s adoption order ought to be discharged on the basis of ‘exceptional circumstances’”.⁹

[32] The correction of the births register to identify the applicant by the surname of her biological father rather than her adoptive father should be made so as to properly give effect to the declaration of paternity and the discharge of the adoption order.

[33] For those reasons, I made the orders which I did.

⁹ The Department’s written submissions; paragraph 15.