THE NAMES OF THE PARTIES, AND ANY INFORMATION IDENTIFYING THE CHILD, ARE SUPPRESSED.

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2010-485-328

IN THE MATTER OF	the Adoption Act 1955
AND	
IN THE MATTER OF	an application by A M M and K J O to adopt a child

Hearing: 17 May 2010

Court: Wild J
Simon France J

Counsel: C Geiringer and D W Milliken for Appellants
V E Casey and P D Marshall for Attorney-General (as intervenor)
Dr M G Gazley, Counsel to assist Court

Judgment: 24 June 2010

JUDGMENT OF THE COURT

Introduction

[1] AM and KO have been in a settled de facto relationship for nearly ten years. When the relationship began, AM had an 18 month old son, S, whom she had conceived through a sperm donor programme. Accordingly, S's natural father is unknown. KO has parented S for almost all of S's life, but he is not S's legal parent.

[2] AM and KO would both like to be S's legal parents, just as they are with their daughter, D. KO can only become S's legal parent if he adopts S. However, if he makes an application on his own, and it is granted, the effect would be to terminate AM's status as mother, because that is what adoption does. It kills off any existing parental status in favour of the new parents. So even though AM is already S's mother, she needs to make a joint application with KO.

[3] However, there is an impediment. Under the Adoption Act 1955, any individual can apply to adopt, but when it comes to couples, the Act is quite specific:

> An adoption order may be made on the application of <u>two spouses jointly</u> in respect of a child.

[4] And so then to the issue confronting the Court. Can the word "spouses", which is normally used to refer to a married couple, be read to apply also to a de facto couple of the opposite sex?

[5] The case comes to this Court by way of a case stated appeal. There are a number of Family Court decisions which differ on the capacity of couples other than married persons to make application to adopt. In the present case Judge Ellis followed an earlier decision of Judge Inglis QC which had analysed the Adoption Act 1955 and concluded a wider meaning was not possible.

[6] Two variants on the case stated question are suggested. That proposed by counsel for the appellant was:

> Does the word "spouse" in s 3(2) of the Adoption Act 1955 include couples living in a relationship in the nature of marriage, or is it limited to married couples?

[7] That probably favoured by Judge Ellis was the question formed by Judge Inglis in his leading decision:

> The central issue is therefore whether it is permissible to interpret the expression spouses in s 3 of the Adoption Act 1955 so as to include a man and a woman who are unmarried but in a stable and committed relationship.

[8] For reasons that are addressed in the next section, we see this case as limited to consideration of the situation of a de facto couple of the opposite sex. Whilst the wording of the first question could be altered to make this limitation clear, we prefer the question as posed by Judges Inglis and Ellis and proceed against that background.[1]

What the case is, and is not, about

[9] Everyone will be well aware that in New Zealand, as in most countries, there are laws which prohibit unjustified discrimination. If spouses is read to mean that only married couples may adopt, the law would seem to be discriminating against all the other types of relationships that are common place in New Zealand: de facto couples, and civil union couples of the same or opposite sex.

[10] An unusual feature about the case is that the Attorney-General accepts that the law, without logic or justification, discriminates against de facto couples like AM and KO. The real issue in this case is whether the Court is able to do something about it, by giving "spouse" a wider meaning, or is it something that has to be left to Parliament? The Attorney-General's position, endorsed by Dr Gazley as *amicus*, is that it is a matter for Parliament. Whether this is so depends on whether s 6 of the New Zealand Bill of Rights Act 1990 (BORA) allows a more expansive meaning of the word to be taken that would allow this de facto couple to apply to adopt S.

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[1] At a later point Judge Ellis suggested an expanded question that would have covered the situation of civil unions and same sex de facto couples. We decline to accept a wider wording.

[11] That then is what the case is about. What it is not about is whether "spouses" can be interpreted to cover any other type of relationship such as a same sex couple. A favourable decision for these appellants might open the door for people in other forms of relationship to apply. That possible consequence is a factor the Court must take into account. But, in the end, if the decision in this case were to open that door, what the answer will be for those other couples will have to await another day. The Attorney-General's concession is specifically limited to de facto couples of the opposite sex. Here the appellants are only concerned about their situation and we are of the view the case can be approached in that limited way.

Cutting to the chase

[12] We consider this case resolves itself down to one narrow, but very difficult, point, namely whether, under s 6 of BORA, "spouses" can be given that wider meaning. That being so we propose to move to that point quickly. What follows in this section is somewhat of a truncated preamble.

[13] In *Hansen v R*[2] a majority of the Supreme Court set out a usual approach to interpretation tasks when compliance with BORA is in issue. To paraphrase the summary given by Tipping J:[3]

> - ascertain Parliament's intended meaning of the word [here "spouses"];
>
> - decide if that meaning is apparently inconsistent with a relevant right or freedom [here the discrimination provisions of the New Zealand Bill of Rights Act 1990];
>
> - decide if an apparent inconsistency is a justified limit on the right in question. If so, no breach of the New Zealand Bill of Rights Act 1990 exists;

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2 *Hansen v R* [2007] NZSC 7; [2007] 3 NZLR 1.
3 At [92].

- if the apparent inconsistency is not a justified limit, examine whether it is reasonably possible to give the word in question [spouse] a meaning consistent or less inconsistent with the relevant right or freedom;

- if it is, such meaning must be adopted. If it is not, then s 4 of the Bill of Rights mandates that Parliament's intended meaning be adopted.

[14] Ms Geiringer urged us to take a different approach which would involve a more expansive exercise at step one. To put it less elegantly than her submissions, the suggestion is that the task of ascertaining the ordinary meaning of the word "spouse" should be carried out using all the common law presumptions and all the ordinary rules of interpretation. This would include having regard to the rights protected by BORA, and to other well known rules such as giving paramountcy to the best interests of the child. If all this was brought to bear on the meaning of spouse, it is submitted that it would be found that "spouse" naturally included de facto couples, and no further BORA analysis would be needed.

[15] We accept that the approach identified in *Hansen* is not obligatory, and that in other cases a different analysis may be preferable. However, the recommended approach has the advantage in this case that it quickly moves one to the crucial issue. We are also of the view that whatever the analytical structure adopted, the case will resolve itself down to the same key question.

[16] So we cut to the chase and explain how it is that the first three steps rapidly resolve themselves. The Act became law in 1955. The predominant relationship in society at that time was marriage, and it is no surprise that the language within the Act suggests that "spouse" refers to married persons. For example, in s 7(2) the Act deals with a single person application by someone who is married. It describes this married applicant as a "spouse" and says that the spouse's "husband or wife" must consent. This is a clear example of the intended meaning of spouse within the Act. There are other examples, but they only reinforce the reality of an Act drafted in its own time, and an Act which on its face plainly contemplated that joint applications would, and could, be made only by married persons.[4]

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[4] An equally compelling provision is the definition in s 3 of adoptive parent, which in relation to couples, is defined as "a husband and wife".

[17] To be fair, though, as regards the word "spouse", we do not consider that language has particularly changed since the Act was passed. In our view it remains a word that is still ordinarily used to refer only to married persons. If something else is meant, it is inevitably qualified to explain that. The most common example is "de facto spouse". Counsel had, properly, trolled various dictionaries for insight and the results uniformly reinforce this view. Spouse is inevitably defined to refer to a married person.

[18] There really is nothing in the language of the Act, or in common usage, to suggest that the ordinary meaning of spouse, as used in s 3 of the Adoption Act 1955, refers to anyone other than a married person.

[19] The next step in the analytical sequence set out by Tipping J would be to consider whether giving "spouse" such a limited meaning would be apparently inconsistent with a protected right, namely freedom from discrimination. Then, if it is apparently inconsistent, to ask whether it is a justified limit? However, these two steps need not detain, because the Attorney-General accepts it is inconsistent with the right to be free from discrimination, and that it is not a justified limit. We agree and can accordingly move on to the key issue of whether it is open to the Court, because of this discriminatory effect, to give the word a different broader meaning than it would normally have and thereby eliminate or reduce the inconsistency with a fundamental right.

[20] Before doing so, we record that we were somewhat surprised at the hearing to learn of the basis on which the Attorney-General conceded discrimination. Ms Casey submitted that, because AM and KO could apply as individuals, it was accepted to be discriminatory to prevent them from applying jointly. In our view that is not sound; the true discrimination does not lie in favouring individual applicants over applicants who are in a relationship, whatever type of couple relationship it might be. The provision plainly discriminates on the basis of marital status, and it is better to acknowledge it on those terms. Nor, with respect, is it surprising that no defence was mounted to try and justify a provision that would allow AM and KO to adopt jointly if they had been married, but which prevents the same two people from applying because they are not married even though they have

been together for 10 years, have been parenting S for that period, and have another child.

The correct approach to a s 6 BORA analysis

[21] Section 6 of BORA provides:

> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[22] Any analysis of whether "spouses" can be given a meaning wider than married persons must have regard to s 4 of BORA which says Parliament is supreme, and is permitted to enact legislation that amounts to an unreasonable limit on a protected freedom.

[23] The uncertainty created by these two provisions is how far a Court should strive for s 6 consistency when it must be recognised that Parliament may have intended to pass a law that was inconsistent with BORA. One commentator poses the question this way: [5]

> Where does the constitutionally permissible territory of judicial interpretation end and the constitutionally impermissible territory of judicial legislation begin?

[24] In their text on BORA, the Butlers summarise the tensions inherent in ss 4 and 6 in these terms:[6]

> There is an inherent tension in the relationship between ss 4 and 6 of BORA. On the one hand, s 6 is informed by the view that statutory language is malleable and that text is open to several interpretations by a reader. Once told how a text is to be read – in the case of s 6 of BORA, in a manner consistent with the BORA – Courts can (attempt to) divine a meaning in the words of the provision that complies with human rights standards. On the other hand, inherent in s 4 of BORA is the notion that a statute has particular purposes and a bounded set of possible meanings. The conundrum that faces a Court then is that if Parliament has used words that at first glance look as if they cut across rights and freedoms guaranteed by the BORA, how can it

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5 C Geiringer "The Principle of Legality and the Bill of Rights: A Critical Examination of *R v Hansen* (2008) 6 NZJPIL 59 at 64.

6 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A* Commentary (LexisNexis, Wellington 2005) at [7.9.1].

> know that that is not indeed Parliament's intention if those words reflect the legislative policy behind that particular statue? Can it be legitimate in such a case for the Courts to invoke s 6 of BORA in order to adopt a meaning of the statute that, while consistent with BORA, is inconsistent with the purpose and (probably) intended meaning of the provision? In short, it will be seen that ss 4 and 6 pull in different directions, making their interaction a potentially uneasy one.

[25] In *Hansen* the Supreme Court split over the issue of the relationship between ss 4, 5 and 6 of BORA. The approach we set out earlier[7] reflects the majority's view. Concerning s 6 itself, various observations made in that case are relevant to our task. It seems common ground that a textual ambiguity is not a prerequisite to adopting a different meaning. However, whether the alternative s 6 consistent meaning can be a strained meaning seems less clear. Elias CJ thought it could,[8] but in rejecting the appellant's submission in that case, Anderson J rejected the suggested alternative meanings as "strained and unnatural,[9] and Blanchard J likewise made the criticism of "overstretching".[10]

[26] Focussing more on touchstones for what the meaning can be, the various judgments refer to "reasonably possible"[11] and "tenable".[12] Blanchard J observed:[13]

> In situations like the present, where the specific intention relating to an issue plainly within the contemplation of the legislators is clear, it is particularly important for that intention to be respected. Section 6 can only dictate the displacement of what appears to be the natural meaning of a provision in favour of another meaning that is genuinely open in light of both its text and its purpose.

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7 At [13] above.
8 At [12].
9 At [290].
10 At [56].
11 Tipping J at [158] – [159] Anderson J at [290] and McGrath J uses "reasonably available" at [252].
12 Elias CY at [25]; Tipping J at [19], [150]; McGrath J at [179].
13 At [61].

[27] Commentators subsequent to *Hansen*, referring primarily to McGrath J's judgment but perhaps more widely, have suggested that *Hansen* establishes that s 6 of BORA is subservient to s 5(1) of the Interpretation Act 1999 which reads: [14]

> The meaning of an enactment must be ascertained from its text and in the light of its purpose.

[28] Professor Joseph states that *Hansen* establishes the primacy of s 5(1), meaning that an alternative s 6 reading of the Act cannot subvert Parliament's original purpose.[15] The effect of s 5(1) having primacy would be to limit the impact of s 6. Rather than s 6 being a new rule of interpretation that authorised a Court to ignore intended meanings in favour of more creative rights advancing interpretations, s 6 is itself subject to the existing purposive approach to interpretation. Professor Burrows acknowledges the apparent correctness of the Joseph proposition, but seems to concur with others,[16] that there still remains scope for a more aggressive approach to s 6 analysis.[17]

[29] Relevant to the issue of how aggressively a Court should pursue a s 6 meaning, the Supreme Court's evaluation in *Hansen* of recent United Kingdom authority is consistent with the view that the potential impact of s 6 has been curtailed. Prior to *Hansen* it was apparent that the UK Courts, in relation to a similarly worded provision in the Human Rights Act 1998 (UK), had adopted an approach that showed greater willingness to massage the statutory language in order to achieve a rights consistent outcome. Professor Burrows summarises the *Hansen* response to this jurisprudence in these terms:[18]

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[14] The text of s 5 can be seen to underlie that last sentence in the passage just cited from Blanchard J, and was a feature of McGrath J's analysis.

[15] Philip A Joseph *Constitutional & Administration Law in New Zealand* (3rd ed, Brookers, Wellington 2007) at [27.4.6].

[16] C Geiringer at 86-91.

[17] J F Burrows *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 367.

[18] At 365.

> The Supreme Court in *Hansen* made it fairly clear that the New Zealand courts are not prepared to follow the radical, strongly assertive, and sometimes startling line of their UK counterparts. The latter are bound to be influenced by the freer styles of "developmental" interpretation that are adopted in some European countries and to ensure uniformity in impact of law of the European Communities. Moreover, the Human Rights Act 1998 (UK) is stronger that our Bill of Rights Act in that it contains no equivalent to the New Zealand s 4; and, as Lord Cooke has pointed out, s 3 of the UK Act and s 6 of the New Zealand Act are not *exactly* the same, especially in their history, constitutional setting, and supranational environment. New Zealand judges do not have Europe, with it liberal styles of interpretation, looking over their shoulders. And the New Zealand Parliament has not modified its sovereignty by joining a larger unit.

[30] However, as noted earlier, Professor Burrows appears to consider there is, or at least should still be, some scope for a more proactive reading of legislation when undertaking a s 6 BORA exercise. As he observes:[19]

> It is quite clear that in cases before the enactment of the Bill of Rights Act, the interpretations adopted by courts to protect fundamental values sometimes cut across the purpose of an enactment: that was clearly so as we have seen, in respect of privative clauses, and in other situations where the liberty of the subject was at stake. In such cases the courts were astute to *limit*, rather than *advance*, the parliamentary purpose. It is possible also to find cases (some of them relatively recent) where different judges reached different conclusions depending on whether they emphasised the *purpose* of the Act in question or *fundamental rights*. It would be surprising if it were different in cases involving the Bill of Rights Act, which was, after all, meant to enhance and preserve citizens' fundamental rights. If the Bill of Rights Act is to operate as an effective control on Parliament, one might expect this attitude to continue in appropriate cases.

[31] Overall, however, we conclude from this discussion that there are some real limits on the extent to which the Court can act under s 6 so as to remove an inconsistency. Whilst Tipping J acknowledges that the alternative meaning may not be an originally intended meaning,[20] it nevertheless must be a meaning that is consistent with the purposes of the enactment in issue, and available on its text. The latter requirement poses some issues in cases such as the present given that the text of the Adoption Act was settled in 1955, some 35 years before BORA was enacted. Some resulting awkwardness in language must be an inherent consequence of adopting a s 6 alternative meaning, for the very reason that by definition the s 6 meaning will not be the ordinary or primarily intended meaning. It is useful in this connection to have regard to McGrath J's observations in *Hansen* which highlight

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19 At 367.

that a legislative purpose inconsistent with fundamental freedoms is not to be lightly found:[21]

> ... Section 6 should however be seen as requiring that judges apply the presumption that legislation is to be interpreted in accordance with fundamental rights, as part of the statutory reassertion of the importance of New Zealand's commitment to human rights in the interpretation exercise, which requires an approach to interpretation which is sympathetic to protected rights.
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> Section 6 accordingly adds to, but does not displace, the primacy of s 5 of the Interpretation Act, which directs the courts to ascertain meaning from the text of an enactment in light of the purpose, and it does not justify the court taking up a meaning that is in conflict with s 5. That would be contrary to s 4. Rather s 6 makes New Zealand's commitment to human rights part of the concept of purposive interpretation. To qualify as a meaning that can be given under s 6 what emerges must always be viable, in the sense of being a reasonably available meaning on that orthodox approach to interpretation. When a reasonably available meaning consistent with protected rights and freedoms emerges the courts must prefer it to any inconsistent meaning.
>
> While the courts' power to read down another provision so that it accords with the Bill of Rights, or to fill identified gaps in a statute, is accordingly limited by its function of interpretation, a New Zealand court must never shirk its responsibility to indicate, in any case where it concludes that the measure being considered is inconsistent with protected rights, that it has inquired into the possibility of there being an available rights consistent interpretation, that none could be found, and that it has been necessary for the court to revert to s 4 of the Bill of Rights Act and uphold the ordinary meaning of the other statute. Normally that will be sufficiently apparent from the court's statement of its reasoning.

[32] The conclusion from all this, it seems, is that there are no definitive criteria which will provide a clear formula against which to conduct this analysis. It appears to us that the present case represents a good example of how finely balanced the issues can be. We approach it recognising that freedom from discrimination is a fundamental tenet of our society, but that the Court must approach a s 6 exercise with due regard to the principle of Parliamentary sovereignty that underlies s 4 of BORA.

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[20] At [149].
[21] At [251] – [253].

The case for a wider meaning of spouse

[33] In this section we identify the reasons that could support giving the word "spouse" a wider meaning. Then, in the next section we will discuss the recent legislative history around amending the Adoption Act. It is this legislative history which really provides the only, albeit formidable, obstacle to the appellants' case.

[34] Considering first the text of the Act, it is, as we have seen, written with the expectation that joint applications will be made only by married couples. However, as Ms Casey accepts, a decision to extend "spouse" to include a de facto couple[22] would be quite manageable within the Act. There would be no great textual difficulty, other than an occasional awkwardness of language. The provisions of the Act could comfortably be applied to the present appellants.

[35] The next step is to consider the purposes of the Act. As regards applications by couples, and recalling that all one is talking about is the ability to apply to adopt, it must be thought that the purpose of limiting joint applications to married couples was to ensure that the applicants were a man and a woman, and that they were in a committed relationship. The traditional concept of the family unit would seem central to the limitation.

[36] Obviously extending the word "spouses" to a de facto couple is consistent with the first of these purposes. The necessary profile of the applicants, namely that they offer a mother and a father, is achieved. The second purpose is a committed relationship. The Act obviously considered this purpose could be met only by a marriage certificate. However, it is not inconsistent with this purpose of the Act to extend it to de facto couples as long as it is recognised that a de facto couple will need to present other evidence of commitment. The description given by Judge Inglis in the case stated question is a "stable and committed" relationship, and that seems apt. To take the present appellants, evidence of a ten year relationship, a child from that relationship, and ten years of parenting S, would no doubt suffice.

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[22] We use "de facto couple" to refer to a man and a woman in a stable relationship, but who are neither married or in a civil union.

[37] Accordingly, we are of the view that to extend "spouses" to include applications by a de facto couple would not be inconsistent with either the text or purpose of the Act.

[38] What of the consequences of embracing a wider definition? In our view it would have to be accepted that giving spouses a meaning beyond married couple would open the door for other types of couple to seek a similar extended meaning. Whilst the present decision applies only to de facto couples of the opposite sex, a barrier would nevertheless be broken. That does not mean, however, that the outcome of an application by other types of couple would necessarily be the same.

[39] First, for reasons to be discussed more fully in the next section, we consider there are formidable barriers to a successful application by a civil union couple. In brief, as recently as 2005 Parliament rejected an amendment that would have allowed civil union couples (either of the same or opposite sex) to adopt. Second, in relation to the only other option, namely de facto same sex couples, it is apparent that there would not necessarily be the same concession of unjustified limitation from the Attorney-General as there is here. There may be, but not necessarily so. Further, without commenting on the validity of the arguments,[23] it is apparent that different arguments would arise since such an application would represent a departure from the traditional family unit concept.

[40] The present case raises much narrower issues than those confronting the Court in the well-known case of *Quilter v Attorney-General*.[24] There the issue was whether "marriage" in the Marriage Act 1955 could be interpreted to include same sex couples. That was an issue that obviously engaged broad social policy issues. Further, the existing law in many areas was premised on a limited meaning for "marriage", and the ramifications of a Court altering that interpretation would inevitably have been both very large and quite uncertain.

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[23] As to which, see: Law Commission *Adoption and Its Alternatives: A Different Approach and a New* Framework (NZLC R65, 2000).

[24] *Quilter v Attorney-General* [1998] 1 NZLR 523.

[41] Here, adoption is a discrete area. The numbers affected by it are relatively small, and the present decision involves only one form of extended definition, namely to de facto couples of the opposite sex. Further, as noted the Relationship (Statutory References) Act was passed in 2005. This was a significant exercise that addressed almost all of the existing statutory references to marital status. Its enactment means that whatever is decided here will have very little impact on other areas, since they have already been addressed by that statute.

[42] Accordingly, we are of the view that the implications of allowing the application would be predictable and limited. They do not provide a reason for not applying s 6 of BORA.

[43] Finally, we turn to the question raised by s 6: "can" spouse, as a word, be given a different consistent meaning? In our view the answer must be yes and we illustrate the point by four statutory examples:

[44] Section 2 of the Companies Act 1993 provides:

> In this Act, unless the context otherwise requires,—
>
> …
>
> **spouse**, in relation to a person (**A**), includes a person with whom A has a de facto relationship (whether that person is of the same or a different sex) and a civil union partner
>
> **…**

[45] Section 3 of the Accident Rehabilitation and Compensation Insurance Act 1992 (repealed) provided:

> In this Act, unless the context otherwise requires,—
>
> …
>
> **Spouse**, in relation to a deceased person, means a person—
>
> (a) To whom the deceased person was legally married immediately before his or her death; or
>
> (b) Of the opposite sex with whom the deceased person was in a relationship in the nature of marriage immediately before his or her death—

> but does not include any person to whom the deceased person was legally married or with whom the deceased person was in a relationship in the nature of marriage, if they were living apart at the time of the deceased person's death and the deceased was not contributing financially to the person's welfare, unless the parties were living apart principally because of the health, imprisonment, or employment obligations of either of the parties:
>
> …

[46] Section 374A of the Income Tax Act 1976 (repealed) provided:

> For the purposes of this Part of this Act, unless the context otherwise requires,—
>
> …
>
> **Spouse**, in relation to any person, includes a person, being a man or a woman, who, although not legally married to the said person, has entered into a relationship with the said person in the nature of marriage; but does not include a person who, in relation to the said person, is a separated person:
>
> **…**

[47] Section 2 of the Rates Rebate Act 1973, between 1 April 1973 to 30 June 2006, provided:

> In this Act, unless the context otherwise requires,—
>
> …
>
> **Spouse**, in relation to any ratepayer, means the wife or husband of the ratepayer, being a wife or husband who, at the commencement of the rating year in respect of which an application for a rebate under this Act is made, ordinarily resides on the property in respect of which the rates are payable; and includes a man or woman who at the commencement of that rating year is living with the ratepayer on a domestic basis as the husband or wife of the ratepayer, notwithstanding that they are not legally married:
>
> **…**

[48] There are many other examples that could be cited. The point is that on these occasions the legislative drafter has concluded that the word "spouse" can bear an expanded meaning. Thus our 'yes' answer to the 'can' issue posed in [43].

[49] A question which might be asked is whether it is valid to adopt a partial expanded definition? The apparent discrimination in the section as regards other couples would still remain. In their text the Butlers suggest the case-law supports

adopting an interpretation that most advances BORA, i.e. adopting the least BORA-inconsistent meaning.[25] In *R v Poumako*, in their joint judgment, Richardson P, Gault and Keith JJ observed:[26]

> … The meaning to be preferred is that which is consistent (or more consistent) with the rights and freedoms in the Bill of Rights. It is not a matter of what the legislature (or an individual member) might have intended. The direction is that wherever a meaning consistent with the Bill of Rights can be given, it is to be preferred. …

The important reference, for present purposes, is to adopting a meaning that is "more consistent".[27]

[50] We conclude that a meaning more consistent with the right to freedom from discrimination can be found. It is to interpret "spouses" as including de facto couples of the opposite sex. Although not the meaning that was intended at the time of enactment, it is a meaning that is consistent with the purposes of the Act, is not a strained meaning of "spouse", and is workable within the other parts of the Act. It will have quite limited consequences beyond the area of adoption.

[51] The Attorney-General, supported by Mr Gazley, submits, however, that there remains a significant impediment to the Court doing this. It is that the limitation of spouses to married persons cannot just be seen as a 1955, context specific, decision. Rather it is submitted that quite recently Parliament has made its continuing intention clear, with the result that s 4 BORA is engaged:

> No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—
>
> (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
>
> (b) Decline to apply any provision of the enactment—
>
> by reason only that the provision is inconsistent with any provision of this Bill of Rights.

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25 Butler and Butler at [7.8.4].

26 *R v Poumako* [2000] 2 NZLR 695 at [37].

27 The passage as a whole is supportive of a more aggressive approach to s 6 than later decisions of the Court of Appeal, and then *Hansen*, would adopt.

[52] Before addressing the Attorney-General's submission, it is necessary to note one other plank relied on by Ms Geiringer in support of a wider meaning. She submitted that all decisions taken pursuant to the Adoption Act 1955, including this interpretation decision, were governed by s 4(1) of the Care of Children Act 2004, which provides:

> 4 **Child's welfare and best interests to be paramount**
>
> (1) The welfare and best interests of the child must be the first and paramount consideration—
>
> (a) in the administration and application of this Act, for example, in proceedings under this Act; and
>
> (b) in any other proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child.

[53] For two reasons, we are not convinced that this section applies to the present case. First, the route advanced by Ms Geiringer was that an adoption order made the successful applicant a parent. That, in turn, necessarily meant it was a decision involving the provision of day-to-day care of the child, since such care was the duty of the parent. Even if we were to accept this, it means the paramountcy principle would apply to decisions taken under the Act, not to an interpretation of whether the Act applied in the first place.[28]

[54] Second, we note that s 11 of the Act already prescribes a similar principle, and it is doubtful that s 4 of the Care of Children Act 2005 adds much. Further, it is a principle of marginal relevance at the stage of determining eligibility to apply. In theory having the largest pool of possible applicants would be in the best interests of prospective adoptees, but it takes one not far. There is no evidence that there is presently a shortage of applicants. Also, the argument, if extended beyond opposite sex couples, would engage the Court in the types of argument Ms Geiringer urged us to avoid in the present case, namely whether extending the pool to same sex couples is in the best interests of potential adoptees.

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[28] The point made by Blanchard J in *Re T (an adoption)* [1996] 1 NZLR 368 (HC) at 372, with which we are in agreement.

[55] For these reasons we preferred to reach the conclusion that there was an available more consistent meaning without including the paramountcy principle as a further justification.

The case for s 4 BORA being the dominant provision

[56] In 2000 the Law Commission issued its report *Adoption and Its Alternatives: A Different Approach and a New Framework*.[29] The report recommended allowing all types of couples to apply to adopt a child. As the report suggests, what was proposed was a significant change to the existing adoption laws. The legislative mechanism by which these changes would occur was a new Care of Children Act.

[57] Such an Act indeed came into existence when in 2004 Parliament enacted the Care of Children Act. Notably, however, reform of the adoption laws was not part of its contents. This is the first of three examples of legislative inaction which underpin the Attorney-General's submission that Parliament has reaffirmed that the meaning of "spouses" is limited to married couples.

[58] The second piece of legislation is the Civil Union Act 2005. This Act provides a way for couples to register their relationships without marrying. It is an option available for both same sex and opposite sex couples. Consequent on the enactment, some consequential amendments were made to the Adoption Act 1955. These amendments did not include any change to the eligibility criteria, and particularly did not recognise a civil union as the basis for joint application.

[59] The third, and most significant legislative act, is the Relationships (Statutory References) Act 2005. Its significance to the present case can best be illustrated by an extract from the Explanatory Note to the Introduction copy of the Bill:

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[29] Law Commission *Adoption and Its Alternatives: A Different Approach and a New Framework* (NZLC R65, 2000).

General policy statement

Many aspects of the law differentiate between people in committed, exclusive and stable relationships depending on their marital status. A number of legal rights and responsibilities are accessible only to married couples. However, in tax and social security legislation there are significant elements of discrimination against married couples.

The current lack of legal recognition for many non-married couples has led to difficulties; in some instances partners of many years are treated as legal strangers. On the other hand, rates of social security payments are sometimes higher and the ability to engage in beneficial tax arrangements is sometimes greater for non-married couples.

The Human Rights Amendment Act 2001 requires government activities to comply with the anti-discrimination standards set out in section 19 of the New Zealand Bill of Rights Act 1990 for the prohibited grounds of discrimination in section 21 of the Human Rights Act 1993. The prohibited grounds of discrimination include marital status and sexual orientation.

The Government's objective is to have neutral laws on relationships that apply across the board, whether those relationships are marriages, de facto relationships, or same-sex relationships.

As a result of this Bill, the same legal rights and responsibilities will apply to married, de facto (whether opposite or same sex), and civil union relationships. People's choices and relationships will be protected, and legislation will be amended so that it does not unjustifiably discriminate on the basis of marital status and sexual orientation. This will reduce the risk of the Government being subject to complaints to the Human Rights Commission and litigation under the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990.

To provide legal recognition for civil unions and de facto couples, the Bill makes several consistent changes across legislation (that is not already part of a review or for which a suitable legislative vehicle already exists).

[60] This was a significant statutory exercise. By our count no less than 103 existing statutes were amended so that references within them to relationships were updated. The exercise was detailed. It was not simply a case of a generic new definition of spouse, or husband and wife. Each statutory reference was amended to reflect its new intended meaning. Thus, whilst in the Fisheries Act 1996 a reference to marriage was amended to include "marriage, civil union and de facto relationship", in the Friendly Societies and Credit Unions Act 1982, a reference to marriage[30] was changed only to marriage or civil union. The reason for the different treatment in each of those reforms is not relevant to the present exercise. The

[30] Friendly Societies and Credit Unions Act 1982, s 43.

example is given simply to illustrate the extensive and detailed nature of the statutory reform.

[61] The Adoption Act was omitted from the exercise, seemingly pending a fuller reform such as that contemplated by the Law Commission. Ms Casey submits the decision at this time to omit any change to "spouse" as it is used in s 3 of the Adoption Act is to be seen as confirmation that it retains its ordinary meaning. If Parliament chose not to give it an expanded meaning, the Court should not. Rather, s 4 of BORA governs.

[62] This submission gains further support from an event that occurred during the enactment of the Relationships (Statutory References) Act 2005. An amendment was proposed to s 2 of the Adoption Act, which presently defines adoptive parent as including "a husband and wife" who jointly adopt. The proposed amendment would have redefined "adoptive parent" to read:

> adoptive parent means any person who adopts a child in accordance with an adoption order; and in the case of an order made in favour of a husband and wife or of civil union partners on their joint application, means both the husband and wife or civil union partners, but does not include a spouse or partner who merely consents to an adoption.

[63] The amendment was defeated 102 to 10. There is insufficient material from the accompanying debates to allow one to be definitive about the reasons. No doubt there were many, and one of the motivations for rejecting the amendment was undoubtedly a desire to avoid piecemeal reform. The other reality, however, is that the amendment did not draw any distinction between the civil union of a same sex couple, and the civil union of an opposite sex couple. Whilst the amendment sought to equate a civil union certificate with a marriage certificate for the purpose of establishing a committed relationship, it would also have changed the fundamental profile of adoptive parents by removing the requirement for a man and a woman.

[64] It is possible to suggest, therefore, that the rejection of this amendment should not be seen as overly significant for an application by a de facto opposite sex couple such as KO and AM. Extending "spouses" to cover them does not have that fundamental effect.

[65] On the other hand, Parliament can be said to have legislated twice as regards adoption by couples – in the Act itself when using a word normally reserved for married couples, and then by rejecting an expansion of this definition to a new form of relationship, namely a civil union.

[66] Before concluding this section on the arguments against a broader definition, we refer to *Re R (adoption)*, the decision of Judge Inglis which was followed by Judge Ellis in this case.[31] The primary points noted by Judge Inglis were the text of the Act, and his view, which we share, that spouse continues to be a word reserved for a married person. His Honour also took the view that the numerous examples of expanded meanings that could be found in the statute book favoured a view that in the absence of an expanded meaning the ordinary meaning should prevail. We also agree generally with that reasoning, but note it does not address the s 6 BORA mandate to identify where possible, a "non-ordinary" but available consistent meaning.

Decision

[67] The issue resolves itself around the weight to be given to the absence of the Adoption Act 1955 from the Relationship (Statutory References) Act 2005. As noted, in that legislation Parliament set about updating numerous statutory references. Acts which previously were cast only in terms of married persons were expanded to apply as appropriate, either to civil unions or to de facto relationships or to both.

[68] Section 3 of the Adoption Act 1955 was left unchanged. That means it was deliberately not given an expanded meaning. But, on the other hand, nor did Parliament expressly clarify or restate the meaning of spouse so as to rule out an expanded meaning being given through s 6 of BORA. Given the contents of the 2000 Law Commission report, and given that in this case no attempt is made to advance any argument that would justify the discrimination, it must have been

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[31] *Re R (adoption)* (1998) 17 FRNZ 498.

known that there was a serious issue of inconsistency with BORA, and that the issue could arise in the way it has in this case.

[69] The respective positions of the parties are captured by this last paragraph. Ms Casey says the exclusion of adoption from the 2005 legislation means the ordinary meaning must prevail. Ms Geiringer says it must have been known it was discriminatory, and without any justification, and if Parliament wanted to close the door on the application of s 6 of BORA, it needed to do so expressly. Otherwise s 6, itself a legislative mandate of Parliament, should apply.

[70] There is merit in both positions. However, we return to the fact that no justification for this discrimination has been advanced. For the reasons we set out at length earlier, we are of the view that a more consistent BORA meaning can be given, and we consider Parliament's instruction to the Courts is to do so.

[71] The situation arising here, via s 6 of BORA, is not one specifically in issue in *Hansen*. There it was not possible to find a s 6 meaning, and although the Act in question was passed in 1975, the particular provision in issue was not one that was subject to changing social policy. Here, an alternative meaning can be found, and the reasons against it being adopted are not found in the text and purpose of the Act. Rather they are sourced in what can be termed deliberate inaction by Parliament; whether legislation by inaction, to coin a phrase, is enough to establish a s 4 BORA situation is the key question.

[72] Even though it is plainly arguable that Parliament wishes to correct the discrimination on its own timeframe, we have come to the view that our task is to alleviate the discrimination now to the extent possible.

[73] Accordingly we allow the appeal. We answer the case stated in these terms.

> Is it permissible to interpret the expression "spouses" in s 3 of the Adoption Act 1955 so as to include a man and a woman who are unmarried but in a stable and committed relationship? Yes.

Wild J

Simon France J

Solicitors:
C Geiringer, Senior Lecturer, Victoria University of Wellington School of Law, PO Box 600, Wellington, email: claudia.geiringer@vuw.ac.nz
D W Milliken, Barrister, PO Box 5494, Wellington 6145, email: david.milliken@waterfront.org.nz
V E Casey, Crown Law, PO Box 2858, Wellington, email: victoria.casey@crownlaw.govt.nz
P D Marshall, Crown Law, PO Box 2858, Wellington, email: peter.marshall@crownlaw.govt.nz
Dr M G Gazley, Principal, Wellington, email: wilfordlaw@clear.net.nz