

SHARED PARENTING IN 'SPECIAL' CIRCUMSTANCES

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PART I - INTRODUCTION

The Family Law Amendment (De Facto Matters and Other Measures) Act 2008 (Cth) ("the Amending Act") amended a number of the parenting provisions in the Family Law Act 1975 ('Family Law Act'). The amendments commenced on 21 November 2008 and repealed s60H of the Family Law Act and inserted two new sections at 60HA ("Children de facto partners"), and 60HB ("Children born under surrogacy arrangements"). The amendments were retrospective.

Prior to the amending Act commencing, the status of a sperm donor was silent¹ and the non-biological parents in a lesbian relationship were not deemed to be a parent of a child born as a result of an artificial conception procedure to their partner and the sperm donor was considered a legal parent under the law and the presumption of equal shared parental responsibility prevailed to the exclusion of the non-biological parent. The Full Court stated in Aldridge and Keaton [2009] FamCAFC 229, that the intention of the amendments to section 60H was that children should have the same rights and protections to receive proper parenting from the biological parent and that parent's partner, including a same sex parent.

This meant that prior to the amendments and upon a child being born as a result of donor insemination, same sex couples needed to make application to the Family Court for equal shared parental responsibility in order for the non-birth mother to acquire parental responsibility. This involves either filing an Application for Consent Orders or an Application with supporting Affidavit

¹ Re Mark (2003) 31 Fam LR 162; [2003] FamCA 822

material with the Court. Both of these options were costly and timely to all parties.

Fortunately, in 2008 there were various laws at State and Federal level that were reformed to address the legal vacuum of the non-recognition of the non-biological parent in same sex relationships in terms of parentage.

PART II - HOW FAR HAVE WE COME?

It is useful to review some of the older case law on same-sex parenting prior to looking at the position today to determine how far we have come.

In 1977, there were three cases hearing which considered the "lesbianism" of the mother as a "relevant fact or circumstance"² when determining the best interests of the child in the making of a parenting order. In *N and N*³, the Court considered the mother's lesbianism and awarded custody of the three children to the father. In *O'Reilly*⁴ the Court awarded custody to the Mother, who was at the time of the Orders living in a lesbian relationship as the Father was an alcoholic. In the case of *Cartwright*⁵ the lesbian mother was once again awarded custody over the father; however she was made to give certain undertakings to the Court not to subject the children to "lesbianism".

In 1979, the case of *PC and PR*⁶ the Family Court of Western Australia determined that the father should have custody of the parties daughter and not the mother (who was in a lesbian relationship), with expert witness evidence being produced as the effects of homosexuality on children.

² Repealed s68F(2) Family Law Act 1975 (Cth)

³ *N and N* (1977) FLC 90-208

⁴ *O'Reilly* (1977) FLC 90-300

⁵ *Cartwright* (1977) FLC 90-302

⁶ *PC and PR* (1979) FLC 90-676

In 1992, in the case of *Doyle and Doyle*⁷ the Court appeared to depart from the list of factors developed by Baker J in *L and L*. Despite the court determining that the list as "handy",⁸ it was seen as neither comprehensive nor determinative. The Court therefore awarded custody of a nine year old boy to his father who was living in a homosexual relationship, deciding that homosexuality was only relevant if it affected parenting ability or the welfare of the child.

PART III

WHO IS A PARENT PURSUANT TO THE PROVISIONS OF THE FAMILY LAW ACT 1975 (CTH)?

The Family Law Act provides at sections 60H, 60HA and 60HB outlines presumptions of parentage. Although the Act does not define a parent, determining who is a parent of a child is done so with reference to these presumptions of parentage.⁹

Section 61C of the Act provides clarity as to who has parental responsibility of a child in the absence of an Order allocating parental responsibility,¹⁰ to each of the biological parents of a child¹¹.

Section 61B of the Act defines parental responsibility as "*all the duties, powers, responsibilities and authority which, by law, parents have in relation to children*". In the absence of parental responsibility, a person is not able to make decisions concerning long term issues in relation to the child, including decisions as to the care, welfare and development of a child.

⁷ Doyle and Doyle (1992) FLC 92-286

⁸ Ibid, 79, 122

⁹ Boers, P "Surrogacy – The Varied Approaches of the States and Territories" (2011)

¹⁰ s61C(3) Family Law Act 1975 (Cth)

¹¹ s61C(1) Family Law Act 1975 (Cth)

Pursuant to section 61DA of the Act there is the presumption of equal shared parental responsibility when making parenting orders regardless of whether the parents are married, separated or never actually lived together.

In December 2008, section 60H (1) of the Act was repealed¹² and replaced with retrospective legislation in the following terms;

S60H - Children born as a result of artificial conception procedures

(1) If:

*(a) a **child** is born to a woman as a result of the carrying out of an **artificial conception procedure** while the woman was married to, or a de facto partner of, another person (the other intended **parent**); and*

(b) either:

*(i) the woman and the other intended **parent** consented to the carrying out of the procedure, and any other person who provided genetic material used in the procedure consented to the use of the material in an **artificial conception procedure**; or*

*(ii) under a prescribed law of the Commonwealth or of a **State** or **Territory**, the **child** is a **child** of the woman and of the other intended **parent**;*

*then, whether or not the **child** is biologically a **child** of the woman and of the other intended **parent**, for the purposes of **this Act**:*

*(c) the **child** is the **child** of the woman and of the other intended **parent**; and*

*(d) if a person other than the woman and the other intended **parent** provided genetic material--the **child** is not the **child** of that person.*

(2) If:

*(a) a **child** is born to a woman as a result of the carrying out of an **artificial conception procedure**; and*

¹² The Family Law Amendment (De Facto Matters and Other Measures) Act 2008 (Cth)

*(b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman;
then, whether or not the child is biologically a child of the woman, the child is her child for the purposes*

(3) If:

(a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and

*(b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of a man;
then, whether or not the child is biologically a child of the man, the child is his child for the purposes of this Act.*

(4) For the purposes of subsection (1), a person is to be presumed to have consented to an artificial conception procedure being carried out unless it is proved, on the balance of probabilities, that the person did not consent.

Impact of section 60H

Section 60H (1) (a) defines that for the purposes of the Act, the 'other intended parent' is the spouse or de-facto partner of the biological mother. Therefore, the provisions outlined in s60H are applicable to lesbian couples if they conceive a child through an artificial conception procedure.

Pursuant to s60H (1) (a)-(c) and (2), if a child is conceived through artificial conception procedure (whether through a registered Assisted Reproductive Treatment facility or through self insemination) then, the non-biological mother is deemed to be the 'other intended parent' if she was in a de-facto relationship with the biological mother when the child was conceived and she consented to the procedure being undertaken to conceive the child.

Section 60H(1)(d) provides that if a person other than the woman and her married or de-facto partner provided genetic material to conceive a child, then the child is not a child of that person.

The impact of paragraph 60H (1) (d) is that it precludes a sperm donor as a parent under the law and they have no legal responsibility for any child born as a result of assisted reproductive technology.

S60H (2)

Section 60H (2) provides that;

- If a [child](#) is born to a woman as a result of the carrying out of an [artificial conception procedure](#); and
- Under a prescribed law of the Commonwealth or of a [State](#) or [Territory](#), the [child](#) is a [child](#) of the woman;
- Then, whether or not the [child](#) is biologically a [child](#) of the woman, the [child](#) is the [child](#) of the woman and of the other intended [parent](#).

Regulation 12CA of the *Family Law Regulations 1984* outlines that for the purpose of paragraph 60H (2) (b) of the Act, the law mentioned in the following table is prescribed:

| Item | Law |
|------|--|
| 1 | Status of Children Act 1996 (NSW), section 14 |
| 1A | Status of Children Act 1974 (Vic), section 15 and 16 |
| 2 | Status of Children Act 1978 (Qld), section 23 |
| 3 | Artificial Conception Act 1985 (WA) |
| 4 | Family Relationships Act 1975 (SA), sections 10B and 10C |
| 5 | Status of Children Act 1974 (Tas), Part III |
| 6 | Parentage Act 2004 (ACT), subsections 11 (2) and (3) |
| 7 | Status of Children Act 1978 (NT), sections 5B, 5C and 5E |

On 1 January 2010, the Assisted Reproductive Treatment Act 2008 (“ART Act”) became operational and governs assisted reproductive treatment in Victoria. The ART Act inserted ss13 and 14 in the Status of Children Act 1974 (“Status of

Children Act”) which outlines the status of a child when a child is born to a woman with a female partner through assisted reproductive technology.

Status of Children Act 1974

Section 13 - Women with a female partner: presumption as to status of child

(1) If a woman undergoes a procedure as a result of which she becomes pregnant-

(a) the woman is presumed, for all purposes, to be the mother of any child born as a result of the pregnancy; and

(b) the woman's female partner is presumed, for all purposes, to be a legal parent of any child born as a result of the pregnancy if she-

(i) was the woman's female partner when the woman underwent the procedure as a result of which she became pregnant; and

(ii) consented to the procedure as a result of which the woman became pregnant; and

(c) the man who produced the semen used in the procedure is presumed, for all purposes, not to be the father of any child born as a result of the pregnancy, whether or not the man is known to the woman or her female partner.

(2) A presumption of law that arises under subsection (1)-

(a) is irrebuttable; and

(b) prevails over-

(i) any conflicting presumption that arises under section 8; or

(ii) any conflicting declaration made under section 10.

(3) In any proceedings in which the operation of subsection (1) is relevant, the woman's female partner's consent to the carrying out of the procedure in

respect of the woman is presumed but that presumption is rebuttable.

Section 14 - Women with a female partner: presumption as to status of child where donor ovum used

(1) If a woman undergoes a procedure using a donor ovum as a result of which she becomes pregnant-

(a) the woman is presumed, for all purposes, to have become pregnant as a result of fertilisation of an ovum produced by her and to be the mother of any child born as a result of the pregnancy; and

(b) the woman's female partner is presumed, for all purposes, to be a legal parent of any child born as a result of the pregnancy if she-

(i) was the woman's female partner when the woman underwent the procedure as a result of which she became pregnant; and

(ii) consented to the procedure as a result of which the woman became pregnant; and

(c) the man who produced the semen used in the procedure is presumed, for all purposes, not to be the father of any child born as a result of the pregnancy, whether or not the man is known to the woman or her female partner; and

(d) the woman who produced the ovum used in the procedure is presumed, for all purposes, not to be the mother of any child born as a result of the pregnancy.

(2) A presumption of law that arises under subsection (1)-

(a) is irrebuttable; and

(b) prevails over-

(i) any conflicting presumption that arises under section 8; or

(ii) any conflicting declaration made under section 10.

(3) In any proceedings in which the operation of subsection (1) is relevant, the woman's female partner's consent to the carrying out of the procedure in respect of the woman is presumed but that presumption is rebuttable.

Section 138 (2) of the ART Act also amended sections 8(1) and 8(5) of the Status of Children Act pertaining to evidence of parentage and substitutes the reference of “the father” to “a parent”. Paragraph 138(3) inserts an additional paragraph after section 8(2) of the Status of Children Act as follows:

8(2A) An instrument signed by the mother of a child and any person certifying that she is the non-birth mother of the child is, if executed as a deed or by each of those persons in the presence of a legal practitioner, prima facie evidence that the person named as the non-birth mother is a parent of the child”.

Section 152 of the ART Act amends section 16(1) (a) of the Births, Deaths and Marriages Registration Act 1996 and substitutes “father and the mother” with “parents”.

Pursuant to section 69R of the Family Law Act there is a presumption of parentage arising from the registration of the birth of the child. Section 69R provides as follows:

“If a person’s name is entered as a parent of a child in a register of births or parentage information kept under a law of the Commonwealth or of a State or Territory or prescribed overseas jurisdiction, the person is presumed to be a parent of the child”.

Section 60HA – Family Law Act 1975

Children of de facto partners

(1) For the purposes of [this Act](#), a [child](#) is the [child](#) of a person who has, or had, a de facto partner if:

- (a) the [child](#) is a [child](#) of the person and the person's de facto partner; or*
- (b) the [child](#) is [adopted](#) by the person and the person's de facto partner or by either of them with the consent of the other; or*
- (c) the [child](#) is, under subsection 60H (1) or section 60HB, a [child](#) of the person and the person's de facto partner.*

This subsection has effect subject to subsection (2).

- (2) A [child](#) of current or former de facto partners ceases to be a [child](#) of those partners for the purposes of [this Act](#) if the [child](#) is [adopted](#) by a person who, before the adoption, is not a [prescribed adopting parent](#).*
- (3) The following provisions apply in relation to a [child](#) of current or former de facto partners who is [adopted](#) by a [prescribed adopting parent](#):*
 - (a) if a [court](#) granted leave under section 60G for the adoption [proceedings](#) to be commenced--the [child](#) ceases to be a [child](#) of those partners for the purposes of [this Act](#);*
 - (b) in any other case--the [child](#) continues to be a [child](#) of those partners for the purposes of [this Act](#).*

Notably, section 60HA(1)(c) defines a child as a child of a de facto relationship if the child was conceived through artificial conception procedures as governed by section 60H of the Family Law Act as outlined above.

Co-Parents

We are increasingly seeing arrangements between gay fathers (whether single or in a relationship) and mothers (whether single or in a relationship) entering into private co-parenting arrangements in order to conceive a child. This is common practice when lesbian mothers seek a known donor to conceive a child through assisted reproductive technology (including self insemination). Although in theory these arrangements appear to work for all parties with a child born to two

loving parents (or four, depending on the parents relationship status), it leaves co-fathers vulnerable by virtue of s60H of the Family Law Act, to the co-mother to determine their relationship with the child despite the parties intention at the date of conception.

Section 65 of the Family Law Act outlines who may make an application for a parenting order in relation to a child. However, a parenting order does not transfer parentage of a child but will provide for whom a child will live with and how much time the child will spend with the other person in whose favour an Order is made.

At best, under the provisions within the Family Law Act, a co-father would at best be determined by section 65C(c) of the Family Law Act as a person concerned with the 'care, welfare and development' of the child but not as a parent. The presumption of equal shared parental responsibility pursuant to s 61DA does not apply, as the sperm donor is not deemed a parent given the means of conception.

The inherent problem with s60H in co-parenting arrangements is that there is no way to ensure that the co-father will play a role in the child's life. It may be the intention of both the co-parents for the child to spend regular, consistent and significant time with both parents, but the reality is that there is no legal process to protect this intention. The parties can execute a "Donor Agreement" which outlines their intention as co-parents to their child but it is not legally binding. This means that if the co-parents relationship breaks down prior to the birth of the child, or the co-mother decides to change her mind regarding the co-father's role within the child's life, they have no recourse other than to make an application pursuant to section 65C(c) as a person concerned with the care, welfare and development of the child.

Although not legally binding, a Donor Agreement can document the intention of the parties when a child is conceived through assisted

reproductive technology and be used by the co-father in Court to evidence the parties' intentions. However, it should be noted that if the relationship between the co-parents breaks down prior to the birth of the child, and the co-mother refuses to allow the co-father to establish a relationship with the child, the co-father will be hard pressed in making a successful application pursuant to s65 of the Family Law Act.

Section 60H – A Historical Analysis

The questions of parentage of children when a child is conceived through assisted reproductive procedures arise regularly and have been addressed in many judgments and most notably in 2002 in the case of Re Patrick.¹³

In Re Patrick, Guest J considered an application for contact by a man who had provided genetic material to a lesbian couple and conceived a child through an artificial insemination procedure. Guest J held that under the then s60H (3) a child was to be regarded as the child of the biological father, and the biological father is to be regarded as a “parent” of the child, only if there was a specific state or territory law which expressly conferred the status on a sperm donor for the purposes of the Family Law Act. At that time there was no such prescribed law and therefore the men fell outside of the meaning of “a parent” under the Family Law Act.

At this time, Guest J urged for legislative reform. He stressed that it was time for state laws to be enacted to make available to lesbian women and their known donors a “well regulated scheme with all the safeguards, medical and otherwise, available to heterosexual couples”. Little was done at that time to affect legislative change despite clear problems with the law and the lack of recognition of co-parenting arrangements.

In 2003, this issue again came before the Family Court of Australia in the

¹³ Re Patrick (2002) 28 Fam LR 579;FLC 93-096.

case of *Re Mark*.¹⁴ In this case, Brown J agreed with Guest J that law reform was desired but disagreed that a “biological” father should be regarded as a “parent” only if there is a specific state or territory law that expressly confers that status on a sperm donor for the purpose of the Family Law Act. It should however be noted that the facts of this case did differ to *Re Patrick*. In this case there was a surrogacy arrangement in the USA and a child was born to a surrogate mother, using a donated egg and the sperm of the applicant father. The child was born as a result of this surrogacy arrangement and was brought up by the applicant and his gay partner.

Brown J held (in obiter) that a man who had “provided his genetic material for the express purpose of fathering a child he would parent” was a ‘parent’ in the ordinary meaning of the word and thus a ‘parent’ for the purposes of the Family Law Act. Brown J further stated that the then s60H was not an exhaustive definition of ‘parent’, but instead enlarges rather than restricts the categories of people who may be regarded as parents.

As outlined above, it was not until the Amending Act was implemented in December 2008 that s60H was repealed and replaced with its current form. This did not however resolve the question of parentage in co-parenting arrangements.

Wilson and Anor & Roberts and Anor (No.2)[2010] FamCA 734 (19 August 2010).

In this case, Ms Roberts and Ms Boston (“the mothers”) who had been in a relationship for 12 years, approached Mr Wilson and Mr Farmer (“the Fathers”) and requested that they donate sperm in an attempt to conceive a child of which any child born would be co-parented jointly by all 4 parties. Although the intention of the parties prior to conception

¹⁴ *Re Mark* (2003) 31 Fam LR 162; [2003] FamCA 822

was in dispute throughout the case, the Court accepted that it was the mutual agreement of the parties that the fathers would have a significant role in the child's life. In July 2008, Baby E was born.

From the time of Baby E's birth, the fathers played a significant role in his life, caring for him two (2) full days per week and on one other evening per week. The mothers formed the opinion that Baby E's relationship with the fathers was causing upset to Baby E and they unilaterally suspended contact between Baby E and the fathers. On 9 September 2009, the Fathers issued proceedings before the Federal Magistrates Court of Australia at Melbourne to reinstate their time with Baby E.

Dessau J who heard the matter on appeal was satisfied that the mothers and fathers did initially set out with a shared decision, as two couples, to create and contribute to the raising of a much-wanted and much-loved child. Dessau J also concluded that she was "satisfied that E should have the benefit of the men's loving involvement in his life, and that it should be a meaningful relationship". She further concluded that she was not satisfied that "it should be at a level, time-wise, whereby the women would inevitably feel that their family unit is severely compromised, nor should their freedom of movement be so restricted that they cannot relocate" overseas. In this case, parental responsibility was afforded to the mothers pursuant to section 60H of the Family Law Act and they were at liberty to relocate overseas with Baby E, with the Fathers to spend specified time with Baby E.

PART IV – SURROGACY

Surrogacy is an arrangement whereby a single person or couple (“the intended parent(s)”) enter into an arrangement with a woman (“the surrogate mother”) who will carry their child, and then surrender the child to the intended parents upon birth with the intention that the intended parents will raise their child as their own.¹⁵

There are two forms of surrogacy, traditional and gestational.

Traditional surrogacy involves the surrogate mother undergoing donor insemination and utilizes her own ovum to conceive the child. It should be noted that this form of surrogacy does not ordinarily occur in Assisted Reproductive Treatment facilities in Australia but usually occurs through home self-insemination.

Gestational surrogacy involves the harvesting of the ovum from a third person (or one of the intended parents depending on the circumstances) and fertilized by using the sperm donated from one of the intended parents. Once fertilized the embryo is then implanted in the surrogate mother.

Surrogacy arrangements can also be either altruistic or commercial.

Altruistic surrogacy arrangements are privately organized and save for the payment of expenses that are legislatively sanctioned; there is no other payment for this arrangement. On the other hand, commercial surrogate mothers get paid a fee for carrying the child.

Section 60HB of the Family Law Act provides that if a Court has made an order under a prescribed law of a State or Territory to the effect that either a child is a child of one or more persons; or each of one or more

¹⁵ Boers, P “Surrogacy – The Varied Approaches of the States and Territories” (2011)

persons is a parent of a child, then for the purposes of the Family Law Act, the child is the child of each of those persons.

In the 2009 case of *Re Michael (Surrogacy Arrangements)*¹⁶ the Family Court of Australia had to again consider who was a “parent” within the meaning of s60H of the Family Law Act 1975 (Cth) after the 2008 amendments referred to above.

Watts J held that the debate between Brown J and Guest J had now been legislatively decided by the amendments to s60H. Watts J further held that ss60H (1) and 60HB of the Family Law Act now provide an exhaustive definition as to who is legally a parent.

In *Re Michael*, Watts J dismissed the application of intended parents of a surrogacy arrangement to commence proceedings to adopt the child born from this arrangement as they were not the child’s parents pursuant to ss 60H(1) and 60HB of the Act, which in Watts J view, provided an exhaustive definition of a “parent”.

The facts of this case differed substantially from the earlier cases of *Re Patrick* and *Re Mark*. In this case, the surrogate 'Lauren' was the mother of the intended mother, Sharon who was married to Paul. Sharon was diagnosed with cervical cancer and prior to commencing treatment, which would render Sharon infertile, her eggs were harvested. An embryo was produced using Paul’s sperm. The embryo was implanted into Lauren who carried Michael in utero and gave birth to him. Lauren and Paul were registered as Michael’s parents on his birth certificate. Paul, Lauren and Sharon made an Application to the Family Court of Australia seeking orders that leave be granted for them to commence adoption proceedings for the adoption of Michael.

The Application was dismissed because there was no law in the state of NSW which would allow Paul and Sharon to have an order made in their favour to the

¹⁶ *Re Michael (Surrogacy Arrangements)*-(2009)41 Fam LR 694

effect that they were Michael's legal parents. Watts J continued and stated (at [34]) that it was the legislative intent of s60HB of the FLA to not grant the status of parents to the providers of genetic material in a surrogacy arrangement if that was consistent with an order made in accordance with State legislation, thus it was parliament's intention that they not be recognized as parents. Consequently the provisions of s60H (1) (d) of the FLA then apply and a child is not to be considered a child of those who have provided genetic material.

The impact of Watt J's judgment is two fold. Firstly, His Honour's conclusions indicate that the same fact scenario could potentially lead to a different result in other States of Australia depending on legislation governing surrogacy arrangements in that State, and secondly, there needs to be serious consideration given to the provisions of the Family Law Act and how they are read with other prevailing sections of the Act.

It should also be noted that with surrogacy arrangements, by consent the intended parent who provided the sperm donation may be named on the child's birth certificate thereby giving rise to a presumption of parentage pursuant to s69R of the Family Law Act. However, s60H(1)(d) precludes a sperm donor from being a parent of the child if he was not in a marriage or de-facto relationship with the surrogate mother. Therefore, ss 60H and 69R conflict and in those circumstances s60H prevails.

Transfer of Parentage – Status of Children Act

Part IV of the Status of Children Act outlines the status of children in surrogacy arrangements.

Section 20. Application for a substitute parentage order

(1) The commissioning parents of a child born under a surrogacy arrangement may apply to the court for a substitute parentage order if-

(a) the child was conceived as a result of a procedure carried out in Victoria; and

(b) the commissioning parents live in Victoria at the time of making the

application.

(2) An application for a substitute parentage order must be made-

(a) not less than 28 days, and not more than 6 months after the birth of the child; or

(b) at another time with leave of the court.

(3) Before the court hears the application, the commissioning parents must file a certified copy of the child's birth certificate (if available) with the court.

Section 21 - Commissioning parents presumed to be named as legal parents

(1) If the court decides to make a substitute parentage order, it is presumed that the commissioning parents will be named on the order as the child's legal parents.

(2) A presumption under subsection (1) is only rebuttable by evidence that a person named as a commissioning parent did not consent to the surrogacy arrangement.

Section 22 - Court may make substitute parentage order

(1) The court may make a substitute parentage order in favour of the commissioning parents if it is satisfied-

(a) that making the order is in the best interests of the child; and

(b) if the surrogacy arrangement was commissioned with the assistance of a registered ART provider, that the Patient Review Panel approved the surrogacy arrangement before the arrangement was entered into; and

(c) that the child was living with the commissioning parents at the time the application was made; and

(d) that the surrogate mother and, if her partner is a party to the arrangement, her partner have not received any material benefit or advantage from the surrogacy arrangement; and

(e) that the surrogate mother freely consents to the making of the order.

(2) In deciding whether to make a substitute parentage order, the court may take into account any other considerations it thinks relevant.

(3) If the surrogate mother's partner is a party to the surrogacy arrangement, before making a substitute parentage order the court must also consider whether her partner consents to the making of the order.

(4) To avoid doubt, the reimbursement of costs as permitted by [section 44](#) of the [Assisted Reproductive Treatment Act 2008](#) is not a material benefit or advantage for the purposes of subsection (1) (d).

Section 23 - Additional requirements for surrogacy arrangements without assistance of registered ART provider

(1) This section applies if-

(a) a surrogacy arrangement was commissioned without the assistance of a registered ART provider; and

(b) the surrogate mother became pregnant as a result of artificial insemination; and

(c) the commissioning parents apply under section 20 for a substitute parentage order.

(2) In addition to the matters set out in section 22, the court must also be satisfied-

(a) that the surrogate mother was at least 25 years of age before entering the arrangement; and

(b) that the commissioning parents, the surrogate mother and, if her partner is a party to the surrogacy arrangement, her partner have-

(i) received counseling about the social and psychological implications of making the substitute parentage order, including counseling, if relevant, about any of the matters prescribed for the purposes of [section 43\(a\)](#) of the [Assisted Reproductive Treatment Act 2008](#); and

(ii) received counseling about the implications of the relinquishment of the child and the relationship between the surrogate mother and the child once the substitute parentage order is made; and

(iii) obtained information about the legal consequences of making the substitute parentage order.

(3) For the purposes of subsection (2) (b), the person must receive counseling from a counselor within the meaning of [section 61\(3\)](#) of the [Assisted Reproductive Treatment Act 2008](#).

Section 24 - Circumstances in which consent not required

(1) Despite section 22(1) (e), the court may dispense with consent of the surrogate mother if satisfied-

(a) that the commissioning parents cannot, after reasonable inquiries, find the surrogate mother; or

(b) that the surrogate mother is deceased; or

(c) on evidence given in accordance with subsection (4), that the surrogate mother is, and is likely to continue to be, in such a physical or mental condition as to be incapable of properly considering whether to give consent.

(2) Despite section 22(3), the court may dispense with consent of the surrogate mother's partner if satisfied-

(a) that the commissioning parents cannot, after reasonable inquiries, find the surrogate mother's partner; or

(b) that the surrogate mother's partner is deceased; or

(c) on evidence given in accordance with subsection (4), that the surrogate mother's partner is, and is likely to continue to be, in such a physical or mental condition as to be incapable of properly considering whether to give consent.

(3) For the purposes of subsections (1) (a) and (2) (a), the commissioning parents have made reasonable inquiries if they have-

(a) sent the person a letter, by registered post, to the person's last known place of residence and seeking the person's consent; and

(b) sent a letter referred to in paragraph (a) to the address of any other person that the commissioning parents believe may know where the person may be found; and

(c) searched the roll of electors under the [Commonwealth Electoral Act 1918](#) and confirmed that the address of the person could not be found; and

(d) made enquiries of such persons, bodies, agencies and government departments as might reasonably be expected to have known where the person may be found; and

(e) made any other enquiries the court determines.

(4) For the purposes of subsections (1) (c) and (2) (c), the evidence required is a certificate signed by at least two persons registered under the Health Practitioner Regulation National Law to practise in the medical profession (other than as a student) certifying as to the matters referred to in that paragraph.

Ancillary orders

25. Ancillary orders

On making a substitute parentage order, the court may make any consequential or ancillary order it thinks fit-

(a) in the interests of justice; or

(b) for the welfare and in the best interests of the child in respect of whom the order is made.

It should be noted that the transfer of parentage provisions outlined in the Status of Children Act relate only to artificial conception procedures carried out in Victoria and therefore do not apply to surrogacy arrangements that were carried out either interstate or overseas and is not available to commercial surrogacy arrangements. In those circumstances, the only remedy available to commissioning parents is an Order of the Family Court of Australia for equal shared parental responsibility.

Pursuant to s65C of the Family Law Act "non-parents" can apply for parenting orders.

Child Support

As a result of the reforms introduced in the Amending Act in conjunction with the *Same-Sex Relationships (Equal Treatment in Commonwealth Law – General Law Reform) Act 2008 (Cth)* was that separated same-sex parents became liable for Child Support as from 1 July 2009.

Same-sex couples that separated prior to 1 July 2009 were only required to pay child support retrospectively from 1 July 2009. Prior to the above mentioned reforms, in the absence of a private agreement between separated parties, the only option available to separated same-sex couples was to apply to the Supreme Court for equitable relief which was often more expensive than the relief sought by a parent.

PART V - ADOPTION

Pursuant to the *Adoption Act 1984 (Vic)*, "an adoption order may be made in favour of a man and a woman"¹⁷ or "in favour of one person"¹⁸, subject to certain requirements. This means that gay and lesbian couples are unable to adopt in Victoria unless they adopt as a single person.

The laws in relation to adoption in other states of Australia are differing with adoption being legal for same sex couples in NSW¹⁹, Western Australia²⁰ and the Australian Capital Territory²¹. However, same sex adoption remains illegal in all other states of Australia. Same-sex individuals can adopt in all states, save for South Australia where only heterosexual couples can adopt (except in "special circumstances" where single persons can adopt)²².

It should be noted that the laws governing same-sex adoption apply equally to inter-country adoptions.

¹⁷ *Adoption Act 1984 (Vic)*, s11(1)

¹⁸ *Ibid*, s11(4)

¹⁹ *Adoption Amendment (Same Sex Couples) Act 2010 No 66 (NSW) Schedule 14.*

²⁰ *Adoption Act 1994 (WA)* s39

²¹ *Adoption Act 1993 (ACT)* s14

²² *Adoption Act 1988 (SA)* ss4 & 12

PART VI - GRANDPARENTS RIGHTS

As previously outlined, s65 of the Family Law Act outlines who may make an application for a parenting order in relation to a child. Pursuant to s65(c) of the Family Law Act a grandparent can apply for a parentage order as a person concerned with the care welfare and development of the child.

Further, pursuant to the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011, it is proposed that s67Z of the Family Law Act (which relates to allegations of child abuse) be amended to apply to an 'interested person' thereby allowing a non-party to proceedings to file a Form 4 - Notice of Risk of Child Abuse. This will further enhance the ability of a grandparent to protect their grandchildren without formally being joined as a party to the proceedings.

PART VII - CONCLUSION

Recent parenting reforms have been largely positive, however there are many further reforms required to ensure that the best interests of the child are met and that substantive equality for same-sex couples is achieved. As outlined, the reforms to the law governing assisted reproductive technology have led to equality for most lesbians but have not been as successful for gay male couples. The failure of the law to recognize co-parenting arrangements has primarily impacted them and the children, who could be denied the opportunity to have a parental relationship with their biological father. Only through further law reform can the paramountcy principle be satisfied and equality achieved.



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