

IN THE CHILDREN'S COURT OF VICTORIA
FAMILY DIVISION

APPLICANT: Department of Families, Fairness and Housing (DFFH)

CHILD: JH¹

MAGISTRATE: GAIL HUBBLE

DATE OF HEARING: 6 May 2021

DATE OF JUDGEMENT/ORDER: 11 May 2021

CASE MAY BE CITED AS: Re JH [2021] VChC 2

REASONS FOR DECISION

Catchwords: Child protection – child aged three years and 10 months – whether Mr S, the former step-father of JH, fell within the definition of ‘parent’ in s3(1) of the *Children, Youth and Families Act 2005* – concept of a psychological parent – whether Mr S the psychological father of JH – relevant factors for consideration – expert assessment – categorisation of adult as a psychological parent can change over time – at some point in time Mr S ceased to be JH’s psychological father.

APPEARANCES: Legal representative

For DFFH: Ms Buchanan

For Mr S: Ms Jones

¹ This decision has been anonymised.

HER HONOUR:

1. JH [is aged 3 years and 10 months] and is the child of Ms H, the mother. The identity of JH's biological father is unknown. At the time of his birth, JH's step-father was Mr S. The mother and Mr S are no longer in a relationship.
2. On 12 December 2019, the Department of Families, Fairness and Housing (**the Department**)² filed a Protection Application by Emergency Care. The protective concerns primarily revolved around substance abuse by the mother and Mr S, exposure to violence and criminal activity, and neglect. On 13 December 2019, the court made an Interim Accommodation Order to Out of Home Care, and the Department placed JH in a home-based foster care placement. That order has been extended until the current hearing and JH remains in foster care. The Department now seeks a Care by Secretary Order.
3. The matter was listed before me on 6 May 2021 for a one day contested hearing solely on the question whether Mr S falls within the definition of 'parent' under section 3 of the *Children, Youth and Families Act 2005 (the Act)*. While Mr S was joined³ as a party on 13 December 2019 – so is entitled to participate in the proceeding – his ability to work towards reunification with JH turns on the question whether he is a parent. Counsel for Mr S conceded that if Mr S is not a parent under the Act, he cannot seek either a Family Preservation Order or a Family Reunification Order. The mother did not participate in the hearing and is not currently engaging with the Department. If Mr S is not a 'parent', the Department's application for a Care by Secretary Order cannot be effectively opposed.

Psychological Parent

4. Mr S submitted that he falls within the definition of 'parent' in the Act by virtue of being JH's psychological father.
5. Section 3(1) of the Act states that the word 'parent' in relation to a child includes –
 - (a) *the father and mother of the child; and*
 - (b) *the spouse of the father or mother of the child; and*
 - (c) *the domestic partner of the father or mother of the child; and*

² It was then known as the Department of Health and Human Services

³ Pursuant to s522(1) of the Act

- (d) *any person who has parental responsibility for the child, other than the Secretary; and*
- (e) *a person whose name is entered as the father of the child in the register of births in the Register maintained by the Registrar of Births, Deaths and Marriages under Part 7 of the Births, Deaths and Marriages Registration Act 1996; and*
- (f) *a person who acknowledges that he is the father of the child by an instrument of the kind described in section 8(2) of the Status of Children Act 1974; and*
- (g) *a person in respect of whom a court has made a declaration or a finding or order that the person is the father of the child.*
6. The definition of ‘parent’ in the Act does not refer to the concept of a psychological parent. However, Mr S submitted – and the Department conceded – that the words ‘father’ and ‘mother’ in s3(1)(a) of the Act are capable of referring to a person who is a psychological parent.
7. The concept of a psychological parent has been accepted by the High Court in the context of the *Family Law Act 1975*. In *Masson v Parsons* [2019] HCA 21 the majority⁴ referred with approval to English authority on the question of psychological parenthood. The majority in *Masson v Parsons* observed at [29]:
- ‘In In Re G (Children), Baroness Hale of Richmond observed [2006] 1 WLR 2305 at 2316-2317 [33] – [37]; [2006] 4 All ER 241 at 252-253, in relation to comparable English legislation that, according to English contemporary conceptions of parenthood, “there are at least three ways in which a person may be or become a natural parent of a child, depending on the circumstances of the particular case; genetically, gestationally and psychologically...” ’*
8. The majority in *Masson v Parsons* added at [29]:
- ‘The question of whether a person qualifies under the Family Law Act as a parent according to the ordinary, accepted English meaning of a ‘parent’ is a question of fact and degree to be determined according to the ordinary, contemporary Australian understanding of ‘parent’ and the*

⁴ Comprised of Kiefel CJ & Bell, Gageler, Keane, Nettle and Gordon JJ

relevant circumstances of the case at hand.'

9. In my view, the definition of 'parent' in section 3 of the Act is inclusive rather than exhaustive and has the effect of expanding the definition of parent beyond its ordinary meaning to include the circumstances listed in sub-paragraphs (a) to (g). There is nothing in the definition of 'parent' which would evince an intention on the part of Parliament to exclude either the common law definition of parent or 'contemporary conceptions of parenthood.' I am also of the view that an expansive interpretation of 'parent' is consistent with the key decision-making principles in the Act, which recognise the harm suffered by children when they are removed from the adults who have loved and cared for them.⁵
10. There is no doubt that the question whether an adult is the psychological parent of a child will turn on the facts in any particular case. Relevant factors will usually include:
 - whether the biological parent consented to and encouraged a parent-like relationship between the putative parent and the child
 - whether the putative parent lived with the child for an extended period of time
 - whether the putative parent assumed some or all of the obligations of parenting, including providing care and support
 - whether the relationship existed long enough to build a bond between the adult and child
 - whether the child views the adult as a parent.
11. While it may depend on the age of the child, the question whether the child views the adult as a parent will often be grounded in an expert assessment of the interactions between the adult and child, and the quality of the child's attachment to the adult.
12. It is also my view that the categorisation of somebody as a psychological parent is something that can change over time. Psychological parenthood rests, to considerable extent, on the quality of the bond between the adult and child. As

⁵ See in particular the 'best interests' principles set out in section 10 of the Act which include the need to strengthen, preserve and promote the relationships between children and parents, family members and persons significant to the child (s10(1)(b)).

such, a person may be a psychological parent at one point in time, but not at another.

Is Mr S the Psychological Father of JH?

Caring History

13. JH was two and half years of age when he was taken into care. The evidence about his care arrangements prior to his removal established that Mr S identified himself as JH's father during the mother's pregnancy⁶. Mr S reportedly purchased a car seat in preparation for JH's birth, and both Mr S and the mother informed child protection workers that Mr S would be supporting the family.
14. On or around 4 April 2018, (when JH was nine months old) Mr S took JH into his sole care due to his concerns around the mother's drug use. On 7 April 2018, the Department safety planned for JH to remain in the care of Mr S. Mr S appears to have been JH's sole caregiver between early April 2018 and late June 2018. During this time, Mr S carried out caring responsibilities, such as taking JH to the Maternal Child Health Nurse. In or around late June 2018, Mr S and the mother reunited and apparently resumed joint care of JH.
15. The mother and Mr S apparently cared for JH together from June 2018 until an unknown date in late 2019 when Mr S again became the sole carer of JH. On 11 December 2019 JH was removed from Mr S's care pursuant to the current protective intervention.
16. Overall, I am satisfied that the mother and Mr S intended that Mr S would be JH's father and that, for two and a half years, Mr S played a significant role in caring for JH either in conjunction with the mother or, for short periods, on his own. While the Department has raised concerns around the quality of care provided to JH during this time, there is little doubt that Mr S assumed parenting obligations in relation to JH for a considerable period, and that JH would have formed an attachment to Mr S during those years.

⁶ For example, he told Department workers that he was the father at the Department's first home visit on 19 June 2017

Evidence of Dr K

17. I heard evidence from Dr K, who carried out a Psychological and Parental Capacity assessment of Mr S on 23 November 2020. As that assessment did not observe Mr S and JH together, it did not assist me in determining the question whether Mr S is JH's psychological father.

Evidence of Dr M

18. I also heard evidence from Dr M, who assessed JH and Mr S together.⁷ Dr M viewed footage shot by child protection workers at a contact between JH and his stepfather approximately six weeks after JH was removed from Mr S's care. Dr M observed JH to present as flat and withdrawn, and she noted that his attention frequently drifted. She stated that he was overly compliant in a passive way, making fleeting eye contact with Mr S, but otherwise avoidant.
19. When Dr M assessed JH with Mr S on 29 January 2020, she observed them to interact in a way that was described as pleasurable and without distress. She noted that Mr S showed JH affection, but she also observed that JH was at times avoidant of eye contact and that he showed no outward signs of distress when Mr S left the room. She also observed that Mr S showed an active and attuned relationship with JH, whom he was clearly engrossed in, but with a concerning need to place JH in a role of being a son who was uniformly close to his stepfather. Dr M concluded that JH's relationship with his stepfather was an important one that was enduring since birth, that Mr S had clearly taken on the role of father, that Mr S is the only father JH has known and would be best considered to be a father in all but genetics. She noted that JH was willing to interact with him and placed some reliance upon him, but that JH was also considerably avoidant in terms of eye contact and showed self-containment when they were separated. In my view, JH displayed an attachment to Mr S, but one which could not be characterised as strong.

Contact between JH and Mr S

20. Mr S is currently having contact with JH for one hour a week, fully supervised by workers from the Department. Mr S generally behaves appropriately at contact

⁷ Report dated 20 March 2020. Dr M reviewed footage of Mr S and JH taken by child protection workers on 24 January 2020, and assessed them in person on 29 January 2020

and JH usually engages with Mr S reasonably well. However, the Department has had numerous concerns about the experience of contact for JH. For example, JH has at times been reluctant to attend contact, and when at contact has sometimes appeared shut down and withdrawn. It has been observed that JH does not seek engagement or affection from Mr S and there is little evidence of a secure attachment between them.⁸

21. In an Update Report filed by the Department dated 7 September 2020, the author Ms Z states that the supervisor of contact between JH and Mr S continues to observe startle responses from JH and evasion of physical contact by JH. It was also observed that Mr S tends to rely on watching cartoons and other shows, and that JH remains quiet or non-verbal. Similarly, in an Update Report filed by the Department dated 18 November 2020, the author states that JH was withdrawn, wary and hypervigilant at the contact held on 22 September 2020. I also note that Mr S had no contact with JH in the three weeks after JH's removal, and that his contact with JH was again interrupted between October and December 2020 due to Mr S spending time remanded in custody due to family violence offences.⁹ Mr S had audio visual contact with JH on 27 November 2020 and 24 December 2020, and JH was noted to offer a minimal verbal response.
22. However, at some more recent contacts, JH has seemed more at ease with Mr S. For example, at a contact on 23 February 2021, JH was smiling and laughing and enjoying rough and tumble play. At the contacts held on 9 March 2021, 16 March 2021 and 6 April 2021, JH seemed happy to see Mr S, and he was noted to reciprocate affection.¹⁰
23. I also note that JH is settled in his foster care placement and refers to his carers as 'mum' and 'dad'.¹¹ JH apparently makes no mention of Mr S in between contacts. Dr M gave evidence that, in all likelihood, JH would now view his foster carers as his psychological parents.
24. While I accept that JH has grown more comfortable with Mr S at recent contacts and that he expresses some affection towards Mr S, I do not think this signifies

⁸ Disposition Report dated 31 March 2020

⁹ On 16 October 2020 Mr S pleaded guilty to a charge of making a threat to kill and two charges of breaching a family violence intervention order.

¹⁰ These observations were recorded in Department CRIS notes

¹¹ See Update Report dated 7 September 2020 at page 8

that JH views Mr S as a father. In my view, at the time that JH was removed from Mr S's care, the attachment between JH and Mr S was not a strong or secure one. Over time, that bond has undoubtedly weakened due to the infrequent contact between them and the development of the alternative bond between JH and his foster carers. While I accept the evidence of Dr M that at the time of removal Mr S was the only father JH had known, I do not think the parent/child bond has survived JH's removal from Mr S's care. At some point in time – and I do not think it is necessary to stipulate when – Mr S ceased to be JH's psychological father.

25. Accordingly, I find that Mr S is not a parent of JH for the purposes of the Act